

Chapter 5

South African Truth and Reconciliation Commission: Development, Structure and Goals

1. Introduction

This chapter provides an analysis of the specific local political context which shaped the policy development and legislative process regarding the TRC in South Africa. The high political stakes of the battle over truth and justice regarding past human rights abuses, the political context of conciliation politics within the executive branch of government, and the under-developed nature of civil society at the time of transition are examined as a context within which the TRC legislation took on a framework that prioritized certain national goals over local community and individual victim concerns.

After reviewing the impact of this political context, the structure and policies of the TRC are examined in terms of the way that they engage (or fail to engage) with community reconciliation. The TRC legislation is found to provide significant acknowledgment of the need to engage communities and be responsive to victim needs. These affirmations of this level of engagement are, however, contrasted with national reconciliation agendas that form the key mandate of the TRC. While giving some scope to competing interpretations of its

mandate, the key legislative demands are ultimately less ambiguous in focusing on national-level outputs.

This chapter thus analyses, from the policy development and legislative perspective, the question of whether the TRC is a top-down process, and where and how it provides acknowledgment of and space for bottom-up processes.

2. Establishment of the TRC in South Africa

The legislation that established the TRC was the outcome of a confluence of different political and social developments. The key political tension was between the demand of the outgoing government to protect their members from criminal and civil prosecution and that of the liberation movements to hold the previous government accountable for past abuses. Civil society also campaigned for the exposure of past abuses on all sides of the conflict, while also motivating strongly for the protection of the rights of victims. A compromise agreement that satisfied these competing demands was reached through a long process of debating, lobbying and legislative negotiations. The key power brokers in this process were, however, the political parties.

a) Political Context: Not Victory, but Negotiated Transition

The transition from apartheid to democratic rule in South Africa was a negotiated one. The outgoing government, while finding its legitimacy severely undermined, and being locked in a political stalemate, was not defeated (see Friedman, 1993). Without conclusive military defeat, the option of Nuremberg-type trials was not viable, even if favored by some

within the ranks of the ANC and the PAC (Liebenberg, 1996 and Kollapen, 1993). The National Party refused to relinquish power without some form of guarantee that their members and those who defended the government would not be prosecuted (Simpson and van Zyl, 1995). On the other hand, the ANC and other parties would not agree to a general amnesty.¹ Some compromise had to be reached in order to break the deadlock. ANC MP Willie Hoffmeyr explained the ANC's eventual concession on amnesty:

We had to accept very early on that we would not get complete justice. In the negotiation process, several compromises had to be made, and I would defend them very strongly in the interests of peace in this country. We could have chosen the revolution and overthrow route, but we chose the negotiation route, and that means having to live and work with and rebuild the country together with people who have treated us very badly in the past and against whom we have very strong feelings.²

These negotiations on how to deal with the past occurred in the context of various interim measures and arrangements regarding indemnity and exposure of abuses.

¹ It has also been argued that the ANC were clearly in favour of an amnesty deal in order to secure the release of their members who were still in jail (or who could potentially still be jailed). Russel Ally, a TRC HRV Committee Member, argues that it would not have been politically feasible for the ANC to sacrifice their own soldiers in pursuit of a deal that would prosecute the agents of the former government for their illegal actions. (Seminar presentation at Centre for the Study of Violence and Reconciliation, 15 July 1998)

² Interview reported in Graybill (1996, p. 258)

A qualified amnesty (the 1990 Indemnity Act) had, after initial negotiations between the ANC and the NP, been granted to ANC personnel in order to facilitate their return to South Africa. This temporary indemnity was specifically aimed at ANC members who needed a guarantee that they would not be imprisoned when returning to South Africa during the negotiation process. In return, however, the government demanded that applicants make full disclosure of the political crimes for which they wanted indemnity.

Additional amnesty legislation (the Further Indemnity Act of 1992) was promulgated amidst great controversy in November 1992. The act effectively gave the State President sole discretion to grant amnesty to individuals who committed an act with political intent and whose release might promote negotiations and peaceful solutions. The State President only needed to publish the name, date of release and the act of those who were granted amnesty. No explanation or details of the cases were to be released. Predictably, the act led to widespread condemnation and protest, was blocked by one of the houses of the tricameral parliament³, and only passed after it was rammed through the President's Council (Liebenberg, 1996).⁴

There were, however, also previous attempts by the government to unearth the truth about human rights abuses. These were, however, “almost universally unable to establish the full facts, or some would say unwilling to ‘get to the truth’” (Minnaar, 1995, p. 1). The

³ The tricameral parliament consisted of three houses of parliament, composed of white, coloured and Indian chambers. Where deadlock arose when the coloured or Indian chambers voted against legislation, the President had the authority to refer the matter to the President's Council (consisting of Presidential appointees) for a final decision.

⁴ While the Indemnity Acts of the apartheid government were repealed by the Promotion of National Unity and Reconciliation Act, the indemnities that were granted were to remain in force. Those who had previously been granted indemnity did therefore not have to re-apply.

McNally Commission was appointed in 1989 to examine claims of a hit squad after allegations by a former police captain Dirk Coetzee. While the commission found the allegations to be unfounded, later court cases (specifically State versus de Kock) and the Goldstone Commission showed these allegations to be largely true. A second commission, the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation (Goldstone Commission), provided more substantiation of human rights abuses by the security forces. A subsequent commission to follow-up on these findings and examine the responsibility of high level military personnel (Steyn Commission) was established and produced a report to the State President which resulted in the forced resignation of 23 high-ranking officers of the South African Defense Force.⁵ The content of this report was, however, not made public at the time.

The ANC had also undertaken a somewhat similar process of examining its own human rights record. In 1991 the ANC appointed the Commission of Inquiry into Complaints by Former African National Prisoners and Detainees to investigate allegations of torture and detention of ANC dissidents in detention centers outside South Africa. The commission did not, however, release any names, and the neutrality of its findings was questioned because two Commissioners were ANC members (Hayner, 1994).

A second commission, the Commission of Inquiry into Certain Allegations of Cruelty and Human Rights Abuses Against ANC Prisoners and Detainees by ANC Members, was established in 1992. This commission was more widely accepted but again did not name individual perpetrators of abuse. Its report was handed to the ANC

⁵ This report was only made public by the Truth and Reconciliation Commission in 1997. The

leadership, who refused to make the findings public and, instead, called for the establishment of a process of national disclosure of all violations of human rights from all sides.

As part of the constitutional negotiations both sides wanted the question of a truth commission to be addressed. The exact balance between punishment and indemnity, accountability and restitution, had to be negotiated. The final product of constitutional negotiations presented a compromise which established an obligation to provide amnesty to human rights abusers by the new government (expected by negotiators to be dominated by the ANC), but left the details of the process to the new government. The granting of amnesty was thus an obligation of the new government in respect to both the criminal and civil liability of the perpetrators.

The relevant section of the interim constitution reads:

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993⁶, and providing for the mechanisms, criteria

resignation of the 23 officers were called into question as they were not the only, or the most responsible, individuals identified in the report.

⁶ December 6, 1993 was the date that agreement on the Interim Constitution was reached.

and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
(Postscript, Constitution of the Republic of South Africa Act, 200 of 1993, p. 180)

The constitutional agreement was thus a broad agreement on the boundaries limiting the power of the new government to act against perpetrators. The fact that this provision was a postscript to the constitution was because agreement on this issue was only reached at the 12th hour of negotiations. It was the last issue that stalled a final agreement, indicating the gravity that the ANC and the NP attached to their positions. Without resolution of this point, neither party was willing to sign the interim constitution.⁷

In fulfillment of this constitutional obligation, the government promulgated The Promotion of National Unity and Reconciliation Act (Act No. 34 of 1995) in June 1995 (referred to as the TRC Act), which established the Truth and Reconciliation Commission . As spelled out above, the only constitutionally guaranteed component of the TRC Act was the granting of amnesties. Other aspects of the Act were subject to negotiated agreements among the various political parties.

b) The Legislative Process

Within the context of the preceding indemnities, the commissions of inquiry and the debate about transitional justice, a number of actors in the political scene had anticipated the establishment of some form of truth commission. The deciding factor in the establishment

⁷ Interview with Willie Hofmeyr, chair of the Parliamentary Portfolio Committee on Justice, March 3, 1998

of the TRC was the Interim Constitution. Given the ANC's position on uncovering the truth, it made the establishment of a truth commission a generally anticipated fact.

The initiative and momentum to establish a TRC in South Africa did not arise as a result of grass-roots and collective civil society groundswell. While there was significant civil society input into the process, the incentive for such a commission was rather the product of party-political concerns and negotiations. These dynamics and the ideas that fed into them must, however, also be seen within the international debates and local human rights and victim perspectives around truth commissions.

This direction of political maneuvering was, however, anticipated by certain people in civil society. A key figure to emerge at an early stage of discussions was Alex Boraine, director of Justice in Transition. Boraine had been the director of IDASA (another NGO) and left specifically to set up Justice in Transition, which was to become a central facilitator of discussion around the establishment of the TRC.

A close working relationship was established between Boraine and the new Minister of Justice, Dullah Omar. This served to link the party-political process and civil society debates that emerged around the question of a TRC. The ANC were, at the time of drafting the TRC legislation, partners with the National Party in a Government of National Unity. The ANC were reluctant to push for the adoption of legislation which might upset this relationship. Omar thus found it very convenient to have the TRC conceptualization and drafting pursued via civil society organs.⁸ Rather than use Department of Justice staff

⁸ A lack of suitable expertise within the Department of Justice may also have been a consideration at the time.

to draft the legislation, funds were channeled from overseas donors to Justice in Transition to contract the necessary expertise.⁹

Dullah Omar felt that the drafting process should be outside the official justice structures. He did not want to take the issue to cabinet until he had straightened out the sticking points and built sufficient public momentum to carry the process through. He thus wanted to assist civil society push the idea of the TRC.¹⁰

While not overtly manipulating the process unfolding in civil society, Omar was very closely in touch with developments. The informal committee established to work on drafting the legislation also worked closely with Omar in developing the many drafts of the legislation.¹¹ The committee expanded and contracted, drawing on individuals from a range of backgrounds.¹²

Input on the underlying principles which shaped these drafts came largely from conferences and workshops held by Justice in Transition. These were the forums where NGOs were formally invited to make an input into the policy process. A wide range of

⁹ The Community Peace Foundation (based at the University of the Western Cape) was also involved similarly as a conduit for funds and expertise in the legislative development process.

¹⁰ Medard Rwelamira (Department of Justice) Interview with author, February 25, 1998

¹¹ Medard Rwelamira (Department of Justice) Interview with author, February 25, 1998

¹² Participants in this committee included academics, NGO staff, international experts and ANC politicians (*van der Merwe, et al (1998) The Relationship between Peace/Conflict Resolution Organisations and the TRC*, Paper prepared for the International Study of Peace Organisations)

political and civil society organizations were involved in these discussions. (National Party, military and police representatives, however, declined invitations to participate).¹³

Another important influence in these deliberations was that of international experience. Various individuals who had participated in truth and reconciliation commissions in other countries (especially Chile and Argentina) participated in discussions in South Africa, and a number of key individuals from South Africa visited countries where these commissions had operated and attended conferences that exposed them to the international human rights debates about transitional justice.¹⁴

The final draft adopted by Omar was then presented to cabinet and it was approved to go before parliament. The Justice Portfolio Committees in parliament and the senate then engaged in another round of public input and discussion. There were public hearings at which parties covering the whole political spectrum made substantial submissions. Public interest at the time of the hearings also led to extensive media coverage and public debate about the policy issues raised by the legislation.

Political negotiations and horse-trading did, however, also play a central role in shaping the final legislation. Particularly within the context of the Government of National Unity, the ANC went to great lengths to ensure that the National Party would also support the legislation when it was put to the vote. The interests of the IFP and PAC in ensuring that their members would also be covered by the legislation also contributed to defining the shape of the final outcome. The time spent by members of parliament on this legislation

¹³ For more details about these discussions see Boraine and Levy (1995).

¹⁴ Interview with André du Toit (Dept of Political Studies - University of Cape Town) March 3, 1998

reportedly exceeds that spent on any other legislation that this parliament has considered.¹⁵

When the bill was passed it was supported by the ANC, NP, DP and PAC, with the Freedom Front opposing it, and the IFP abstaining (Liebenberg, 1996).

c) Role of Civil Society

Considering the high level of interest and relevance in this Commission, both the process of conceptualizing and drafting the legislation, and that of implementing the tasks of the TRC were characterized by a relatively low level of NGO involvement. While certain individuals and organizations had a very central role (particularly in conceptualization and legislative drafting), conflict resolution NGOs as a whole were not effectively mobilized. There are a range of factors responsible for this, some related to internal characteristics of the NGO sector and some related to the context of the post-elections political environment.¹⁶

The role of peace NGOs in this process is fairly complex. While individual NGO staff were at times crucial role players in the process, they were often drawn in as individuals with particular skills and allegiance to a particular political party rather than as representatives of a particular sector of society, or even as organizational representatives. The lobbying efforts of NGOs were, however, undertaken by organizational representatives with explicit concerns who were often representing the interests of sectors of society that did not have a clear political voice.

¹⁵ Interview with Willie Hofmeyr, chair of the Parliamentary Portfolio Committee on Justice, March 3, 1998.

¹⁶ For more details see van der Merwe, et al (1998) *The Relationship between Peace/Conflict Resolution Organisations and the TRC*, Paper prepared for the International Study of Peace Organisations.

Most NGOs saw the process of legislative development as being politically driven at a national level and they did not see themselves having much influence (van der Merwe et al, 1998). The major countervailing force was that of Justice in Transition, which facilitated the input of NGOs into the legislative process. The process facilitated by Justice in Transition was also seen as not sufficiently transparent by many NGOs. Some felt left out of the loop: not being provided sufficient space to make formal input, not receiving regular report-backs or being kept abreast of developments. For other organisations, Justice in Transition provided a key linkage to the legislative process.

Religious organizations were one group specifically targeted by Justice in Transition initiatives, and a Religious Response to the TRC was launched in October 1994. This structure provided a networking function for a number of NGOs to engage with the policy issues raised by the TRC. It was, however, only fully functional by 1995, i.e., at the time that the draft legislation was being discussed.

d) Lobbying in response to draft legislation

It was only when draft legislation was eventually made public that the NGO sector mobilized effectively to put its concerns on the table. This lobbying was, in part, done by individual organizations, but also through regional networks of NGOs.

These networks included the NGO Coalition on the TRC (Johannesburg), the Religious Response to the TRC (Cape Town), the Mental Health Response to the TRC (Cape Town), and the Coalition of KwaZulu-Natal Mental Health and Human Rights Organizations (Durban). Peace NGOs were involved in each of these initiatives.

These networks managed to pull together the input of a wide range of organizations and present their collective voice to the minister and the legislature. The organizations that were more centrally involved in these networks were human rights organizations and those concerned with mental health services. Most conflict resolution organizations did not participate in these networks (and also did not make individual submissions regarding the legislation).

The substance of these submissions dealt with a range of issues raised in the legislation. These included the need for the bill to make provision for:

1. Public education regarding the work of the commission (especially to deal with false expectations)
2. Counseling services for victims
3. Counseling services for TRC staff
4. Training for TRC staff in trauma management
5. Victim-offender mediation
6. Restricting amnesties to a minimum
7. Strengthening of victims' role in the TRC process
8. Strengthening victims' rights to reparations
9. Demanding that all hearings are public
10. Punitive measures to be taken against perpetrators

The position of NGOs in these submissions was broadly supportive of the idea of setting up such a commission, but was very critical of certain aspects of the draft bill. The

provision for closed-door hearings of the amnesty committee was particularly strongly opposed. After initial written submission, a number of organizations also made oral submissions at the public hearing held by the Parliamentary Committee on Justice. At these hearings, NGOs arranged for victims to speak in person against provisions for in-camera hearings. NGOs were given credit for the fact that the Act limits in-camera hearings to a minimum.¹⁷

After the passing of the legislation, NGOs made an input on the selection of the Commissioners (and the structure of the commission). While the legislation provided for the Commissioners to be appointed by the State President, the selection process had been left open. A selection process drafted by the NGO Coalition on the TRC and presented to Justice Minister Dullah Omar was accepted with only minor changes. This process was one that allowed for significant input by NGOs and sectors of the public. The criteria considered in the selection of Commissioners were also defined by the Minister as individuals who had a strong commitment to human rights and people who were not seen as connected to political parties in a high profile capacity.

Nominations for Commissioners were open to the public and 299 names were submitted. A selection committee (which included prominent NGO representatives, such as the director of the Lawyers for Human Rights) then interviewed these Commissioners in public and forwarded a short-list to the State President, for him to make the final selection. In this process NGO networks were active in nominating and motivating for candidates. Before the public interviews (in which only selected nominees were interviewed), some

¹⁷ Interview with Willie Hofmeyr, chair of the Parliamentary Portfolio Committee on Justice, March 3,

NGOs also did profiles of the candidates in order to examine their suitability and assess their role in the past conflict. Specific questions to ask in the interviews were also proposed to the interview panel to guide them in determining relevant selection criteria.

While this picture is one of broad NGO involvement, the networks that made an input were often essentially driven by one or two organizations, with fairly limited input by most of the members. One quote expressed a common sentiment among interviewees:

We attended NGO Coalition meetings, but did not have a unique role. Our input was mainly just to endorse the collective submissions that had been drafted.¹⁸

Some of the individuals involved in these lobbying networks also did not bring an organizational mandate, as many of the organizations involved did not take clear positions other than being broadly supportive of the TRC idea. This was particularly the case with those conflict resolution organizations that did participate in the networks.

Human rights organizations saw the TRC as an initiative that directly impacted and overlapped with their work (monitoring abuses, facilitating access to justice, promoting a human rights culture), and mental health organizations anticipated extensive psychological repercussions of the TRC's work (particularly for victims and survivors of human rights abuses). Conflict resolution organizations were, however, ambivalent about whether the

1998.

¹⁸ Interview with Bea Roberts & Gareth Newham (Institute for a Democratic South Africa) January 21, 1998

TRC would have much impact on their scope of work. Reconciliation, according to these organizations, was never seriously considered as a part of the TRC's role. While some feel that this is a gap that could have been addressed by more concerted lobbying by conflict resolution organizations, others felt that the agenda driving the TRC was fundamentally a political one that did not provide scope for serious conflict resolution processes.

The mental health organizations also expressed a deep concern that the basic concept of the TRC was a political arrangement that largely just addressed victims' psychological needs as an afterthought. While the activities of a TRC could fundamentally impact (both positively and negatively) the process of victims' recovery, this recovery was not at the center of the policy debate.

For those who managed to carve out a role for themselves and their coalitions to access the legislative process, the question remained whether the political agendas driving the legislation would provide room for NGO inputs. They could voice their opinions, but whether these would be listened to was perceived as doubtful.

Justice in Transition was a political game: the key players were the politicians. Those in power saw it as a political tool - they were motivated by political goals. The psychological dimension of it was simply not seen as important. Those involved in setting up the TRC were involved because of the politics, power and the money. These motives are still

driving many at the TRC. It was a deal between the old and the new government.¹⁹

Those who felt that they were able to make an impact, were the ones who worked within these political machinations. Where the ANC were, for example, reluctant to fight very aggressively with the National Party on certain issues (because of their commitment to the GNU), NGOs did not operate with the same constraints, and were able to build public support for their proposals and challenge the legislature quite effectively. The clearest example of this was the issue of public versus in-camera amnesty hearings. This was also an issue that was sufficiently emotive and clear for non-specialists to engage. The voices of victims could thus be mobilized very effectively by NGOs. If the position pushed by this NGO voice was unpalatable to any of the political parties, it is unlikely to have had much impact on the outcome.

It is particularly on the issues where political and NGO agendas did not overlap that NGOs felt marginalized (especially those focusing on mental health and community engagement issues). When, for example, they were concerned about addressing the psychological needs of victims and local community dynamics, these issues appeared peripheral to the policy debates.

Most of the NGOs also only developed a voice at the point where the draft legislation had already been developed, and they felt that their concerns were merely appended to the basic framework rather than being incorporated as one of the essential

¹⁹ Anonymous interview with NGO staff member involved in TRC related work (December 1997)

principles. These were thus tentative gains which became the first casualties of budget and time constraints encountered by the TRC.

Conflict resolution NGOs were the ones who expressed the greatest regret at not engaging more pro-actively in the policy-making process. Given their concerns, it is, however, likely that they would have felt marginalized within this process had they managed to formulate a clearer position. Instead they are left with regrets about what might have been.

If the conflict resolution NGOs were more involved in conceptualising the TRC, it would have been more balanced. The TRC would have taken more responsibility to work with and be sensitive to the needs of victims..... We focused too much on the election. When we realized were the TRC was going, it was already too late..... If there was more conflict resolution involvement in the conceptualization it would have led to a process that engaged perpetrators more effectively. By addressing their needs as well it would have managed to draw more out of them ²⁰

The TRC has been good at revealing the truth. The reconciliation side of things appears to be almost an afterthought that was tagged on. The NGO

²⁰ Interview with Athol Jennings (Vuleka Trust) January 16,1998

community's involvement at various stages of the process could have contributed to build up the reconciliation side of the TRC work.²¹

Another significant impact by NGOs was on the selection of Commissioners, both the process and the individuals selected. The selection process was one that one NGO was directly credited for, while it also presented a process that allowed for effective public input. The nominations, support for candidates and critique of candidates were all seen as effective NGO lobbying that did influence the process. Some of this impact was, however, circumvented when the names of the shortlisted candidates were given to the state president, and he appointed two Commissioners whose names had not been nominated. The NGO impact was thus, in part, neutralized at the final hurdle and subjected to political horse-trading.

e) A Weak Civil Society

The problems experienced by civil society in the lobbying process precipitated even greater difficulties during the TRC's actual operation. The process of conceptualisation and lobbying revolved around NGO relationships with Justice in Transition, the Ministry of Justice and the National Parliament. But once the TRC was established, NGOs had to engage with a completely new structure. The legislation that was developed had not set out any parameters for NGO involvement in the activities of the TRC. The NGOs which had

²¹ Interview with Andrew Shackleton (Quaker Peace Centre) December 4, 1997

engaged in the policy formulation and lobbying process had developed expectations around how they could interact with the TRC. Once the TRC was set up, and its structures and processes became clarified, additional NGOs also identified possible roles they could play. Most of these expectations were, however, thwarted in the months that followed.

The relationship between the TRC and NGOs was never clearly delineated, and despite numerous attempts from both sides to form more substantial relationships, these initiatives were seldom concretised. The relationships and interactions that did unfold were very uneven among different regions and were often quite informal in nature. Many NGOs also felt that the TRC did not have their interests at heart despite the TRC making public statements to that effect. As a result, NGOs were often left feeling used, excluded or simply ignored:

The TRC approached us because they wanted to access our resources and skills. They were not interested in developing partnerships. They required sailors to come help on their boat.²²

The TRC sought NGO involvement because they saw it as a cheap way of accessing social skills. They saw it as an alternative to developing their internal capacity.²³

²² Interview with Athol Jennings (Vuleka Trust) January 16, 1998

²³ Interview with Bea Roberts & Gareth Newham (Institute for a Democratic South Africa) January 21, 1998

In retrospect, TRC interviewees also expressed regret at their inability to develop strong working relationships with NGOs. While many had the intention of nurturing these relationships, they found themselves with an enormous task to accomplish in a short space of time. The day-to-day deadlines pushed them into a crisis-oriented mode of operation rather than the prioritisation of policies, structures and relationships. Alex Boraine admits that this was a problem of insufficient prior planning:

The TRC was thus established without sufficient planning. We started with nothing - we had to learn to run in a very short space of time. Once we got going we also could not slow down to allow others to catch up. ... The process suffered because of the quick transition from the legislation to the establishment of a state body. We were often forced to rely on individual consultations with colleagues and friends rather than organisational networks. The relationship with NGOs suffered because they were left behind in this quick transition and the rapid momentum of the TRC.²⁴

There was, however, also criticism from the TRC that NGOs were not sufficiently pro-active in this process:

²⁴ Interview with Alex Boraine (Deputy Chair of the TRC) May 25, 1998

NGOs were also at fault in often sitting back and not getting involved. They sometimes were reluctant to take the initiative. In stead they waited to be asked to make an input.²⁵

3. TRC: Resolution of Key Controversies

There were four key areas of disagreement that were settled during parliamentary negotiations around the act:

- a) How would the TRC be constituted - i.e., who would be selected as Commissioners?
- b) To whom would amnesty be granted?
- c) How public and transparent would the process be?
- d) Cut-off date for amnesty

a) Composition of the TRC

The NP feared that the TRC would be dominated by ANC appointees. The act thus stipulates that the Commissioners would be appointed by the President (in whom the NP had more trust than the rest of the ANC politicians) in consultation with the Cabinet (which at that time also included NP ministers). It also required that the “Commissioners shall be fit and proper persons who are impartial and who do not have a high political profile”.²⁶

²⁵ Interview with Alex Boraine (Deputy Chair of the TRC) May 25, 1998

²⁶ The Promotion of National Unity and Reconciliation Act (Act No. 34 of 1995) Section 7(2)(b).

Largely in response to civil society pressure, the nomination and selection process was highly transparent and open to public input (and consequently also influenced by human rights and other lobby groups).

The Commissioners chosen were a diverse collection of people from different political, professional, and racial backgrounds. The majority have since been identified as ANC sympathizers, but some have seemingly also been appointed because of their political links to other political parties. Except for the ANC, political parties were somewhat unsatisfied with the appointments. Despite various efforts by the Commissioners to change this image, accusations of bias in favor of the ANC was to remain a contentious point throughout the operation of the TRC.

The composition and impartiality of the Amnesty Committee was of particular concern to the National Party, as any bias on the part of the Committee would have serious consequences for the legal position of NP supporters (and some high profile ex-leaders) applying for amnesty. The fact that a previous cabinet minister of the National Party and various generals who served under this government applied for amnesty underscored this point.

The Committee was thus to be composed of persons who are “broadly representative of the South African community”. It was to be chaired by a judge, and three of its five members (including the Chair and Vice-Chair) would be appointed by the

President.²⁷ The Amnesty Committee was also given a certain level of independence from the rest of the TRC by the legislation, such as in the stipulation that

no decision, or the process of arriving at such a decision, of the Committee on Amnesty regarding any application for amnesty shall be reviewed by the Commission²⁸

b) Classification of Amnestiable Crimes

The commission does not distinguish between crimes committed by different sides in deciding whether to grant amnesty. In order to ensure equitable treatment via the use of objective criteria, the act stipulates that political crimes will be defined in accordance with the Norgaard principles (read in conjunction with the definition of political crimes utilized in the Indemnity Act of 1990 and the Further Indemnity Act of 1992²⁹). The Norgaard principles provide certain objective guidelines that determine whether an act could be seen as political rather than simply criminal in nature.³⁰

²⁷ The legislation was amended in 1997 to expand this Committee in order for it to be able to cope with the huge caseload of amnesty applications it received. Both Commissioners and legal professionals from outside the TRC were appointed as Committee members.

²⁸ Section 5(e) of the Act

²⁹ This modification of the Norgaard principles was a last minute concession to the NP who feared that the security forces would have a more difficult time qualifying. Simpson and van Zyl (1995), however, argue that, seeing that the two Indemnity Acts used no objective criteria, there is a danger that the classification would be done in a conceptually incoherent manner.

³⁰ The Norgaard principles were developed by Carl Aage Norgaard, a Danish national and president of the European Commission on Human Rights. He was asked at the time of the Namibian settlement to frame guidelines defining the concept of a political prisoner. His guidelines include six factors which he considered relevant in differentiating between a political offence and a common crime. They are:

(1) the motivation of the offender, that is, whether the offence was committed for a political or personal motive;

A second criterion that needed to be satisfied was that applicants have to fully disclose all facts regarding the acts for which amnesty is being sought. (This was the essence of the ANC position since before the constitutional agreement.)

Whereas the scope for amnesty was restricted by the first draft bill to acts that were part of the conflict between the state and liberation forces, this was expanded to include other acts of political violence such as those between the ANC and the IFP. The scope of the act was also expanded during negotiations to include the actions of a wider range of actors. Whereas the initial draft only covered members of these political structures and their military formations, it was eventually to include all those supporters who acted under instruction from political leaders.³¹

Not only human rights abuse cases were to be heard by the Amnesty Committee (and considered for amnesty), but any politically motivated act for which a person may be held criminally or civilly liable.

c) Transparency

(2) the circumstances in which the offence was committed; in particular, whether it was committed in the course of or as part of a political uprising or disturbance;

(3) the nature of the political objective; whether, for instance, an attempt to overthrow the government or force a change of policy;

(4) the legal and factual nature of the offence, including its gravity;

(5) the object of the offence, for example, whether it was committed against government personnel or property or directed primarily against private citizens; and

(6) the relationship between the offence and the political objective being pursued, for example, the directness or proximity of the relationship, or the proportionality between the offence and the objective pursued.

See Boraine and Levy 1995 for a lengthier version of Norgaard's recommendations. Section 20 (3) of the Act also spells out these considerations and exclusions.

³¹ Interview with Willie Hofmeyr, chair of the Parliamentary Portfolio Committee on Justice, March 3, 1998.

An early draft of the TRC legislation contained a provision which stated that all amnesty hearings would occur “behind closed doors”. This provision was inserted into the legislation as a concession to the National Party as a result of a cabinet level compromise (Simpson and van Zyl, 1995). This provision was, however, vigorously opposed by civil society structures, particularly human rights advocates and human rights abuse victims. The government backed down and the final legislation ensures open hearing except if closed doors would be “in the interest of justice,” or if a public hearing may result in a person being harmed.³² Information gathered in a closed hearing may also be made public by the Commission if they feel that these conditions do not apply.

Even those hearings that are held behind closed doors are, however, open to the victim(s) involved. They or their legal representative is also entitled to oppose the application and question the amnesty applicant (as applies in all hearings).

d) Cut-off Date for Amnesty

The cut-off date was prescribed to some extent by the interim constitution, and accordingly the act stipulated 6 December 1993 as the cut-off point for acts that would be examined and considered for amnesty. This date is significant as it was the day that the parties signed the interim constitution, i.e., the formal settlement of the conflict. Opposition to this date, however, came particularly from both the right wing and the PAC. Both had supporters who were implicated in violence between this day and the elections on 27 April 1994. The right wing was especially active in organizing resistance to the elections and a number of

³² Section 20 (3) of the Act also spells out these conditions.

supporters were jailed for various bomb blasts. The TRC itself took on the cause of these parties in advocating an amendment that would bring them on board the reconciliation process. An amendment of the interim constitution was thus effected by parliament to change the cut-off date for acts considered for amnesty. The new date was 10 May 1994, the day Nelson Mandela was inaugurated as president.

The new cases (or at least the most public of these) that were to be covered by the amnesties were largely ones in which prosecutions had already started or where people had been convicted of offenses. It was thus difficult for the TRC to argue that these amnesties would contribute to assisting victims, as they had already found out the “truth” through public trials. Instead the TRC motivated for this extension on the grounds that it would broaden the basis of party-political reconciliation to include more radical parties such as the Freedom Front and the Pan African Congress - the extreme ends of the political spectrum.

4. Structures and Procedures of the TRC

The Commission is headed by 17 Commissioners who were appointed by President Mandela in consultation with his multi-party cabinet (after public nominations and public hearings by an interview committee). The Commissioners preside over three committees: the Committee on Human Rights Violations, the Committee on Amnesty and the Committee on Reparations and Rehabilitation. Two additional components that assisted

these committees were the Investigation Unit (which has the powers of search and seizure) and a Witness Protection Program.

The TRC came into existence on 16 December 1995 and continued operating until 30 October 1998. On this date, a final report was presented to the State President.³³

Section 3(1) of the Act spells out its specific objectives:

The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by-

- (a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings;
- (b) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act;
- (c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them;
- (d) compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs (a), (b) and (c), and which contains recommendations of measures to prevent the future violations of human rights.

³³ The Amnesty Committee, however, continues operations until it has completed hearings on all amnesty applications that were submitted.

a) The Human Rights Violations Committee

There were two main aspects of this committee's work: public hearings and research. The key functions described by the Act (Section 4) were:

- (a) facilitate, and where necessary initiate or coordinate, inquiries into-
 - (i) gross violations of human rights, including violations which were part of a systematic pattern of abuse;
 - (ii) the nature, causes and extent of gross violations of human rights, including the antecedents, circumstances, factors, context, motives and perspectives which led to such violations;
 - (iii) the identity of all persons, authorities, institutions and organisations involved in such violations;
 - (iv) the question whether such violations were the result of deliberate planning on the part of the State or a former state or any of their organs, or of any political organisation, liberation movement or other group or individual; and
 - (v) accountability, political or otherwise, for any such violation;
- (b) facilitate, and initiate or coordinate, the gathering of information and the receiving of evidence from any person, including persons claiming to be victims of such violations or the representatives of such victims, which establish the identity of victims of such violations, their fate or present whereabouts and the nature and extent of the harm suffered by such victims;
- (d) determine what articles have been destroyed by any person in order to conceal violations of human rights or acts associated with a political objective;

The research unit operating under this committee documented evidence on human rights abuses in order to compile a comprehensive final report. Political parties and other organizations were also invited to make submissions as a way of assessing the motives and perspectives which shaped the context of the period under consideration.

This Committee was also responsible for deciding on whether a victim should be classified a victim of a gross human rights violation (i.e., whether they are eligible for reparations).

Most victims' direct contact with the TRC was through the statement takers in the HRV Committee. Their task was to listen to (and record) the stories of victims who come forward to testify. Additional volunteer "designated statement takers" based within a range of community organizations were also trained to collect victims statements. The victims who give statements were asked whether they would be prepared to testify at a public hearing. About 10% of victims who made a statement also got to speak at a public hearing.

b) The Amnesty Committee

The Amnesty Committee's sole task was to hear amnesty applications and to make findings regarding whether to grant or refuse amnesty according to the established criteria.

The Amnesty Committee could decide whether to accept or reject amnesty purely on the basis of the written application (e.g., rejected if clearly not politically motivated, if it occurred after the cut-off date, or accepted if it meets criteria and does not involve a gross violation of human rights), or it could call a hearing in which the applicants and other witnesses were called to testify. In the case of an application regarding amnesty for a gross human rights violation, the Committee was, however, compelled to hold a public hearing.

Victims (and any other interested party, including the attorneys general) had the right to oppose the amnesty applicants, and their lawyers, can at these hearings also question the applicants, and offer evidence. Information collected by the Amnesty

Committee regarding abuses or the status of victims was also passed on to other Committees.

c) The Reparations and Rehabilitation Committee

The survivors of gross human rights violations (or the dependents of those who were killed) are referred by the other committees to the Reparations and Rehabilitation Committee (RRC). The RRC's primary task was to make recommendations regarding a reparations policy to government. The committee did not have any authority to implement any measures, and could only recommend to the State President who would, through parliament decide on a final policy (and appropriate funding) and give effect to such a policy. Such a policy, especially urgent relief to victims could theoretically have been carried through before the end of the TRC's life span. However, urgent interim relief of very small amounts (approximately \$400) was only provided to victims in October 1998.

As part of the development of a reparations policy, the RRC also engaged in gathering evidence relating to the identity, fate and whereabouts of victims and the nature and extent of the harm suffered by them.

In addition, the RRC was responsible for devising a support strategy to assist witnesses before, during and after TRC hearings.

d) Investigations Unit

The Act gave the TRC the power to set up an Investigations Unit which was headed by a Commissioner. This Unit had wide powers to "investigate any matter falling within the

scope of the Commission's powers, functions and duties." These powers include the ability to conduct inspections, search and seizure, and to summons witnesses to appear before it.³⁴

The Investigation Unit has been widely accused (by NGOs working with the TRC) of being badly organized and managed.³⁵ Internal disagreements within the Unit also led to the resignation of the chief investigator of the Unit in late 1997.

The Investigation Unit was given the huge tasks of:

1. Investigating individuals implicated in human rights abuses
2. Investigating patterns of abuses (e.g., by certain state security units)
3. Investigating applications for amnesty (to confirm whether the full truth was being revealed). Approximately 7500 amnesty applications were received.
4. Investigating victim statements (to corroborate whether they were telling the truth and are therefore eligible for reparations). Over 20 000 victim statements were collected.

d) Human Rights Violations Hearings

Public hearings were conducted in 80 communities around the country. At these hearings, survivors of human rights abuses testified about their experiences to a panel of Commissioners and a public audience. The hearings were held within the community or area where the violations occurred, and the size of the audience who came to listen to the

³⁴ Section 28 and 29 of the Act

³⁵ A TRC investigator also severely criticised the investigation management and processes after leaving the commission (Weekly Mail and Gaurdian, 24 April 1998).

testimony varied in size, but was usually at least a few hundred people³⁶. Some of the hearings were also broadcast directly on radio, and clips were broadcast on national television.

All human rights violations hearings where victims testified were open to the public except under special circumstances, such as a hearing focusing on the abuse of women. A number of special hearings were held to focus either on specific incidents (e.g., a serious massacre, or the Mandela Football Club) or on particular patterns of systematic human rights abuses (e.g., killing of police). Where the TRC deemed it necessary, witnesses were subpoenaed to give evidence. (There was no protection against self-incrimination, except that evidence collected through such testimony may not subsequently be used in a court of law.³⁷) All those who are known, beforehand, to be incriminated by victims' public statements had to be notified three weeks before the hearing, and they had the right to respond at the hearing or through written submissions to the TRC³⁸.

e) Sectoral Hearings

Several sectoral hearings were also conducted by the TRC. These hearings focused on abuses (and patterns of abuses, causes, etc.) that occurred in particular sectors of society. They included the health sector, the media, the legal sector, the military, political parties, the churches, and prisons.

³⁶ Personal observation of 8 hearings in Gauteng and North West Province.

³⁷ Section 31(1) of the Act

³⁸ This right was only secured through a legal challenge to the lack of notification in earlier hearings held by the TRC.

These hearings specifically provided space for organizations and state bodies to reflect on and make input regarding their role in past abuses, and provided an opportunity for them to make inputs regarding ways of preventing future abuses.

f) The Final Report

The final report was presented to the President at the end of the life of the Commission. He decided to make it public immediately. The report, released on 30 October 1998 contains five volumes and 3500 pages.³⁹

The names of victims and perpetrators identified by the TRC were included in the final report. The inclusion of a name would depend on a judgment of the balance of probability based on available evidence.

The information that the TRC collected (which is not included in the final report) will be kept at the State Archives. The level of public access to this information has not yet (as of June 1999) been determined (who, under what conditions, what time period embargoed, etc.).

g) Treatment and Definition of Victims

The Act spells out a number of principles to guide the way in which the TRC should deal with victims. These are:

- (a) Victims shall be treated with compassion and respect for their dignity;
- (b) victims shall be treated equally and without discrimination of any kind, including race, colour, gender, sex, sexual orientation, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin or disability;

³⁹ An evaluation of the TRC's contribution to community reconciliation in Duduza that arose from this doctoral research is included in Volume five, Chapter nine of the TRC Final Report (1998).

- (c) procedures for dealing with applications by victims shall be expeditious, fair, inexpensive and accessible;
- (d) victims shall be informed through the press and any other medium of their rights in seeking redress through the Commission, including information of -
 - (i) the role of the Commission and the scope of its activities;
 - (ii) the right of victims to have their views and submissions presented and considered at appropriate stages of the inquiry;
- (e) appropriate measures shall be taken in order to minimize inconvenience to victims and, when necessary, to protect their privacy, to ensure their safety as well as that of their families and of witnesses testifying on their behalf, and to protect them from intimidation;
- (f) appropriate measures shall be taken to allow victims to communicate in the language of their choice;
- (g) informal mechanisms for the resolution of disputes, including mediation, arbitration and any procedure provided for by customary law and practice shall be applied, where appropriate, to facilitate reconciliation and redress for victims.⁴⁰

The inclusion of these provisions regarding victim treatment were a direct result of the intervention of NGOs in the lobbying process. The level of commitment of TRC staff to these principles was, however, broadly questioned by NGO staff who worked with victims who interacted with the TRC.⁴¹ The legal status of these provisions was also questionable in terms of their broad provisions rather than specific requirements. Informal dispute resolution mechanisms (as stipulated in paragraph g) were, for example, never effectively constituted and mediations were only conducted in a few select cases.⁴²

While the definition of perpetrators who are eligible for amnesty is quite broad, victims were only considered if they were subjected to **gross** human rights violations.

⁴⁰ Section 11 of the Act

⁴¹ See van der Merwe, et al (1998) *The Relationship between Peace/Conflict Resolution Organisations and the TRC*, Paper prepared for the International Study of Peace Organisations.

⁴² Author's personal observation through involvement in the Survivor-Offender Mediation Network, a network of NGOs set up to (amongst other things) assist the TRC in facilitating mediations.

Victims were narrowly defined by the Act to include only those who “suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights” ... “as a result of a gross human rights violation”⁴³ (i.e., killing, abduction, torture, and severe ill-treatment).

The occurrence of other human rights violations such as detention without trial, forced removals, group areas, racial discrimination in employment, etc. were considered too widespread to be realistically include in the ambit of the TRC’s work. There have, however, been various disagreements about how narrowly the Act should be interpreted and what could be interpreted as falling within the Act (see, e.g., Asmal et al, 1996; The Star, 19 Jan 1997; NGO submission, 1997). The TRC has generally looked at these broader forms of abuses as forming the context within which gross human rights abuses occurred, and thus considered these issues in its examination of the “antecedents, circumstances, institutions and organizations involved in such (gross human rights) violations” as provided by the Act. It does not, however, provide victims of such “non-gross” human rights violations with a platform to tell their stories and does not consider the provision of reparations for them.

5. TRC’s Mandate: How Did it Understand its Goals and Mission

While the TRC’s functions and procedures were largely circumscribed by legislation, there were many strategic and symbolic aspects of its work that it has had to define and develop

⁴³ Section 1(xix) of the Act.

itself. It actively tried to define itself and develop an identity as well as impute a specific meaning to the work that it did. Rather than narrowly defining its task in a neutral technicist manner, it imbued it with moral and political meaning through actively cultivating a public profile and engaging the public on the meaning of justice, reconciliation and political-moral values.

While the Act is called the Promotion of National Unity and Reconciliation Act, it does not spell out what is meant by reconciliation. The goals of the Act mention reconciliation twice:

SINCE the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;

AND SINCE the Constitution states that in order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past;⁴⁴

The rest of the act, however, only refers to reconciliation in terms of the general objectives that it spells out and in relation to the use of mediation and other methods “to facilitate reconciliation and redress for victims”.

The logic of the legislation, however, implies that reconciliation will be achieved via the implementation of the specific tasks that the TRC is mandated to complete. The word ‘reconciliation’ is never given any greater clarification. It is held out as the objective that will be achieved through the implementation of the various tasks of the TRC. (The contrasting ways in which this mandate is understood by TRC staff is spelled out in the next chapter.)

There are a number of areas where the Commission was empowered by the Act to interpret its mandate broadly in relation to the promotion of its goals of national unity and reconciliation. For example, Section 3(2) of the Act reads:

The provisions of subsection (1) (*where the specific objectives are spelled out*) shall not be interpreted as limiting the power of the Commission to investigate or make recommendations concerning any matter with a view to promoting or achieving national unity and reconciliation within the context of this Act.

The legislation thus provided the scope for the Commission to develop its own approach, emphasis, and parameters. While the Act provides few limitations regarding what could potentially be included in its mandate, it stipulates certain minimum results. The only absolute requirement was the one relating to the granting of amnesty. The other objectives of the Act can be interpreted in a relatively flexible manner, using language such as “compiling a report providing as comprehensive an account as possible,” and

⁴⁴ Introduction to the Act

“establishing as complete a picture as possible.” These goals of collecting information, listening to victims accounts and making recommendations are ones that could be done broadly and thoroughly or narrowly and hastily, depending on the time and resources. Given the limited time and resources that were available, too much was probably expected from the TRC.

The goal of establishing a detailed picture and examining the complexity of past abuses was, in retrospect, an over-ambitious goal for such a short-lived commission. The legislative demands were, within this context of time and resource constraints, re-interpreted in a narrower manner to refer more to a national narrative of events and symbolic exposure and healing. As a Commission that was supposed to be victim-centered and oriented towards the needs of communities, its ultimate output could not live up to some of the noble intentions contained in the legislation and the vision to which some Commissioners aspired.

6. Conclusion

The legislative process that led to the adoption of the TRC was one that was dominated by political interests and power politics. Rather than presenting a simple form of victor’s justice (or victor’s truth), the outcome was one that was significantly shaped by political negotiations and compromise. It was also a process that was significantly open to public participation. This openness to public input was, however, seriously stymied by the lack of civil society capacity to engage effectively in national political processes where political parties had strong agendas.

The legislation that created the TRC provided something for everybody. It managed to include the key demands of the various political and civil society stakeholders. This mandate was, however, excessively ambitious, and while accommodating the needs of all parties, did not guarantee significant results. The TRC's key objective, as required by the constitution, was to grant amnesties. This was balanced to some extent by the strong efforts of the TRC to expose national patterns of past human rights abuses, and to pin political responsibility on the apartheid government. This political balancing act, did not, however, leave much space to address the moral and political complexity of local conflict dynamics that shaped the experiences of many victims. These dynamics are explored in somewhat more detail in the following chapter.

This chapter has pointed out the various forces which pushed the TRC towards a top-down approach to its work, both in terms of the legislative requirements and the way in which the TRC interpreted its mandate. To the extent that the TRC seriously engaged with reconciliation, it thus focused its attention at the national level. At the same time, NGOs and victims had pressured the legislators and the TRC to acknowledge the importance of local processes and sensitivity to individual victim needs. The TRC was thus constantly pulled in both directions, setting up expectations that they could not ultimately fulfill. The TRC attempted to portray itself as a bottom-up process and there are various examples of serious victim and community engagement practices by the TRC. These examples are, however, exceptions that prove the rule - the overall structure and core functions of the TRC were driven by a top-down reconciliation agenda. The top-down versus bottom-up

tension which characterized the formation and operation of the TRC was particularly evident in its attempts to engage communities in human rights violations hearings.

In order to examine the TRC's impact on these communities it is necessary to first briefly review the context of local political struggle in South Africa. The next chapter introduces the context of local political conflict in two communities on the East Rand (of Gauteng) in order to sketch the landscape of social upheaval and the barriers to community and individual reconciliation.