

**A CRITICAL-THEORETIC STUDY OF THE  
SOUTH AFRICAN TRUTH AND RECONCILIATION  
COMMISSION: WITH REFERENCE  
TO THE WORK OF JÜRGEN HABERMAS**

**Eugene Nicholas Isaac**

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the requirements of the degree of  
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## Declaration

The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others:

Eugene Nicholas Isaac  
April 2006

Signature: E. N. Isaac

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## **Abstract**

By using the work of Jurgen Habermas as my central focus the objective of this thesis was to judge whether the ideas that he has formulated in different bodies of work illuminate the problems and prospects for sustained democratic development in a country that has been affected by the impact of a series of cumulative civilizing offensives. I argue that the South African Truth and Reconciliation Commission (TRC) must be judged in relation to the outcomes that its commissioners attempted to promote.

Following a reading of the works of Habermas I argue that it possible to specify the outcomes that would make it possible for the leaders of a new state to settle their accounts with the violations of the past by paying the fullest settlement of damages. Through the use of a case study methodology I was able to step outside of the realms of pure theory by establishing how some of Habermas's ideas do enable us to acquire an understanding of the outcomes that the TRC was and was not able to influence.

I use the ideas of Habermas in a critical way in order to judge the consequences of successive truth-telling hearings and the settings in which they were constituted. My methodology was also theoretic insofar as my goal was to establish whether it was possible to identify a characteristic or trait that differentiates a positive and/or a full settlement of damages from a negative and/or an empty settlement of damages.

My analysis has demonstrated that the TRC was not able to establish an authoritative record of the perpetrators who committed violations during the mandate period. Therefore, the judgement that successive truth-telling processes made a decisive contribution to the revision of the country's political culture needs to be revised.

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## Chapter 1 – Introduction

### Introduction

This thesis focuses on aspects of Jürgen Habermas's theories to address the issue as to how, why and in what circumstances it is possible to settle accounts with a past that was the product of a series of offensives against ordinary citizens during the apartheid era.<sup>1</sup> By using the works of Habermas as my central focus the objective of this thesis is to judge whether the ideas that he has formulated in different bodies of work can be used to illuminate the problems and prospects for the democratic development of a nation-state that was previously shaped by the impact of a series of civilising offensives. I relate this theme to the issue of whether the leaders of the Government of National Unity (GNU) could reach a rationally defensible agreement as to how the consequences of a multitude of offences could be resolved during and after a negotiated settlement. In this context, I use the ideas that Habermas has formulated in successive works to clarify the problems that the participants in this process encountered after the agreement was made to establish the mandate of a Truth and Reconciliation Commission (TRC).<sup>2</sup> The state-sponsored TRC was responsible for organising a series of public hearings.

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<sup>1</sup> Larry Ray has proposed 'an interpretation of Critical Theory' that situates 'social movements within processes of social regulation, cultural transmission and resistance'. His work analyses 'a model of the peripheral state in the vortex of a global system' and the 'crisis-logics arising from internal and external pressures' (1993, 87). The application of this theoretical framework to: (i) the 'crisis' of state socialism; (ii), the emergence of Islamic Jacobins; and (iii) the collapse of Afrikaner Apartheid is an interesting departure from mainstream studies. However, I am not convinced that his eclectic approach does capture the distinctiveness of Habermas's work. Nor am I convinced that he has achieved his goal of providing a valid analysis of the unfinished project of modernity. His eclectic appropriation of the 'categories' that are present in the Critical Theory Tradition and his 'rethinking' of Habermas also differs from my approach. The 'The Unfinished Project of Modernity' refers to the title (d'Entreves Benhabib, 1981, 1996, acknowledgements) of Habermas's acceptance speech after he had been awarded the Adorno Prize.

<sup>2</sup> Ricardo Blaug has also addressed the issue of how it is possible to deepen 'real democracy' by building on the premise that it must always proceed from the perspective of participants. From such a standpoint real democracy is not an ideal (as it tends to be in Habermas) but an empirically real phenomenon 'that occasionally *breaks out* among particular people in particular situations' whereby 'we find that we have risen above the power saturated ways in which we normally interact' (1999, 135). Blaug also recognizes that the possibility of a breakthrough depends on whether the participants are able to 'preserve' their deliberative 'capacities' or 'means' through an institutional process. Continuity depends on: (i) the accessibility and provision of information; (ii) frequent and substantive practice; (iii) motivation; (iv) the recognition that the development of the relevant skills is a learning process; and (v) a tradeoff between 'participation' and effective 'decision-making'. It is not self-evident how this analysis could be applied to the seventeen commissioners who were appointed by President Mandela to translate the mandate of the South African Truth and Reconciliation Commission into a realistically achievable series of action plans.

Their purpose was to enable the highest and the lowest members of South African society to address some of the consequences of the past in relation to the present.

Individual applicants who voluntarily applied for amnesty were also expected to: (i) disclose the reasons why they were motivated to use excessive levels of force during the mandate period; (ii) acknowledge the normative consequences of a cycle of mutually destructive conflicts; and (iii) formally agree to comply with the conditions of the Act.<sup>3</sup>

I decided to formulate the following arguments at the beginning of my investigation:

- (1) The creation of a dichotomy between social philosophy and the human sciences is as self-defeating as the attempt to weaken the link between theoretical and empirical issues in relation to a concrete problem area.<sup>4</sup>
- (2) It is possible to move beyond this dichotomy by incorporating facets of Habermas's normative thinking into a more fluid framework of analysis.
- (3) The ideas of Habermas can through their carefully crafted modification serve the purpose of clarifying the reasons why a rationally defensible resolution of a conflict is achievable in some contexts but not in others<sup>5</sup>.

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<sup>3</sup> The *Promotion of National Unity and Reconciliation Act* was passed in July 1995. It established a mandate that the appointed commissioners of the South African Truth and Reconciliation Commission were expected to follow. The Act also proposed the formation of a semi-autonomous Amnesty Committee. I shall describe these arrangements in greater detail in the second section of this chapter under the heading 'The Origins of the South African Truth and Reconciliation Commission'.

<sup>4</sup> The issue of how a community can intentionally promote a revision of its political culture also relates to the question of whether it is possible to specify the grounds on which this goal could be realized. In the essay 'Between Philosophy and Science' Habermas claims that the limits of 'philosophical criticism' is that one cannot attain a knowledge of events from a standpoint that is situated beyond its performance. Developing the theme that 'world-historic' reality is the sole responsibility of *man* rather than of *God*, he claims that even if God existed his presence would make no difference to our fate. He inverts the Protestant/Jewish dictum 'nihil Deum nisi ipse' (i.e. no-one can act against God but God alone) by proposing that his alternative is based on a 'post-metaphysical' foundation (1974, 214). According to Habermas, it is because 'no-one can act *against* man but man himself' that the practice of criticism (based on the use of reason) can only establish its foundation or justification from within itself. Habermas is skeptical of: (i) all traditions that acquire the 'normative' force to shape specific human actions through their unquestioned acceptance; and (ii) all attempts to reduce the ethical and moral complexity of modern life to the norms that bind 'us' together by forcing 'us' to exist apart from others. Therefore, one might plausibly expect to find intellectual resources within his body of work that enable us to address the normative and factual consequences of the National Party's decision to use legal and non-legal means to separate the conditions of life of one group of citizens from those of all other racial groups.

<sup>5</sup> Matustik follows Oscar Negt's short but path-breaking reflection on the relationship between violence and language by arguing that there are three insights that lie at the very heart of Habermas's thinking.

- (4) It is possible to identify the strengths of some of Habermas's ideas by assessing their applicability in relation to a clearly defined case study.
- (5) It is possible to specify the weaknesses of some of the ideas that Habermas has outlined in different works by using aspects of a case study to criticize the basis of the solutions that he has proposed.

Within this context, there were six themes that I decided to explore in greater detail.

First, Habermas's theories should be interpreted in the same way that contemporary social analysis deals with the ideas of other key thinkers. Interpreting the works of Habermas in a non-dogmatic way is possible because there is an open-ended quality to his ideas that invites us to enter into a demanding two-way dialogue with him.

Following Gadamer, Benhabib has argued that the reconstruction of the arguments of a theorist occurs through a 'fusion of horizons'. The link between the perspective of a theorist and the horizons of his or her readers is supplied through a method of reading. It 'involves understanding perspectives *within* a framework that makes sense for us. In this sense, *learning* the questions of the past involves *posing* questions' (1986, x) in the light of the key issues that emerged out of the analysis of the ideas of a theoretician. This argument does describe one strand of my approach insofar as my reading has had as its focus the need to explicate the links that can be established between the ideas (and the remedies) that Habermas has formulated and the goal of establishing whether it was possible for the participants in particular truth-telling processes to rationally resolve their differences in the period that followed the occurrence of a negotiated settlement.

I also followed the method of drawing 'more or less freely, though not arbitrarily' on the conceptual tools of Jürgen Habermas in order to establish whether they possess the 'heuristic' ability (Mouzelis, 1990) to address the issues that emerged out of this study.

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These are: (i) the original impulse for the language and communicative theory of Jürgen Habermas is a *political* impulse; (ii) the development of *forms* of the reason orientated to an understanding [with another] is under these conditions ['after Auschwitz, War and Stalinism'] an existential problem, and *democracy* is a question of survival; (iii) one cannot understand the systematic political writings of Habermas .. if one has not ...understood his small *political* writings" (2001, 111). This thesis argues that when one follows through the methodological goal of linking different aspects of Habermas's thinking together the solutions that he has proposed are far less coherent than Matustik would like us to believe.

My initial aim was to: (i) critically interpret the work of Habermas; (ii) to identify the validity of particular ideas that could be derived from his body of work; and (iii) to establish their applicability in relation to particular aspects of the truth-telling process. The context of application of his ideas was defined in relation to the issue as to whether it was possible for the mandate of a Truth and Reconciliation Commission to contribute to the revision of the political culture of South Africa following a negotiated settlement.

The second broad theme was based on the decision to relate the theories of Habermas to the goal of learning how to interpret the structure and the complexity of a series of truth-telling processes at different moments in time. I decided to follow Mouzelis by arguing that it is possible to judge the validity of Habermas's approach by establishing whether his ideas could contribute to the solution of 'methodologically recalcitrant issues' and assist 'in the formulation of arguments' that can be demonstrated to be true (1990, 3).

Although I am not a card-carrying Habermasian scholar I am sympathetic to the focus of some of his ideas insofar as they can contribute to the renewal of critical theory. Therefore, I adopted the standpoint of establishing whether any of his ideas could be utilised in order to diagnose whether it was possible to develop the methodologies of a truth commission to contribute to the revision of the political culture of South Africa. Following a close reading of the remedies that Habermas has proposed I was able to use this methodology to identify a series of fault-lines<sup>6</sup> that the political leaders of a newly constituted community might address in order to settle their accounts with the events of the past. Four issues served as the basis for the formulation of the following questions:

(i) The revision of normative convictions

Given that a series of offensives eroded the foundations of trust within and between different members of the political community can discontent be overcome through the use of a truth-telling hearing to persuade the citizens of a newly constituted political community to revise the basis of their convictions?

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<sup>6</sup> This theme can be defined at different levels of abstraction. Is a particular fault-line 'specific' to: (i) a *particular* nation-state (i.e. to Germany after the Second World War); (ii) the West (i.e. to a particular type of modern society); or (iii) is it 'universal' (i.e. it applies to all societies regardless of the stage of development that its members have attained). I am indebted to Dr Austin Harrington for this insight.

(ii) The creation of accountability-creating mechanisms

Given the effectiveness of specific movements to legitimise normative convictions that have led to taboos on violence being removed from the consciousness of specific groups of perpetrators is it possible to use specific mechanisms to rationally persuade the members of different groups of perpetrators to acknowledge the suffering that resulted from their conduct?<sup>7</sup>

(iii) The establishment of new forms of solidarity

Could all of the citizens who participated in particular truth-telling processes overcome a past that was based on the use of force by identifying with the victims rather than with the perpetrators of specific human rights violations? To the extent that ordinary South Africans could do so did the act of expressing solidarity with the victims contribute to the emergence of a new beginning by acting as an obstacle that prevented a return of the past in relation to the present?

(iv) The rejection of oppressive systems of thought and action<sup>8</sup>


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<sup>7</sup> According to Habermas 'there exists a solidarity of those born later with those who preceded them, with all those who bodies or personal integrity has been *violated* at the hands of human beings. The liberating power of memory is supposed to ....contribute to the dissolution of guilt on the part of the present with respect to the past. The anamnestic redemption of an injustice..ties up the present with the communicative context of a universal historical solidarity' (1998a, 14 –15) based on particular rituals of remembrance.

<sup>8</sup> According to Habermas 'here, in an ethical-political discourse, the question is not primarily the guilt or innocence of the forefathers but rather the critical *self-assurance* of their descendents. The public interest of those born later, who cannot know themselves *how they would acted*, directs itself towards a different goal than the zealous moral judgments of the contemporaries of the Nazi years.....Painful revelations of the conducts of one's own parents and grandparents can only be an occasion for sorrow; they remain a private affair between those intimately involved. On the other hand, the later generations, as citizens, take a public interest in the darkest hour of their national history *regarding themselves* – and in relation to the victims and their own descendants.... They are trying to bring some clarity concerning the *cultural matrix of a burdened inheritance*, to recognize what they themselves are collectively liable for; and what is to be *continued*, and what *revised*, from out of those traditions that earlier had formed such a *disastrous motivational background*' (1997c, 24) The idea that all the members of a community share a collective liability for the consequences of the past in relation to the present is a key but neglected insight. It is crucial in the aftermath of a negotiated settlement for the members of a divided society to address the following question: if the members of a community are systematically divided from each other is it possible for a *method of political integration* to be established that will enable the victims and the beneficiaries of a civilizing offensive to rationally resolve the differences that continue to divide them?



If radical resistance to oppressive forms of social identification is only effective insofar as it operates through the medium of inter-subjective communication is it possible for all of the participants in a truth-telling hearing to reject the basis of oppressive traditions of thought and action without also eroding the foundations of a given form of life and the core values on which its existing traditions rest?<sup>9</sup>

Some of the theoretical issues that emerged out of this study were a direct response to the need to relate the questions outlined above to particular truth-telling hearings.

Others were a response to the fact that as I learnt more about the object of my enquiry it became apparent that I could not do justice to the complexity of what actually happened without acknowledging the need to step outside the parameters of a theoretical study.

There was a constant need to achieve a balance between theoretical exposition on the one hand and detailed judgment on the other hand in order to decide whether the ideas (and models) that I could derive from Habermas's body of work could or could not be applied to the truth-telling hearings that the commission was responsible for organising.

Some of the issues that emerged out of the attempt to analyse successive truth-telling processes forced me to devise solutions that extended beyond the work of Habermas.

For instance, Chapters 9 and 10 make a departure from the work of Habermas by extending the focus of my analysis to a completely new methodological terrain. The solutions that I devised to address the issues that the commission encountered were also shaped by my use of the Habermasian ideas that I had crafted into use beforehand. The problems that the participants in the report writing stage of the truth-telling processes had to address (and deal with) were significant because: (i) they revealed complexities that extended far beyond the scope of a theory with a practical intent; and (ii) they challenged the adequacy of the solutions that Habermas and others have proposed.

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<sup>9</sup> Habermas defines tradition as the 'confidence' to 'unproblematically continue what others began and have taught us.' Its power can be eroded through the destruction of relations of trust. Habermas argues that it is possible to learn from the past in the present, 'we usually imagine that, were we to meet these forebears face to face, they would not completely deceive us, would not play the role of a *deus malignus*. In my view it was precisely the basis of trust that was destroyed before the gas chambers. The complex preparation and extensive organisation of a coldly calculated mass murder, in which hundreds of thousands – indirectly a whole people – were involved, took place after all, with the appearance of normality preserved, and was even dependent on the normality of highly civilized social intercourse. The monstrous occurred, without interrupting the steady respiration of everyday life. Ever since a *self-conscious life* has no longer been possible without suspicion of those continuities which are sustained unquestionably, and which seek to draw their validity from their unquestionability' (1992, 238).

My third theme is that although there has been an impressive interest in Habermas's writings both sympathisers and opponents have noted and discussed a malaise that has generated an attitude of disillusionment to aspects of his methodological approach.<sup>10</sup> Habermas has consistently argued that the members of a given political culture should be able to overcome the consequences of a catastrophic past<sup>11</sup>. However, he has also failed to clarify the basis on which these processes of learning are supposed to rest. Similar tensions are present in the secondary commentaries of theorists who have acquired the reputation of being authoritative exponents of Habermas's major works. Matustik has argued that Habermas is an exemplary social theorist who has grounded his diagnosis in 'his vital hope in the abilities of humans to learn. The defining feature of Habermas' mature profile ...is profound sceptical ambivalence coupled with secular yet redemptive hope' (2001, 139). Yet this defence of Habermas suffers from the defect that Matustik offers no evidence to support the assertion that a Habermasian approach could make a *decisive* contribution to the solution of any actually existing conflict. The importance of my contribution to this debate is that in developing the purchase of my arguments I am not limiting myself to abstract theorising alone. Rather, I am

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<sup>10</sup> According to McCarthy, there is an irreconcilable tension between Habermas's normative goal of extending the basis on which opinion-forming processes can be established in a democratic society and his methodological preference to conceptualise political processes in system-theoretical terms: 'Habermas once criticized Marx for succumbing to the illusion of rigorous science ..The question I ...pose here is whether in flirting with systems theory he runs the danger of being seduced by the same illusion' (1985, 3). Jean Cohen has extended the focus of this critique. The 'attempt to build a dynamic theory of late capitalism has been brought *at the price* of a theory that might locate action-orienting, emancipatory norms in objective institutions. Indeed, one might ask whether political, as opposed to economic, crisis tendencies can be adequately assessed on the level of systematic analysis' (1979, 94). The problem is that 'Habermas has blocked off the very areas that might provide an answer to these questions, namely: the institutions of democratic traditions or national and political cultures of particular societies' (1979, 94).

<sup>11</sup> In a series of interviews it has become apparent that Habermas has not found it easy to find the words to express the difficulties that are involved in facing and working through a 'catastrophic' past. The following excerpts are a selection of the words that Habermas has used express the uniqueness of the form of life that he was socialized into from the period of his adolescence onwards: (i) "The political climate in our family home was probably not unusual for the time. It was marked by a bourgeois adaptation to a political situation with which one did not fully identify, but which one did not seriously criticize either" (1992, 77); (ii) "At the age of 15 or 16 I sat before the radio and experienced what was being discussed before the Nuremberg Tribunal, when others, instead of being struck silent by the ghastliness, began to dispute the justice of the trial, procedural questions, and questions of jurisdiction, there was that first rupture, which still gapes" (1971, 62/41); (iii) "When I was a student, in 1953, I wrote a comparable article on Heidegger's 1935 lectures, because I was outraged by the inability of the protagonists (such as Heidegger, Carl Schmitt, Gehlen and so on) to utter even one word admitting a political error. But I avoided any direct confrontation with my father, who was certainly only considered to be a passive sympathizer. In short, the generational clocks were set in a specific way that the 68ers were able to insist, without any embarrassment, on a *specific* confrontation with the past" (1992, 231).

attempting to establish the credibility of Habermas's arguments by exploring the link between his ideas and their relevance to particular aspects of the truth-telling process.

The fourth theme I am developing is that although a wide-ranging secondary literature has emerged in recent years offering an analysis of the central themes contained in Habermas's work there has been a tendency for 'commentators' to argue for the validity of his ideas without demonstrating their actual use in relation to concrete examples. A further reason why it is important to establish an internal link between different aspects of his theories is because Habermas has not outlined a cogent defence of the reasons why he has made the decision to address related issues in different ways by attempting to locate related remedies in different sections of his published work.

At a meta-theoretical level few attempts have been made to establish the reasons why Habermas has made the implicit decision to articulate the philosophical foundations of a theory of communicative action in his more systematic works but to exclude from their logical structure any reference to the specific 'historical' events that inform the very basis and the limits of his understanding of the historical catastrophes of the past. Metz has claimed that although the 'catastrophe of Auschwitz' plays an influential role in Habermas's *short political writings*, there is no impact, indeed, 'not a word about Auschwitz' (1997, 152f) in the *philosophical writings* that Habermas has written. The tension is that the aspiration on the part of Habermas to formulate a theory of communicative action that aspires to 'repair' or 'heal' the wounds of history (2001, 284) does imply a connection between the issues that he has treated in different works. The weakness of Metz's position is that he has not followed through this objection by using the ideas of himself (or others) to study a society that is attempting to deal with the impact of a catastrophe that is similar to the 'catastrophe' of National Socialism.

At a secondary level of interpretation these tensions create a problem for the reader. In terms of the formal logic that characterises the 'Theory of Communicative Action' - this two-volume treatise - appears to bear no relationship to the historical events that led to the Holocaust. However, when one reads Habermas's shorter political writings the explicit focus of his 'theoretical' profile is that it will only be possible to come to terms with the disasters that have shaped the past through acts of solidarity that are orientated to the goal of institutionalising a permanent memory of the suffering of the victims.

Therefore, it is reasonable and legitimate to attempt to show how the focus of the remedies that Habermas has formulated in one body of work can (or cannot) be brought into line with the remedies that he has also formulated in another body of his work.

The second reason why it is important to establish an internal link between different levels of his intellectual production is because Habermas has not published a concise statement that clarifies the reasons why he believes it is valid for him to attribute a different methodological status to related aspects of his 'theoretical' initiatives by treating one theme 'systematically' and others via his shorter 'political writings'.<sup>12</sup>

The guiding thread of my interpretation is that it is necessary to challenge the scholarly convention whereby his more 'systematic' philosophical works are equated with the 'universal' dimensions of his theoretical production and his 'political writings' are equated with a more immediate 'response' to a crisis or a conjunctural event. The tensions between these levels of his thinking reveal (by uncovering) and conceal (by hiding) the strengths and weaknesses of such a dualistic interpretation of his ideas.

In the making of this claim I am also contesting 'one-dimensional' readings of his work that suppose that Habermas is little more than a 'philosopher in the German idealist and critical traditions, from Kant to Hegel and Marx' (Matustik, 278). His ideas do help us to understand issues that are absent from the current literature on truth commissions. Second, it is necessary to bring to the centre of our attention the relatively unexplored question of how his 'less-systematic' interventions reveal issues and problems that

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<sup>12</sup> In a recent interview, Habermas attempted to clarify what a theoretician can and cannot accomplish in the broadest sense (1994, 99). The first step of his 'reply' was to distance himself from the view that a 'theoretical' work can do more than contribute to the goal of *diagnosing* contemporary conditions. As a consequence, he rejected the idea that a conceptual framework can solve the problems of life itself. The second step, involved his rejection of the idea that one should (or indeed, has to) force everything into a single framework by creating either a *holistic* or *master* theory. In this context, Habermas claimed that the crucial thing for him is that although he 'naturally makes his own contributions to specific debates from his own perspective' he does so in a nuanced way. This is because 'one has to talk about philosophical questions philosophically, sociological questions sociologically, political questions politically' (1994, 114). Although Habermas specified the need to specify (and to know) which 'discourse one is operating in, what tools one is employing [and] at which level of generality one is speaking' the only connection he makes between these levels is the conventional 'Habermasian' one. In other words, this reply clarifies the methodological movement from the level of 'philosophy' to that of sociology' but not the other way round. This reply totally ignores the issue as to how his 'less' systematic 'political' works relate, if at all, to his 'more' systematic 'theoretical' treatises. What is crucial for Habermas is that 'the philosophical dimension of this is merely the attempt not to lose the connections in the move from one discourse to another; not to let the categories freeze up, to keep the theoretical fluid; to know, for example where concepts like 'autopoiesis' or 'self-consciousness' or 'rationality' belong – and above all, where they don't' (1994, 114) The issues that I raised above have not been clearly answered.

appear to be absent or missing from his more 'systematic' philosophical works.<sup>13</sup> Third, I am arguing that if one supposes that there is an absolute 'epistemological' break between one level of discourse and another then the application of this methodological rule might create the false impression that Habermas's systematic 'theoretical' works are *apolitical* in their focus whilst his short 'political writings' are *atheoretical*.<sup>14</sup> The problem is that if one considers specific interventions that Habermas has made such as his contribution to the German Historian's Debate it is not obvious how useful it is to agree to adhere to the continued application of such a fixed or rigid set of distinctions.<sup>15</sup>

A further reason why it is important to establish a link between different levels of intellectual production is because it is necessary to challenge the claim that the ideas of Habermas are not very relevant to the issues that a transitional society must address. He has consistently argued that the social basis of (1974, 257) 'dogmatism' cannot be overcome through the use of intellectual means alone. This is because 'the error' the 'enlightenment endeavoured to discover was the false consciousness of the epoch, anchored in the institutions of a false society, a consciousness [that] ..secured those interests' (1974, 257) through the legitimation of structures that limited human freedom. From this perspective, 'the cognitive interest of the Enlightenment is declaredly critical; it presupposes a specific experience ...emancipation by means of critical insight into [the] relations of power' (1974, 253) that characterise a particular type of society. In each of the chapters of this thesis I follow the logic and the spirit of this argument. I shall do so by criticising the implicit attempt to equate strategic acts with a consensual

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<sup>13</sup> For instance, Habermas has proposed six explanations for the East European revolutions of 1989 – Stalinist, Leninist, reformist-communist, postmodern, anti-communist and liberal (1990, 3-20). His conclusion is that 'with the bankruptcy of state socialism' it had become apparent that 'radical reformist self-criticism of capitalist society' has become 'the eye of the need through which everything must pass.' The ideas that Habermas has proposed in this essay remain as yet another tantalizingly incomplete thread.

<sup>14</sup> Holub avoids the pitfall of supposing that Habermas's systematic 'theoretical' works are *apolitical* whilst his 'political writings' are *atheoretical* in focus by characterising Habermas's writings (in the plural) in terms of their 'performative consistency' (1991, 2). He also implies that Habermas ushered in a break in 'style' with an earlier generation of critical theorists. 'Ranging over a spectrum of disciplines in the social sciences and humanities, Habermas does not have to proceed marginally, poetically or textually against a putative repressive establishment, but rather frontally assaults the central issues in contemporary theory.' This characterisation does not address how the realm of *critique* relates to the *realm of praxis*.

<sup>15</sup> Charles Maier (1988, 1-65) has provided the most comprehensive intellectual history of this debate.

agreement in order to attach legitimacy to a series of agreements and pacts that served the interests of some South Africans far more than it served the interests of others.<sup>16</sup>

In order to develop a standpoint whereby I could identify the strengths and weaknesses of the ideas of Habermas in relation to the nature and character of the truth-telling processes that were created in the aftermath of a negotiated settlement my intention has also been to establish how his ideas can be used to judge the outcomes that emerged. The method I followed was to identify a series of 'leads' that are present in his work and to use them to assess whether a truth-telling hearing made it possible for the victims to free themselves from the suffering that they endured as a result of the acts of others. I have also used the methodology of using the evidence that emerged out of particular truth-telling hearings to establish whether the ideas that Habermas has proposed were relevant to the goals of the persons who designed and implemented specific hearings. This method enabled me to raise the issue as to whether the remedies that Habermas has proposed are vulnerable to the charge that the goals that they presuppose are too ambitious given the means that were available to the participants in a hearing. This is one of the central issues that I return to at various moments or points in the narrative.

### **The use of a case study methodology**

In relation to the application of my framework I decided to analyse a single case study. By concentrating on a single case I was able to relate the ideas that I derived from the work of Habermas to the truth-telling activities that the commission was responsible for organising between the start date of December 1995 and the end date of October 1998. The end date corresponds to the publication and the reception of the methodologies, results, conclusions and recommendations that are contained in its five volume report. One of the advantages of using a case study methodology is that it has compelled me to forfeit the security that accrues to sociological theorists who implicitly refuse to venture beyond the realms of pure theory by addressing more concrete empirical processes. A coherent methodology is similar to a defensible idea insofar as it can be used (and re-used) to produce valid results that make an original contribution to a scholarly debate.

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<sup>16</sup> For an analysis of the content of the pacts and agreements that emerged out of the negotiated settlement see the subsequent sub-section 'The Origins of the South African Truth and Reconciliation Commission'.

Many of the critical commentaries on the South African Truth and Reconciliation Commission have been shaped by the proximity of their authors to an ongoing process. They include the: (i) advocates and architects of the commission (Asmal et al, Sachs, Boraine); (ii) commissioners who played an instrumental role in implementing the mandate of the TRC (Tutu, Boraine, Bell & Ntsebeza); (iii) members of the TRC's research and support staff (Cherry et al); (iv) journalists and reporters who observed the inner working of the TRC and participated in the dissemination of its results through their writings and broadcasts (Krog); (v) critical academic commentators (Du Toit, Dyzenhaus, Mamdani, Wilson); and (vii) the panel of experts who participated in the international conference that occurred after the TRC released its final report (Posel).

According to Trouillot, there are four stages in the construction of an official history. They are: (i) the moment of fact creation (the making of sources); (ii) the moment of fact assembly (the making of archives); (iii) the moment of fact retrieval (the making of narratives); and (iv) the moment of retrospective significance (the making of history in the final instance)' (1995, 26). If we apply a similar scheme to the secondary literature that has grown up around the South African TRC it becomes apparent that relations of power and influence have shaped the outcome whereby some sources, texts and discourses are deemed to be more authoritative and recoverable than many others. I shall now make a few comments regarding the impact of the third and fourth junctures on the quality and scope of the literature that has grown up alongside the TRC.<sup>17</sup> At the third juncture, the construction of a 'grand narrative' may lead to particular debates acquiring a primacy as a result of the pressure that has been placed on leading commissioners to justify the reasons why they agreed to make a particular decision. A great deal of the scholarly debate on the South African TRC is dominated by the discourse of transitional justice. It makes no attempt to fully document the origins of the TRC or to analyse the effectiveness of the entire range of its truth-telling hearings. At the fourth juncture, the literature on the TRC is dominated by the conscious attempt of a range of organisations and persons (inside and outside of South Africa) to portray its achievements in a positive light and to downplay its more negative consequences. A plethora of intellectual initiatives have been undertaken inside and outside of South

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<sup>17</sup> William Roseberry uses the term 'four conjunctures' in his review, 'On Historical Consciousness'. This article includes a review of Trouillot's 'Silencing the Past: Power and the Production of History'. This review was first published in the journal *Current Anthropology*, 39, 5, December 1997, 926-927.

Africa to link the achievements of the TRC to the paradigm of transitional justice. Academic centres, non-government organisations and publishers have all worked together to produce a literature that can be used to justify the commission's initiatives. As a result, much of this literature is structured around the axis whereby the action plans (and the conduct) of the TRC's commissioners are chronologically distinguished according to the time period in which they sought to promote specific normative ends. For instance, it has become a commonsense notion to conceive of the commission in its pre-mandate period, its investigative period and its pre-and-post reporting periods. The problem with much of the secondary literature is that it attempts to justify the reason why the promotion of transitional justice was an appropriate remedy to the problem that the peoples of South Africa were facing in the aftermath of a negotiated settlement. Far too much intellectual emphasis is placed on justifying the reasons why it was correct for the leaders of the country to create and to utilise the mandate of a truth commission. This emphasis has the consequence (intended or otherwise) of deflecting our attention away from the issue of what the TRC was able to achieve once it was established.

Although this study of particular facets of the truth-telling process does not offer a value free approach it does consistently attempt to relate each facet of my analysis to the conduct of the persons who agreed to participate in particular truth-telling hearings. Through the use of a case study methodology I have learnt that it is possible to use the ideas of Habermas to investigate and to analyse the perspectives of different groups of victims, perpetrators and political party representatives as they attempted to use the spectacle of a hearing to disclose one aspect of the truth at the expense of another. Through the use of this methodology I have been able to arrive at the conclusion that it is possible to integrate the tools of analysis that I have derived from the work of Habermas with the sources of testimony at my disposal and to do so by analysing the consequences of the conduct of the persons who participated in a truth-telling hearing.

### **The relevance of Habermas's ideas to the case study**

A central issue that Habermas has addressed in his short political writings is whether a community can settle its accounts with the consequences of the past in the present. His writings reveal a long standing interest in the issue of whether it is possible to show how specific configurations shape the way in which successive generations of citizens



decided to address the results of the past in relation to the conditions of the present. A key issue that needs to be addressed is whether the leaders of the community are able to work together to break the spell of a previous form of rule without destabilising the mechanisms that enable valued aspects of a specific form of life to be reproduced. Habermas recognises that the material constraints that lie at the heart of a project that aims to use specific accountability-creating mechanisms to revise a society's political culture are a reflection of real and existing problems that cannot be conjured away. His thinking is relevant to the South African case is because he has spelt out the risks that are involved in the decision to promote one course of action over another. On the one hand, he argues that the leaders who are responsible for the decision to initiate a revision of a society's political culture would be well advised to avoid the outcome whereby they encourage their followers to create an abyss like situation. For example, it is counter-productive for the leaders of a party to reject the normative deficiencies of a particular form of life if they are also unable to promote an alternative that is capable of acquiring general acceptance within all section of the community. On the other hand, he reminds us that the leaders of a newly constituted community must address the following problem if they are to create a break between the past and the present. If a perception of criminality has invaded the fabric of a given form of life the question will arise as to whether it is advisable (and possible) for the leaders of a national liberation movement to encourage their followers to reject a prior form of life in its entirety. The issue may also arise that if one generation after another is not permitted to reproduce a given form of life then they may also be unable to nourish the cultural foundations that serve as the basis for the reproduction of their identity as a distinct people. There is also the danger that the rejection of a now discredited form of rule and the emergence of discontent among the leaders and rank and file of a more marginal movement may make a return to the systems of the past an unthinkable but unquestionably attractive option.

The second reason why Habermas's thinking is relevant to South Africa is because he argued that it will only be possible to address the consequences of the past in relation to the present through the self-conscious decision to promote a full settlement of damages. Habermas used the term a negative 'settlement of damages' to refer to the project whereby neo-conservative politicians and intellectuals self-consciously attempted to settle their account with a shady past by deciding that they will pay the least costly 'normative' premium that it is possible for them to pay during a specific conjuncture.

In order to prevent the events of the past from being forgotten he argued that it was necessary for the community to establish its own 'accountability-creating' mechanisms. Habermas linked the proposal for a full settlement of damages to the judgment that, 'the less communality a collective life context allowed internally and the more it maintained itself by usurping and destroying the lives of others, the greater the burden of reconciliation loaded onto a ...generation's allocated task of mourning' (1988a, 26/27).

He also argued that from the moment that his fellow citizens turned their gaze from the present to the past they were also co-responsible in the present for the *future* of a form of life that enabled criminal acts to be committed by its members at home and abroad. Therefore, the debt that the current generation owed to the victims of acts of persecution could only be paid through the self-conscious attempt to prevent the legacy of a prior form of life being permitted to contaminate the currency of their own form of life. To achieve this goal it was necessary, 'to keep alive, without distortion (and not only in intellectual form) the memory of the sufferings of those who were murdered by German hands'...for ...'it is ... the dead who have a claim to the *weak amnestic powers* of solidarity that later generations can continue to practice only in the medium of remembrance ..repeatedly renewed ... and continually on one's mind' (1988b, 44). Only through a full and frank admission that it was the leaders of their community who were responsible for the policy choices that led to deaths of millions of innocent (Jewish and non-Jewish) victims would it be possible for this inheritance to be fully addressed.

The third reason why Habermas's ideas are relevant to the South African Truth and Reconciliation Commission is because he interpreted the use of levelling comparisons to minimise the normative transferability of the past of the past to the present as an aspect of a much larger refusal to face the results of a series of unsettling issues. In order to counter the growing influence of these 'apologetic tendencies' he argued against the tendency for his country's leaders to conceive of their function to be, 'on one hand, [to mobilise a sense of the past] that can be accepted approvingly, and on the other hand, [to neutralise all] other pasts that would provoke only criticism' (1994, 43). This argument is valuable because it captures the immense challenges that are likely to lie ahead when the leaders of a new regime are given the responsibility to devise mechanisms that can be used to: (i) persuade the culprits to participate in this process; and (ii) to settle their accounts with the consequences of a shady past by agreeing to pay

the very highest normative premium that it is possible for an 'alleged' suspect to pay. I decided to use these insights to establish whether 'apologetic tendencies' of a broadly comparable form shaped the mandate and the conduct of the South African commission. On the one hand, I decided to investigate whether its reliance on the use of particular truth-telling mechanisms tended to work in opposing directions by simultaneously promoting and arresting the prospect of a full settlement of damages. On the other hand, I decided to formulate a framework to investigate the issue of whether the mandate that the commission was instructed to follow was robust enough to address the impact of the past on the present on a variety of inter-related 'truth-telling' fronts. As a result of this dual 'analytical' focus I was forced to address the following issues. What were the key decisions that determined the focus of the commission's mandate? How was the scope of the mandate legitimised at the moment when it was first enacted? What were the implications of the fact that it was a discourse of unity and reconciliation that was used to define the limits of what was thinkable and actionable during the early stages? How does one relate these features to the development and breakdown of the commission? Do these constraints explain the incomplete settlement that finally emerged? Or is it necessary to extend one focus by taking into account less abstract contingencies? These questions are barely present in much of the secondary literature. There are no general surveys and few commentaries that judge the outcomes of successive truth-telling hearings in a Habermasian way by asking the question of why some factors were more influential than others in arresting the possibility of a full settlement of damages.

The fourth reason why ideas of Habermas are relevant is because they can be used to analyse the impact of the commission's mandate on various truth-telling processes. If consider Boraine's analysis of the origins and the development of the commission's mandate it soon becomes apparent that his account suffers from several major defects. The first problem is that his narrative of the accountability-creating 'potential' of the commission suffers from his inability to step outside the bubble of his own importance. We learn a great deal about his meetings with senior ANC officials, his discussions with leading intellectual lights and opinion formers inside South Africa, his appearance at semi-official conclaves and the date of his breakfast meetings with President Mandela. The second problem is that appointees on the inside track (such as Boraine and Tutu) were seduced by the moment to believe that they were making history on their terms. In fact they were slavish in their refusal to change or to criticise the focus of the mandate

that they had been authorised to put into practice by their political masters. It is at this particular moment that the ideas of Habermas proved to be of great use to me. What I find valuable in his work is his refusal to accept the readymade, illusory and spectral judgment that it is necessary to accept less than a full settlement of damages. The distance between a critical-theoretic study of the accountability-creating 'potential' of successive truth-telling hearings and the apologetic self-justifications that one can discover in the text of Boraine's *A Country Unmasked* can be easily established. The argument that it is necessary to specify the reasons why the commission was unable to promote a full settlement is completely absent from Boraine's 'account of the genesis, establishment and life of South Africa's Truth and Reconciliation Commission' (2000, 1). It is not simply the normative ambition that separates the two approaches. It is also:

'the difference between an enterprise that consistently hold to a chain of causality, however difficult that may be, tracing the complexities of major processes from their remote origins through to their ultimate consequences, and one that essentially offers a series of episodes and vignettes, without responsibility for any deeper understanding of the interconnections between them' (Anderson, 2005, 75).

In order to explain the reasons why the commission was unable to promote a full settlement of damages I decided to develop a framework of thought that would enable me to pinpoint the contradictions that emerged during specific hearings and also between one hearing and another insofar as they were aspects of a more general process. By adopting this methodology I was able to follow the example of Habermas and to show how the promise of a full settlement of damages was derailed through the decision of the commission itself to reverse or to neutralise a series of persistent possibilities.

### **The origins of the South African Truth and Reconciliation Commission**

In order to contextualise my argument I shall now specify how the negotiation of a political settlement shaped the mandate of the South African Truth and Reconciliation Commission before it was formally established on the 16<sup>th</sup> of December 1995. In February 1990, President F. W. de Klerk decided to make public (in his first address to parliament) the decision to lift the ban on the African National Congress (ANC), the

South African Communist Party (SACP) and the Pan African Congress (PAC). He also announced the plan to release Mr Nelson Mandela from prison. He was subsequently released on an unconditional basis. The period from the beginning of 1990 to the middle of 1993 was characterised by senior representatives of the South African Government entering into a series of talks with their allies and opponents in order to prepare the ground on which it would be possible for a lasting political settlement to be negotiated.

During this period the two main protagonists gradually shifted their focus from a dispute over the content of their policies to the creation of a negotiation forum. The initial goal of the National Party (NP) was to use its dominance to compel the ANC negotiators to accept a power sharing deal and the entrenchment of minority rights. The acceptance of this plan lay in direct opposition to the declared objective of the ANC. This was to establish a non-racial and democratic form of rule that was based on every member of the same national community being granted the same rights as a citizen.

Right-wing members of the NP attempted to weaken the effectiveness of their opponents by inciting members of the security forces (who were operating 'within official parameters' but independent of their superiors) to attack civilian activists. The emergence of the so-called 'Third Force' (between the state on the one hand and unarmed non-combatants on the other hand) was used to eliminate political opponents of the National Party. There was also the danger that this situation might spiral out of control with violence and retribution becoming a permanent feature of life in many townships. According to R. W. Johnson, it is 'hard to know what would count as normality in a society where scores of Africans can be shot down in the street by other Africans and no-one even dreams of apprehending the killers' (Hamber, 1998, 31).

Paradoxically, the attempt by the leaders of the NP to weaken the bargaining power of the ANC was undermined by the means that they decided to use to promote this end. The NP's strategy was 'undermined by revelations ...of government dirty tricks, and slush funds to support Inkatha in its conflict with the ANC in Natal and on the Rand' (Szeftel, 1994, 458). In June 1992, the Boipatong massacre led to the deaths of 48 ANC supporters at the hands of the IFP and to the collapse of a series of all-party talks. This proved to be a major turning point. This particular conjuncture of circumstances proved that it was impossible to sustain violence and negotiations at the same time. Up to 4

million citizens took to the streets. They demanded for an end to public violence on a mass scale and called for the organisation of new negotiations (Hamber, 1998, 4). On the 27<sup>th</sup> of September the Ciskei Defence Force killed 28 supporters of the ANC.

The National Party's use of a heavy-handed negotiation strategy and its tactical use of force led to an outcome emerging that was different from the one that its leaders initially intended to promote. Its core constituents became more alarmed as they witnessed the use of force against the ANC alliance provoking an increase in militancy. In addition, the economy was contracting, capital was leaving the country and the homeland governments were less able to sustain themselves as viable systems of rule. This crisis could only be permanently overcome through both sides acknowledging that if they failed to negotiate a settlement the prospect of a breakthrough might be lost. A summit on violence was held and the NP and ANC signed a Record of Understanding. This four-page document included the agreement for a transitional system of rule to be formed that would observe the 'terms of an interim constitution' (Du Pisani, 1994, 37).

Between April and November 1993 the Multi-Party Negotiating Forum (MPNF) was established to address the following constitutional issues: 'the form of the state and its basic constitutional principles, a transitional executive council [and] an independent electoral commission' (Du Pisani, 1994, 45). The MPNF was expected to establish a timetable for the holding of a general election and the negotiation of a final constitution. The negotiations were a two-horse race. They were dominated from start to finish by the negotiating teams who acted on behalf of the two main political parties. According to Louw, 'most of the crucial decisions ... depended on secret deals struck between a party with state power and one enjoying the legitimacy of mass support' (Du Pisani, 1994, 68). Although he claims that 'the ruling NP was, in fact, negotiating the conditions of its surrender to its successor' the terms of the final settlement were not that disagreeable to the party that was supposedly losing its grip on the reins of power. The settlement led to an agreement being reached to replace a system of white-minority rule with a power sharing deal. When one examines the basis of the three pacts that subsequently emerged in greater detail the so-called 'victories' of the ANC closely resembled its actual defeat.

In the political sphere the ANC was unable to secure a transition to majority rule. The 1994 elections were followed by the formation of a Government of National Unity that

included the leaders of the 'minority' political parties of the country. After a period of five years elections were to be held and the basis of the pact would come to an end. The ANC accepted a series of constraints on the ability of its leaders to freely determine and/or to pursue a political programme that was orientated towards the goal of emancipating its key constituents from the legacy of a system of white minority rule. The key intra-governmental constraints included, 'a written constitution, dual legislative chambers, an independent judiciary and a constitutional court, proportional representation, promises of consultations with minority parties, a vice-presidency for the leadership of the opposition' (Macdonald, 1996, 222). The ANC also agreed to accept a power sharing cabinet in exchange for all minority parties losing their ability to veto the policies that were agreed by an 'interim' Government of National Unity. The NP dropped its demand for a minority veto and a permanent power sharing arrangement in exchange for the agreement of the ANC to guarantee the pensions and the salaries of all the public officials who were responsible for administering a system of apartheid.

In the economic sphere the ANC agreed to abandon its demand for the nationalisation of 'strategic' industries and decided to open internal markets to overseas competitors. The National Party was also able to weaken the economic leverage of the Government of National Unity by privatising state businesses and redistributing '20 million hectares of land to homeland leaders' prior to the formal transfer of power (Hamber, 1998, 5). The agreement to protect the pensions and the conditions of employment of the civil servants who occupied the most senior positions in the apartheid state was extended to include members of the security forces and the officials of the homeland governments. As a result of these actions a sizeable proportion of the budgets of the regional and provincial governments could not be used or diverted to serve other goals or purposes.

In the military sphere the emergence of an internal armed conflict that neither side could win without further loss of life on a mass scale was followed by the uncertainty of a truce. In the short to medium term the key issue was whether it was possible for the agreements that emerged out of the negotiations at Kempton Park to be enforced. The problem was that an orderly transfer of power was dependent on the state's security forces agreeing to enforce a period of order prior to the holding of the 1994 elections. According to Sachs, this 'was a crisis which was threatening our first democratic elections and the whole transition process' (1999, 1566). He went so far as to claim that

the 'security people were now saying ... that they knew of a bombing campaign that was being prepared ... to destroy the entire process' (1999, 1566). The ANC was 'not in a position to defend the elections [and] it did not have the informers' (1999, 1566). Its leaders were also sympathetic to the idea that the security officers who were putting themselves on the line should not be asked to protect the elections and then face the prospect of being subject to prosecutions after a new government had been formed.

In response to this 'issue' the decision was made to amend the draft constitution through the addition of a last minute clause. The post-amble stated that 'amnesty shall be granted in respect of acts, omissions and offences associated with a political objective and committed in the course of the conflicts of the past' (Guella, 2000, 63). It would then be the responsibility of the first post-apartheid government to devise the legislation to determine the methods that would be used to grant amnesty to a specific perpetrator. Through the amendment of the interim constitution the concept of amnesty was linked to the decision to establish a truth commission. As a consequence of this decision 'people could get amnesty to the extent that they owned up to what they had done, and told the truth on an individual basis' (Sachs, 1999, 1566). Following the decision to sign this agreement the leadership of the ANC was forced to admit that its (Bell, 2003, 286):

'original demand to prosecute the apartheid criminals would be as politically impossible as the blanket amnesty demanded by the NP. The one was simply unworkable when trying to take over the apartheid state machine, the other would be unacceptable to a mass constituency that produced negotiations'.

This was a consequential u-turn. Sachs argued that the decision to create a truth and reconciliation commission 'came out of a very specific debate and an intensely felt need. It was rooted in our experience, it helped to solve one of our greatest dilemmas' (1999, 1565). The beneficiaries of this process were liberal members of South Africa's civil society. They included Dr Alex Boraine. He was a former executive of the Anglo American Corporation. He resigned from the Progressive Federal Party (PFP) in 1986. With Mr Van Zyl Slabbert he co-founded the Institute for a Democratic Alternative for South Africa (IDASA). It received 'substantial funding from the United States Agency for International Development' (Taylor, 2002, 41). Its goal was to bring 'long-range



political considerations and issues concerning social stability to the interests of the dominant classes and their inner core in the corporate community' (2002, 38). Boraine and his colleagues were ideally placed to take advantage of this new conjuncture of circumstances. On the one hand, they used the resources at their disposal to argue for the establishment of a truth commission. They proposed that it would become the principal means through which a newly formed Government of National Unity could establish a discontinuity between the politics of the past and the politics of the present. On the other hand, they argued that through the agreement of a limited mandate the Government of National Unity would be able to stabilise the relationship between the state and its citizens without the risk of a fundamental challenge being made to the country's relations of production and the property relations on which they were based. With funding from the billionaire currency dealer, George Soros, Boraine was able to establish 'Justice in Transition'. It was a non-government organisation. Its purpose was to supply the state with 'the best possible advice' on how to establish a commission (Bell, 2003, 288). With the assistance of Albie Sachs and Kader Asmal, two ANC lawyers, the decision was made for Boraine to approach President Mandela with a draft model of the TRC. He was subsequently appointed to the Parliamentary Portfolio Committee that recommended the legislation that led to the commission's creation.

The *Promotion of National Unity and Reconciliation Act* was passed in July 1995. It established the mandate of the South African Truth and Reconciliation Commission (TRC). It proposed a concept of truth-telling whereby the causes and the consequences of gross human rights violations would be disclosed through open public hearings. After a process of public consultation in which the names of 299 nominees were put forward a parliamentary committee composed of the parliamentary representatives of the African National Congress, the National Party, the Inkatha Freedom Party and the Freedom Front selected a list of twenty-five names. The final choice was left to the president. Mandela selected 'fifteen ...and added two new names' (Boraine, 2000, 73). The commissioners whom he decided to appoint were given the legal authority to promote the following goals between July 1995 and January 1997 (Act No. 34, 1995, 1):

- (i) To establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent the repetition of such acts.

- (ii) The pursuit of national unity ...and peace require (i) reconciliation between the people of South Africa and (ii) the reconstruction of society.
- (iii) 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 victimization.
- (iv) 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.

The idea that the TRC should be even-handed in its approach to all human rights violations was based on the judgment that the newly enfranchised citizens of South Africa would only 'fall into line' with the legislative purpose of the Act insofar as the principle was established that the victims of *all* acts of violence should be judged in the same way. The 'liberal premise - that all violence should be equally abhorred – cut the high moral ground from under the liberation forces, equating the violence of resistance with the violence of the oppressed' (Bell, 2003, 286). The content of the mandate also deepened the mood of the time by elevating 'to undisputed moral superiority those few individuals such as Archbishop Desmond Tutu who had non-violently resisted apartheid' (2003, 286) and had lived to tell the tale before *and* after its formal demise.

In addition to Tutu (the Chairperson of the TRC) and Boraine (his vice-Chair) President Mandela also agreed to select fifteen citizens of the country to act as commissioners. He also retained the prerogative to determine who (in addition to three commissioners) should be appointed to a semi-autonomous Amnesty Committee. Table 1 includes the names of the judges who were appointed. Three commissioners were assigned to work alongside the judges whom Mandela appointed to the committee. Two of the three were advocates. The final commissioner was an attorney. Mr de Jager was a Broederbond member as was Mr Malan who joined the TRC's Human Rights Violation Committee.

President Mandela also decided to appoint the other commissioners who were appointed to the other standing committees of the TRC or to its Investigation Unit. There were 7 female and 10 male appointees. They differed from each other in terms of their age, ethnicity and level of involvement in the key political events that shaped the present. Mandela's final choice included: (i) four ministers of religion (the Chair, the vice-chair,

Reverend Finca and Reverend Mgojo); (ii) seven trained lawyers (Chris de Jager, Sisi Khampepe, Richard Lyster, Wynand Malan, Dumisa Ntsebeza, Denzil Potgeiter, Yasmin Sooka); (iii) three medical practitioners (Wendy Orr, Mapule Ramashala, Fazel Rander); (iv) one psychologist (Hlengiwe Mkhize); (v) one social worker (Glenda Wildschut); and (vii) a single civil rights activist (Mary Burton of the Black Sash).

When the commissioners met each other for the first time Tutu decided to 'announce his choices' as to the role that they would perform within the commission. He did so by proposing that they 'approve' a decision that he had already arrived at (Bell, 2003, 294). The impact of this patrimonial style of leadership on the structure and function of the South African Truth and Reconciliation Commission has not been fully documented. The only sources that were available to me were the commentaries of Terry Bell and the administrative reports that are contained in the TRC's final report. It is the latter sources that I have used to specify the organisational structure of the commission as a whole.<sup>18</sup>

Figure 1 shows that Tutu 'took charge of the Human Rights Violation Committee, with Yasmin Sooka and Wynand Malan [another ex-Broederbond] as his deputies.

Hlengiwe Mkhize agreed to chair the Reparation and Rehabilitation Committee with Wendy Orr as her deputy' (2003, 294). Mr Dumisa Ntsebeza was appointed to lead the Investigation Unit. The report notes that the Act 'envisaged the establishment of an investigation unit as one of the four critical components of the commission. It was, however, silent on the precise functions of the unit and on its relationship to the three standing committees (1, 11, 330, 24) of the commission. Mr Ntsebeza was expected to work alongside Mr Glenn Goosen. Mr Goosen was appointed in March 1996. The function of the Investigation Unit was 'to provide an investigative service to the Commission's committees (principally the Human Rights Violation and Amnesty

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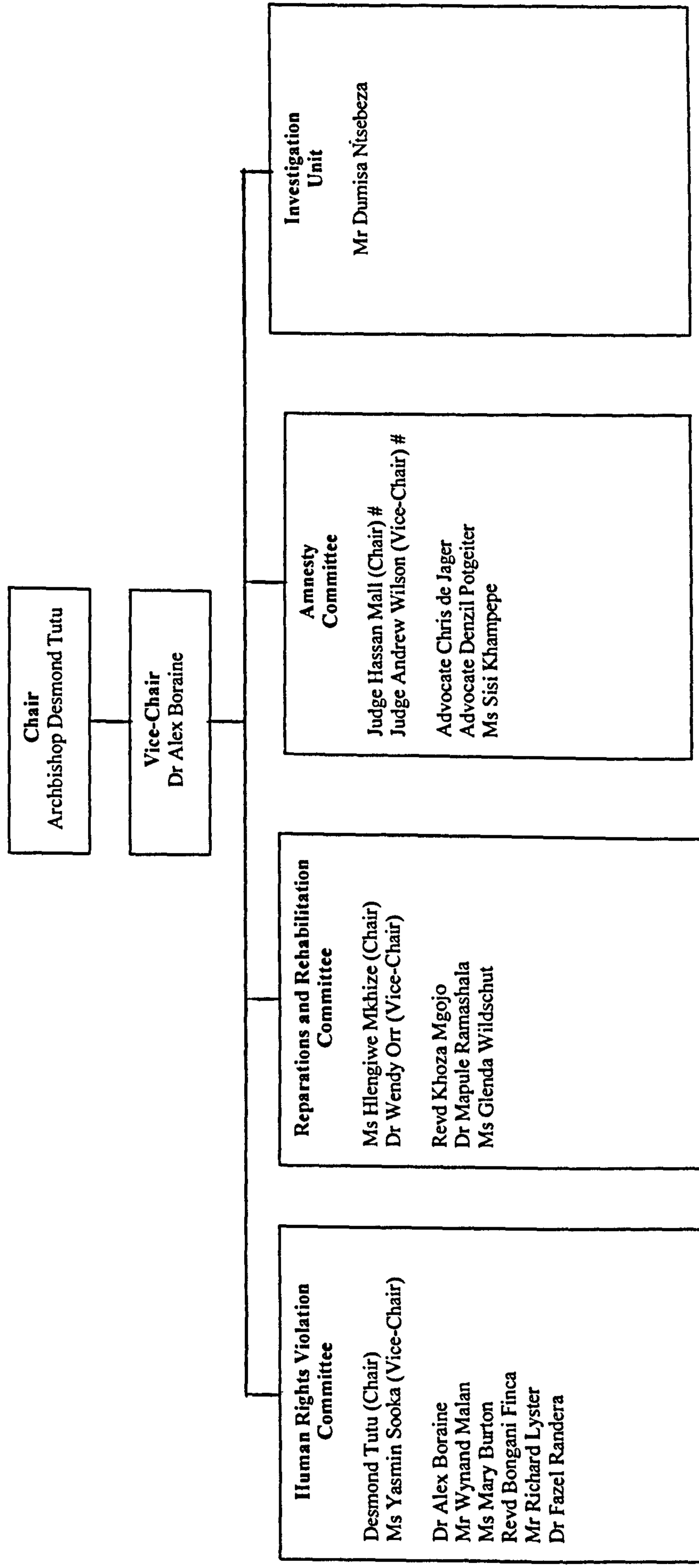
<sup>18</sup> The Interim Report of the TRC was published in June 1996. It states that 'it was decided at the first meeting of the Commission that the ultimate authority of the Commission would rest completely with commissioners, whose task it would be to execute the mandate of the Commission as provided for in the Act' (TRC, 1996, 4). After listing the names of each commissioner it then goes on to say that the TRC decided to establish an 'Executive Committee'. The report does not specify how this committee operated, the role of its members or the basis on which its members were expected to arrive at a particular decision. The committee was composed of the following members: 'the Chairperson, Vice Chairperson, Chairperson of the Reparation and Rehabilitation Committee (alternate Vice Chairperson), two Vice Chairpersons of the Human Rights Violations Committee, Head of Investigative Unit, Ms Sisi Khampepe as a representative of the Amnesty Committee (alternate Chris de Jager), Khoza Mgojo and Bongani Finca' (1996, 4). The report makes no further reference to this committee's business or decisions.

Committees) and to initiate independent investigations as determined by the Commission' (1,11, 332, 35). The report does not document what it did in fact do.

Figure 1 shows that I have been able to specify how the seventeen commissioners were allocated a position in either the three standing committees or the Investigation Unit. The sources at my disposal do not specify how the activities of the latter unit and the three standing committees interacted with each other at different moments in time. The report also fails to specify how the decisions of its commissioner led to the inputs and outputs of one committee interacting with those of each of the other committees. Although there were links between the Human Rights Violation and the Reparations and Rehabilitation Committee the final report does not document their interactions.

The Amnesty Committee was granted a semi-autonomous role within the commission. According to Dr Boraine, one of its key architects, 'the chairperson of the Amnesty Committee was not a member of the Commission. We invited him to attend Commission meetings, but that is very different than being a commissioner' (2000, 116). The proposal for 'the chairperson to be a commissioner and also for any amnesty decisions to be reviewed by the full Commission' was turned down when the content of the *National Unity and Reconciliation Act* was established at the drafting stage. The 'National Party wanted to ensure that the Amnesty Committee, which should be making major decisions about perpetrators' should be as independent as possible' (2000, 117). The disjointed relationship between the Amnesty Committee and the rest of the TRC was never ironed out because 'the mood of the judges was very different from that of the Commissioners. ...they saw themselves as beyond contradiction, allowing no one to dare to question their decisions' (2000, 117). Boraine concludes by stating that although 'we gave them as much administrative back-up as possible ...appointed additional staff and finally additional Amnesty Committee members ....nothing seemed to galvanise the committee into action' (2000, 117). As a consequence they failed to meet their targets. Although I have been able to derive the basic structure and anatomy of the commission from the administrative reports that are contained in its final report I have not been able to use the sources at my disposal to specify how the commission's decision-making

**Figure 1 – Who’s Who at the TRC (Appointed Commissioners)**



Source: This figure was established by analysing the Administrative Reports of the Commission (see the TRC Report – Volume 1, Chapter 10)  
# Although Judges Mall and Wilson were not appointed as commissioners they were formally appointed to the commission by President Mandela.

structures determined the functioning of different organs of a single organisation. Although the literature on the TRC is extensive it fails to specify who made significant decisions at different moments in time or the precise reasons why they were made. However, I am able to specify the formal functions of the TRC's main committees. The Human Rights Violation Committee was responsible for deciding who fell within the remit of the Act and could be attributed with the status of having been a victim. The applicants who were conferred such a status were eligible for a reparation payment. The members of this committee were also given the responsibility to organise public hearings at which the testimony of victims and perpetrators was disclosed to the public. The Act established the principle that the victims of acts of violence should be located on the same continuum depending on their proximity to a gross human rights violation. At one end, a victim was anyone who "(a) individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights as (i) a result of a gross violation of human rights; or (ii) as a result of an act associated with a political objective for which amnesty has been granted' to a perpetrator (Section 1(1) (XIX) Act No. 34, 1995, 3). In addition, a victim was a person who 'suffered harm ..as a result of such a person *intervening to assist persons contemplated in paragraph a* who were in distress or to prevent [the] victimization of such persons' after an attack' was also judged to be a victim (Section 3) (b), Act 34, 1995, 3). At the other end, a victim was a 'relative' or a 'dependant' of a 'victim' who experienced suffering or loss as a result of a ...violation' that occurred between the 1st of March 1960 and the 10<sup>th</sup> of May 1994.

The function of the Reparation and Rehabilitation Committee was to establish a series of policies that could contribute to the rehabilitation of the TRC's official victims. It was also expected to make a series of policy recommendations to the President. This committee's recommendations were supposed to: (i) identify a series of 'institutional, administrative and legislative measures' to prevent 'the commission' of 'human rights violations in the future'; and (ii) contribute to the 'to the creation of institutions' that were 'conducive to [the creation] of a stable and fair society' (Dyzenhaus, 2000, 477).

Finally, the function of the Amnesty Committee was to decide whether the persons who applied for amnesty for a specific offence should be granted an amnesty. Successful

applicants were granted an immediate and irreversible amnesty and their liability (criminal and civil) for the offences that they committed was completely erased. Section 1(1)(ix) of the Act defines a gross violation as the violation of the human rights of a victim through: (a) the killing, abduction, torture or severe ill-treatment of any person; or (ii) any attempt, conspiracy, incitement, command or procurement to commit an act referred to paragraph a. Each individual applicant could only be granted amnesty if the violation occurred between the 1st of March 1960 and the 10<sup>th</sup> of May 1994.

Figure 2 also specifies a second layer to the formal organisation of the commission. Tutu and Boraine decided to use the discretionary powers that they had been granted. They did so by appointing additional support workers whom they could rely on. Dr Alex Boraine recommended a lawyer, Paul van Zyl, as the commission's Executive Secretary. He was responsible for policy development within the commission. A friend of Boraine (Professor Villa-Vicencio) was appointed as the commission's Research Director. Tutu appointed his media officer (John Allen) as the Communication Director. Dr Biki Minyuku was also appointed as the Chief Executive on the administrative side.

I have not been able to establish how each unit or committee established a working relationship with the Government of National Unity and its main sponsors (the Office of the President and his ministerial colleagues in the Ministry of Justice). There is no reliable source that documents the mechanisms that were established in order to manage the relationship between each body before and after the creation of the commission.<sup>19</sup> Therefore, I am unable to specify how a working relationship between these agencies was structured through the transfer of orders from a minister of state to a TRC official or through the leading commissioners of the TRC (Tutu and Boraine) being permitted to

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<sup>19</sup> Andre Du Toit has claimed that 'the TRC was not part and parcel of the regular state apparatus. Not only was the TRC an independent commission but unlike, say, the Human Rights Commission, it was not founded as a permanent body: but as a transitional institution, it had a limited mandate and its specific objectives had to be achieved within a fixed time span. For this transitional moment, the TRC was empowered to speak of 'truth' and justice' both *on behalf* of the new democratic state as well as *to* the state (both the prior regime and its incumbents)' (Du Toit, 2005, 441). In practice, the relationship between the state and the TRC was not as distinct and clear cut as this statement implies. In his memoirs, Dr Boraine claims that Mandela 'was enormously supportive of Tutu and me; he would take it upon himself to call us at times of extreme stress and would invite us to meet with him, usually over a very early breakfast, never to tell us what to do but to allow us to tell him what we were doing ...there is no doubt that there were times when he disagreed with the actions we took ...he ..was not happy that we finally subpoenaed [the] ... former State President P. W. Botha' (2000, 263). The formal and the informal channels of communication between the state and the TRC have not been fully documented.

**Figure 2 – Who's who at the TRC (Staff and Committee members)**

**Support Staff**

**Executive Officer**  
Paul van Zyl

**Research Unit**  
Professor Charles Villa-Vicencio  
(Director)

**Report Writers**  
Nicky Rousseau  
Madeleine Fullard

**National Legal Officer**  
Mr Hanif Vally

**National Director of the Investigation Unit**  
Mr Glenn Goosen

**Committee Members**

**Cape Town Office**  
(convened by Dr Orr)

**Human Rights Violation Committee**  
Ms Mary Burton (see Figure 1)  
Ms Pumla Gobobo-Madikizela

**Reparations and Rehabilitation Committee**  
Dr Mapule Ramashala (see Figure 1)  
Dr Wendy Orr (see Figure 1)  
Ms Glenda Wildschut (see Figure 1)

**East London Office**  
(convened by Reverend Finca)

**Human Rights Violation Committee**  
Mr Ntsikilelo Sandi  
Ms Judith 'Tiny' Maya  
Ms June Crichton  
Ms Mothu Misuli (she was later replaced by Ms Maya)

**Reparations and Rehabilitation Committee**  
Archdeacon Mcebisi Xundu

**Durban Office**  
(convened by Mr Lyster and Revered Mgojo)

**Human Rights Violation Committee**  
Mr Mdu Dlamini  
Ms Virginia Gcabashe  
Mr Ilan Lax

**Reparations and Rehabilitation Committee**  
Dr S'Mangele Magwaza

**Johannesburg Office**  
(convened by Dr Randerera)

**Human Rights Violation Committee**  
Dr Fazel Randerera (see Figure 1)  
Ms Yasmin Sooka (see Figure 1)  
Mr Wynand Malan (see Figure 1)  
Dr Russell Ally  
Mr Hugh Lewin  
Ms Joyce Seroke

**Reparations and Rehabilitation Committee**  
Ms Hlengiwe Mkhize (see Figure 1)  
Mr Tom Manthatha  
Professor Piet Meiring

Source: This figure was established by analysing the Administrative Reports of the four committees (see the TRC Report, Volume 1, Chapter 10).



request the support of senior officials and ministers within a specific state apparatus. Figure 2 shows that the TRC established branch offices in four provinces. With the exception of Durban a single commissioner was appointed to manage each office. The commission decided to utilize a further raft of discretionary powers by appointing additional staff to support the workload of its 'regional' commissioners. The provincial offices replicated the structure set out in Figure 1. 'Committee' members were appointed to assist each commissioner to complete their immense workloads. In some cases, a single person was appointed to head a local branch of a larger committee. It is noticeable that the offices of Durban and East London refer to only one committee member who was appointed to their Reparation and Rehabilitation Committees. The report includes a list of the names of a further 550 staff, 33 foreign interns, 20 special investigators and 36 outside researchers who worked on behalf of the TRC. However, it fails to specify what their roles were within the structure of the commission. The TRC was established on autocratic lines. Its executive officers were only partially subject to the constraints that emanate from the observance of legal-rational rules. Due to the absence of a clearly defined charter of rules governing the responsibility and levels of authority of the TRC's key office-holders it is not possible to specify who was legally and/or rationally responsible for devising a solution to the multitude of issues and problems that emerged at different stages in the life of this temporary institution.

It is likely that the fragile constitutional status of the commission and the vagueness of the mandate that its officials were instructed to follow contributed to the outcome whereby its rules and procedures were subject to challenge through the law courts. The first volume of its report includes an entire chapter that is devoted to this issue. The introduction states that 'during its lifetime, the Commission was so often involved in litigation that one could be forgiven for thinking that it was under siege' (1, 7, 175, 6). These challenges included: (i) the claim that the amnesty clause was unconstitutional; (ii) the requirement for its officers to inform an alleged perpetrator that a third party had made an allegation that implicated him or her in the occurrence of a specific violation; (iii) the requirement for alleged perpetrators to be given proper, reasonable notice of any evidence that might be disclosed during a Human Rights or Amnesty hearing; and (iv) the allegation that specific officers of the commission failed to act impartially by deciding to investigate offences without bias and in an even-handed way. For instance, the National Chairperson of the Inkatha Freedom Party made a complaint to the Office

of the Public Protector. The allegation was made that the TRC: (i) acted in a biased manner; (ii) violated the IFP's constitutional rights; (iii) impaired its dignity within a newly established system of constitutional rule and (iv) contravened its own statutory objectives by failing to promote national unity and reconciliation (1, 7, 196, 107).

### **The structure and layout of the chapters**

The first part of the thesis documents the legacy of apartheid as a system of rule. I argue that this system was responsible for the occurrence of a complex range of external and internal offences during the period of its formal ascendancy. My starting point for Chapter 1 is the proposition that it is not possible to understand the narrowness of the commission's mandate in the absence of an understanding of the civilizing offensives that successive leaders of the National Party authorised during the apartheid period. These offensives targeted the peoples who lived in the region of Southern Africa as well as the mass of the citizens who resided within the borders of the South African state. In the aftermath of the negotiated settlement I argue that one of the key issues was whether the leaders, the agents and the operatives (who contributed through their acts and their omissions to the systematic occurrence of human rights violations) would be investigated and called to account for the causes and consequences of their actions. Would they be alleged culprits be called to account for their actions or would they be permitted to pay the least costly premium that it was possible for them to pay? I decided to raise this issue in this way as a result of my reading of the works of Habermas. He has argued that it will only be possible for the participants in the conflicts of the past to resolve their differences insofar as they individually (and collectively) agree to pay the highest normative premium that it is possible for each 'culprit' or 'suspect' to pay. I decided to place Chapter 2 at the beginning of my narrative in order to specify the scale of the problems that the elected leaders of the African National Congress had to address when they agreed to share the reins of power with their rivals in the National Party. In the concluding sections of this chapter I argue that a revision of a society's political culture is dependent on whether the leaders and the allies of a white-ruled regime were prepared to acknowledge the full extent of the suffering that occurred as a result of the decision to wage a series of offensives against all of the peoples of Southern Africa.

The second part of the thesis analyses the proceedings of the Human Rights Violation and Amnesty committees as an aspect of a broader sequence of truth-telling processes. My starting point for the third chapter is that it is necessary to extend the focus of one's analysis beyond the dynamics that shaped the relationship between the TRC's commissioners and support staff in different structures of the commission as a whole. Conflicts of interest emerged because leading members of the TRC failed to establish a series of standards that could be used to judge inter-related aspects of its action plans. On the one hand, the commissioners failed to specify a series of standards that could be used to judge the adequacy of the mandate that they had been instructed to follow. On the other hand, they failed to specify how the conduct of the commission should be judged in relation to the purposes of the action plans that they agreed to follow. I am unable to fully analyse the specific ends that individual commissioners decided to promote as a result of the way in they decided to follow a specific course of conduct. However I am able to demonstrate how the impact of a series of external and internal constraints gave rise to the emergence of a series of contradictory impulses that shaped the conduct of specific commissioners in relation to specific truth-telling hearings. Chapter 3 outlines an analysis of the impact of the mandate on the action plans of the TRC as they unfolded during the first phase of its development as a transitional body.

My starting point for Chapter 4 is the argument that it is possible to use the ideas of Habermas to evaluate whether individual members of the commission were able to utilize the means at their disposal in order to promote credible truth-telling outcomes. The first section of the chapter develops the argument that the truths that emerged from particular truth-telling hearings were likely to be of greater use (or effectiveness) to the extent that the participants were able to express the fullness of their own perspectives. I use the idea of the ideal speech situation to test the proposition that the more the design of specific truth-telling hearings conformed to the conditions of this ideal the more likely it was that these hearings would produce a more credible truth-telling outcome. In the making of this claim I am not supposing that the movement between each level of the analysis is automatic or inevitable in relation to the peculiarities of a hearing. Clearly there is a difference between the ideal situation that Habermas has identified and the truth-telling hearings that the commission decided that it would in fact organise. The analysis is based on an explicit acknowledgement of the fact that although some

aspects of the ideal speech situations were institutionalised the public hearings that the TRC decided to establish also deviated from the ideal in a number of crucial respects. The second section of Chapter 4 reverses the methodological focus of the first section. It does so by using aspects of the TRC's truth-telling hearings to specify some of the ambiguities that are contained within Habermas's consensus theory of truth. Instead of using the conception of the ideal speech situation to identify the incompleteness of the truth-telling process I decided to use the evidence that emerged from particular truth-telling hearings to identify some of the ambiguities of the consensus theory of truth.

Chapter 5 returns to a key theme that I mentioned but did not develop in Chapter 3. I argued there that one of the problems with the commission's action plans was that its commissioners failed to specify the normative ends that its commissioners should aim to alter versus those that lay outside of its reach at different stages in its development. In the absence of its own clearly defined standards I decided to fill this gap by formulating a series of critical standards that were implicit in the action plans of the commission. By explicitly distinguishing one end from another I was able to use the standards that were implicit in the action plans of the commission to judge the conduct of its commissioners as they attempted to translate the TRC's mandate into a series of achievable goals.

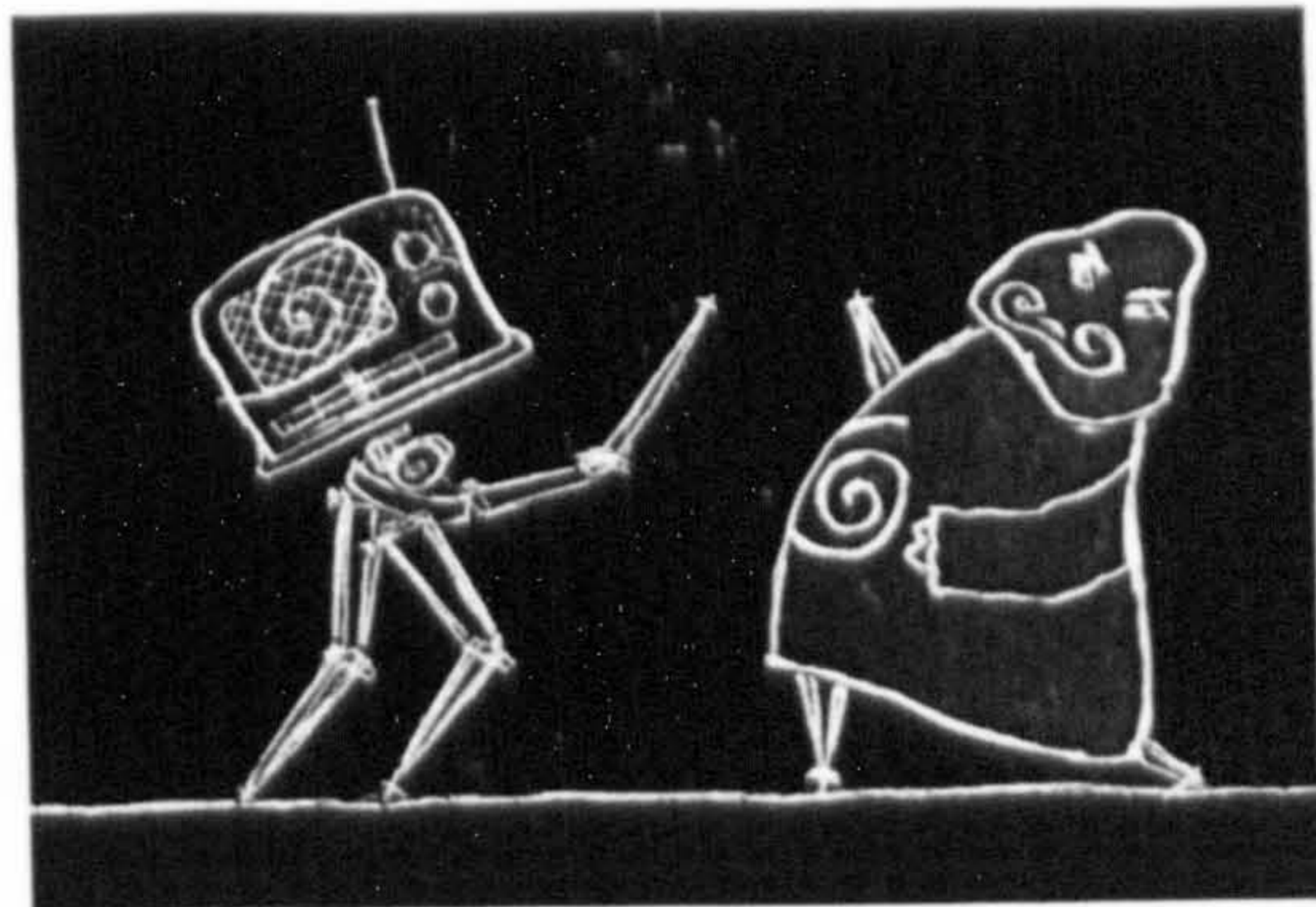
The third part of the thesis analyses the Political Party Recall Special hearings. I argue that these hearings reveal that one of the limitations of Habermas's thinking is his failure to acknowledge that the accountability-creating purpose of a hearing could be neutralised through the self-conscious use of specific tactics of evasion. Chapter 6 outlines the structure of these hearings. They were the only occasion when the leaders of the country's main political parties were given the public opportunity to settle their accounts with the events of the past and the conduct of their members and supporters. Chapter 7 addresses the key issue as to whether the leadership of the National Party succeeded in their attempt to preempt, deter and neutralise the question of who should be held to account for the occurrence of gross human rights violations. Chapter 8 extends this focus by examining the record of the African National Congress. It analyses how a panel of its leaders attempted to mobilise a version of the past that could be uncritically accepted by its supporters to be a true record of their conduct in the past. This occurred at the same time that they attempted to neutralise other pasts that cast the conduct of some of its members in a bad light by raising a series of unsettling questions.

The fourth part of the thesis proposes an analysis of the procedures and methods that the TRC decided to utilize in order to produce its own body of official truths. My starting point for Chapter 9 is the idea that the commission used a series of mechanistic methods to present its findings and conclusions to President Mandela and the peoples (and media) of the world as they awaited the publication of the commission's final report. The first section of the chapter shows demonstrates how a series of constraints linked to the mandate of the commission shaped the way in which its report writers were able to move the truth-telling pendulum of the TRC in a series of predetermined directions. I argue the commission's report-writers were given the unenviable task of recording the findings of the TRC without making explicit reference to the main causes that shaped the conflicts of the past and the human rights violations that occurred in their wake. The second section focuses more explicitly on the methods that the TRC used to report its findings in the five volumes of the report that it published in October 1998. Although the commission's commitment to the goal of reporting specific violations was a grand undertaking the methods that it used to disclose their meaning were far from effective. The disclosure of the commission's findings should have been a liberating moment. However, the commission's achievements were undermined by the methods that its commissioners decided to use in order to disclose its main findings and conclusions. The decision to report a selection of 'window' cases and to let the facts 'speak' for themselves resulted in the umbilical cord that linked the causal occurrence of specific events to their normative consequences being erased from the content of the report.

The third section of this chapter questions the decision of the commission to add to its formal 'findings' and 'conclusions' a distinct set of 'perpetrator' findings. The TRC decided to attribute to itself a series of powers that enabled its commissioners to assume the function whereby they could act as the custodian of the nation's morality. The starting point for Chapter 10 is the judgment that the documented decisions of the Amnesty Committee failed to produce an authoritative record of the gross human rights violations that occurred during the period that it was formally permitted to investigate. I substantiated this claim by analysing the outcomes of the recorded decision of the Amnesty Committee prior to the publication of the commission's October 1998 report.

## PART 1

### The legacy of Apartheid as a system of rule



Source: Stills from the film 'Ubu Tells the Truth' 1997 - William Kentridge

## Chapter 2 -

### Remembering and forgetting the cruelty of the crimes of apartheid

#### Introduction

In confronting the crimes of apartheid it is not self-evident how sociological and other forms of analysis can be used to grasp the complexity of such an unstable object. The policy choices of the National Party led to the occurrence of a complex map of internal and external offences. These offences were the product of a multiplicity of causes. This chapter can be understood as a symptom of and a response to the inadequacy of the theoretical means that are available to us to grasp the causes of a range of offences.

The difficulties that are involved in grasping the consequences of the past in relation to the present made it an important task for me to identify the reasons why the South African state decided to initiate a series of offensives against its own citizens. As I attempted to link the events of the past to the present it also became apparent that the more we learn about the causes of these offensives the greater is the need to relate the occurrence of empirical patterns to an examination of their normative consequences. In the framing of this issue I decided to utilise a key Habermasian argument. He argues that the promotion of a full settlement of damages depends on whether the architects and the participants in a truth-telling process are prepared to address the following issues: (i) exposed to the limits of the rationality of their own form of life can the members of a society address the consequences of the past in relation to the immediate present?; (ii) can the leaders of a society's political parties settle their accounts with the past if they decide to ignore the fault-lines that are contained within a given form of collective life?; (iii) is it possible to establish a link between past and the present if the most destructive aspects of a system of white minority rule have not been fully accounted for? This chapter outlines a preliminary answer to these questions. It does so in full awareness of the fact that similar questions have been posed in relation to other states whose leaders committed acts of cruelty on a mass scale. Indeed, this chapter includes a comparison between the genocide that was carried out by the National-Socialist state during the 1940s with the more recent offensives of the apartheid state.

I begin this chapter by investigating a nexus of problems, both theoretical and empirical, with a bearing on the issue of memory versus forgetfulness. I refer to intentional acts of cruelty to indicate (Balibar, 2001, 15) ‘those forms of extreme violence, intentional or unintended, physical or moral that, appear to be worse than death’ insofar as they may have consequences that extend far beyond the scope of their most immediate victims. A unique feature of the recent history of Southern Africa is that a system of white minority rule was established and defended through successive acts of violence. There are several reasons why it is not easy to grasp the specificity of these acts. First, the causes and consequences of many of these acts originated not on a single stage but within and between a variety of locations inside and outside of South Africa. Second, individual acts of violence were linked to, and part of, a civilising offensive that led to previously untested action plans being intentionally translated into an existing reality. A key issue that needs be explored in relation to this offensive is how it is possible to establish a ‘language’ that enables us to understand how specific acts of violence occurred in order to serve a multiplicity of ends at different moments in time. One form of language that does suggest itself as a candidate for understanding the range and diversity of apartheid-era violence is international ‘humanitarian’ law. It reminds us that the members of one state share an interest with the members of every other state to exist in a community without the acts of aggression of one state undermining the security of another through the violation of its territorial integrity.

The first argument of this chapter is based on the idea that although the categories of international humanitarian law can be used to establish the severity of the offences that were committed in order to sustain a system of white minority rule there is no reason why a society’s memory of itself will coincide with the formal categories of the law. In the making of this argument I am also implicitly developing a critique of Habermas. The terms that he uses to identify the ‘catastrophes’ of the past do not provide us with the means to analyse the depth and scale of the suffering that resulted as a result of the National Party using the means at its disposal defend a system of white minority rule.<sup>20</sup>

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<sup>20</sup> Although Habermas recognizes that ‘the twentieth century “generated” more victims, more dead soldiers, more murdered civilians, more displaced minorities’ more torture, more dead from cold, from hunger, from maltreatment, more political prisoners and refugees, than could ever have been imagined’ (2001a, 45), he fails to specify the reasons why ‘the phenomena of violence and barbarism mark the distinctive signature of the age’ (2001a, 45). Indeed, he displaces this focus by asserting that there was always a ‘reverse side’ to ‘all these catastrophes’ (2001a, 45). He supports this claim by arguing that ‘the conscious assessments of the dimensions of the horror ... set loose energies, even opened new insights,



The value of the explanations that I propose is that they demonstrate how the leaders of the National Party used the state to deliberately change existing political structures. As a result, 'non-normal' relations became a permanent aspect of life within South African. This is an important aspect of the country's history. It provides the evidence to support the Habermasian claim that if the leaders of a newly constituted state are to 'settle their accounts' with the past it will be necessary for them to make some firm decisions as to who will be forced to the costs of one form of resolution in preference to another.

The leaders of the African National Congress refused to entertain the idea that all of the criminal acts that were committed during the apartheid era would be fully investigated in order to establish the evidence that was required to prosecute 'alleged' suspects. The decision not to blockade this route or pathway was taken for a number of reasons. The negotiation of a joint political settlement between the leaders of the country's main political parties was one of the reasons why a Nuremberg style trial was not established. Therefore, one can conclude that 'humanitarian and ethical principles' were 'only taken out of the legal cupboard when they served [the] *objectives*' of a movement (De Witte, 2001, 165). In circumstances in which they did not they were simply abandoned. This chapter also attempts to overcome the tendency for the scale of the problems that resulted from the use of force to sustain a system of white minority rule to be forgotten. It does so by using a series of categories of criminality to specify the harm that resulted from the attempt to use the legal-rational structures of a modern state to engineer a series of permanent changes to the political and social structures of Southern Africa.

My second argument is based on the idea that it will not be possible for an entire people to settle their accounts with the past by relying solely on truth-telling processes alone. One of the problems with transitional justice is that it is a direct reflection of traditional power politics insofar as it is based on the assumption that the need to 'deal with' the

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that brought about a reversal in the perception of this horror during the second half of the century' (2001a, 45). According to Habermas, 'the year 1945 marks a turning point ..towards the mastery of the force of barbarism that had broken through the very foundations of civilisation in Germany' (2001a, 45). He attributes this breakthrough to the 'Allied Victory'. It was this event that 'sparked the democratic developments in the Federal Republic of German, Japan and Italy, and eventually Portugal and Spain. It undermined the foundations of *all* forms of political legitimation that did not – at least verbally, at least in words – subscribe to the universalistic spirit of political enlightenment'. Habermas concedes that this judgment this will be 'of little consolation for the victims of ongoing violations of human rights' (2001a, 46). The tendency for Habermas to disconnect the causes and the consequences of specific 'catastrophes' from the processes of 'learning' that contributed to their subsequent 'resolution' is a little infuriating.

non-normal consequences of 'the past' is essentially a superstructural process. It is limited to the goal of restoring relations of *civility* between the state and its citizens through the articulation of the idea that a newly formed state does possess a human face. In this context, the purpose of a truth and reconciliation is to restore the most minimal conditions of justice between the state and the individual citizens whom the architects of commission's mandate have decided (or presupposed) were the categories of persons who suffered the worst possible harm as a result of the 'political' conflicts of the past. Although transitional justice aims to establish its validity by diagnosing the reasons why specific offences occurred in the past it often fails to make explicit the reasons why it was legitimate for some offences to be investigated and others to be set to one side. The emphasis on individual acts can also lead to the fault-lines that were embedded in a society's wider political culture being excluded from the mandate of a commission.

My third argument is that it is only through the attempt being made to retain a memory of all of the offences<sup>21</sup> that were committed during the past that it will be possible to establish what the consequences were of the leaders of the Government of National Unity deciding to exclude a range of offences from the mandate of a commission.

### **The initiation of civilising offensives**

In developing the focus of the first argument my starting point is the idea that a key characteristic of apartheid is the way in which it defined relations between a white minority and the black population of South Africa in terms of a civilising offensive. I use this term because there is no equivalent concept in Habermas's body of work. Throughout this chapter I shall argue that this concept is a useful idea because it refers to the fact that if a state is able to retain a monopoly of the means of violence then civilising and decivilising processes need not be mutually exclusive (van Krieken, 1999, 301). The two processes can operate in tandem through democratically elected leaders using the state (and its army and police force) to persecute the lives of one section of the population at the same time that it also extended the civic freedoms of other groups.

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<sup>21</sup> Primo Levi used the term 'the memory of the offence' in *The Drowned and the Saved*. I use the term in a descriptive sense only. Levi used it to link 'memories of extreme experiences, of injuries suffered or inflicted' to the paradoxes of recall of individuals who were victims and oppressors (1988, 12).

The norms that gave legitimacy to apartheid were dependent on successive leaders of the National Party convincing their core political constituents that the use of force against their opponents was part of a civilising project. The decision: (i) to retribalise the political identities of the mass of the population; (ii) to expel groups from their homes and to selectively return them to an ethnic homeland; (iii) and to remove their rights to was not conceived as the outcome of a decivilising process. It was not as if the collapse of the existing political order was followed by a return to relations of barbarity. Rather the implementation of these policies was part of a civilising process (a process of integration) that was accompanied by the consolidation of a system of minority rule.

Apartheid was a paradigmatic example of the process whereby the leaders of a democratically elected government decided to use the institution of the law to dismantle the basis of an integrated society in order to create a society that was internally divided. The re-racialisation of inter-group relations and the retribalisation of intra-group relations were not extrinsic to the logic of apartheid but an aspect of its extension. The implementation of these policies constituted a 'form of barbarism *explicitly within* [civilisation] ....rather than something that was opposed to, 'outside' ... 'beneath' [or accidental] to its intended development' (van Krieken, 1999, 299). The articulation of this offensive was linked to 'its 'rational' philosophical underpinnings'. A system of racial rule was 'enshrined in law and practised both within and outside the law with efficiency and with no moral repugnance' and racism was '*practised by men and women ...who knew what they [were doing]*' (Tatz, 1985, 162) and why they were doing it.

In the analysis that follows I shall argue that successive leaders of the National Party were responsible for the establishment and implementation of a range of policies that led to the members of one group becoming the direct beneficiaries of a civilising offensive<sup>22</sup> at the same time that many others became its consciously intended victims.

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<sup>22</sup> Arthur Mitzman uses the term 'the civilizing offensive' rather differently than Elias. For him the concept, refers to three interrelated processes that have shaped the social and cultural history of Europe over the past two and a half centuries. These are: '(1) the evolution of a disenchanted and goal-orientated modern consciousness (2) the development of national consciousness ....as a surrogate for traditional religious beliefs and (3) as a means of levelling *the opposition* to 1) and 2) and as a reconciliation of their contradictory elements [via those who are in authority judging it their right to] attack [the habits of others] they consider immoral or uncivilized' (1987, 664). It is necessary to add that a civilizing offensive in a colonial context is likely to consist of far more than an assault on the habits of particular groups.

I have divided my analysis of this civilising offensive into two related sections. First, I specify how the policies of the National Party led to criminal acts being committed against individuals who resided within the borders of the Republic of South Africa. Apartheid was: (i) a criminal system of rule; (ii) a crime against humanity; (iii) a form of colonialism; and (iv) a structure of power that prevented the vast majority of South Africans from exercising the right to determine their own system of self-rule. Second, I analyse the way in which the defence of apartheid led to criminal acts being committed against sovereign nation-states who were judged to have stepped out of line by developing policies that ran contrary to those of the region's major superpower. My argument is that the apartheid state committed grave breaches of humanitarian law. The main offences were crimes against the peace and grave breaches of the laws of war.

### **Apartheid as a criminal system of rule**

Apartheid was unique insofar as the United Nations declared that the Republic of South Africa was based on a form of rule that was a crime against humanity. According to the *Convention on the Suppression and Punishment of the Crime of Apartheid* the unique factor that distinguished the regime that the National Party created from all other forms of rule was that it was based on a racial state. According to Article II of the Convention, the South African state established and maintained the 'domination of one racial group of persons over any other racial group of persons' (Sarnoff, 1997, 116) through the creation of a system of discrimination. This system of rule was established through: (i) a parliamentary system passing 'racial' legislation; (ii) senior officials agreeing to implement illegal policies; and (iii) the judiciary agreeing to sanction the enforcement of laws that had been agreed by a parliamentary majority (Sarnoff, 1997). This led to: (i) the use of legislative means to prevent particular racial groups from participating in the life of the country; (ii) the division of the population into racial groups; (iii) the subjection of some groups to forced labour; and (vi) the persecution of individual citizens due to their opposition to white minority rule (Sarnoff, 1997, 116, Article 2).

A system of racial (and ethnic) domination was established through 'the creation of reserves and ghettos ...the prohibition of mixed marriages ...the expropriation of the landed property [of particular racial groups] and their forced resettlement' to the reserves and homelands (Sarnoff, 1997, 116, Article 2). The economic imperative to

exploit 'black labour' was also writ large into 'white' politics. The pass laws were designed to subordinate blacks to whites within a common division of labour. Africans who failed to produce their 'pass' documents could be fined, sent to jail, or sold to private individuals (in particular to white farmers living in rural areas). Every day the men had to 'feel the inside pocket of their jackets, just to make sure that the 'stinker' ...is safely tucked in or else it means being picked up by the police' and being subject to a unknown fate that was beyond the control of each individual (Sikakane, 1997, 5).

### **Apartheid as a crime against humanity**

From 1948 onwards South Africans inhabited an increasingly Orwellian universe. As part of its effort to demystify the manner in which basic rights were removed the National Party sought to conceal acts of dispossession behind a smokescreen of propriety. Verwoerd remarked that 'the modern world was keen on democracy' (Hope, 2003) Therefore, he would achieve his grand vision with the assistance of democracy. Apartheid depended on the mobilisation of votes in a parliament chamber. The lawyers who drafted key legislative measures were key players in this process. They were given the role to strike the right note by making propriety the quintessence of the process. Through legislative acts the leaders of the National Party attempted to avoid the outcome whereby they became the victims of what they (and their allies) described as a worldwide conspiracy to limit the right of a white minority to determine their own affairs. Out of these conditions a world was created that literally turned 'upside down':

- (i) If one was black the Population Registration Act of 1950 was not an opportunity to sign up for something beneficial. Rather it was the first step in the life-long process whereby each individual was told who they had to associate with, live with, work with, die with and so on.
- (ii) The introduction of the Separate Representation of Voters Act of 1951 was not based on the attempt to create separate systems of racial representation. Rather its purpose was to remove the franchise from Cape Coloureds who had previously been legally entitled to vote for a white candidate in an election.

- (iii) The creation of black homelands (the so-called Bantustans) did not confirm that the black majority had been granted the right to establish their own forms of rule. Its purpose was to create ghettos for 'tribal' groups who were judged to be of lesser value and to reserve the best living spaces to whites only occupation.
- (iii) The Pass Laws were not designed to enable all individual to share the same physical space regardless of their immediate social origins. Rather the purpose of these laws was to regulate, on the basis of race, the persons who were permitted to be 'administratively' or 'legally' present in 'white' South Africa.
- (iv) The Group Areas Act was not concerned with each racial group being given the right to live within the same community with the physical spaces where each individual lived being segregated on the basis of the group one was born into.
- (vi) The Mixed Marriages Act of 1949 did not legally permit all South Africans to live alongside each other or to freely-determine whom each individual choose to enter into a permanent relationship. Its purpose was to criminalise relations of intimacy and commitment across a series of racial and/or ethnic boundaries.

The use of the law to 'criminalise' relations that were normal elsewhere was one thing. The attempt to neutralise all challenges to a system of minority rule was quite another. In order to minimise the political effectiveness of their opponents successive generations of National Party leaders gave their authority to the decision to plan, commission, and to carry out acts that existing legal codes did not permit to occur.

As a result, senior leaders of the Broederbond, the National Party and its core constituents decided to establish policies that were a breach of international law.

The defining features of these crimes against humanity is that they were: (i) systematically organised; (ii) carried out to advance a policy of the state; and (iii) and designed in order to persecute the civilian members of an actually existing state.

According to the Charter of the International Military Tribunal at Nuremberg there are three components of a crime against humanity (Woetzel, 1960, 246, Article 6(c)).

First, crimes against humanity occur where individuals suffer mental and physical harm as a result of the most extreme acts it is possible for a non-participant to imagine.

They occur when the members of a civilian population have been subject to an action plan that leads to the occurrence of any of the following outcomes: (i) murder; (ii) extermination; (iii) enslavement; (iv) deportation; or (iv) other inhuman acts (such as imprisonment, torture, enforced disappearances, or severe restriction to one's liberty).

Second, they occur when one group of perpetrators make the conscious decision to persecute other individuals because they belong to a distinguishable human group. The decision to persecute the members of another group because they belong to a specific group may be the product of a variety of motives depending on the circumstances. In each case it is important to remember that the decision to persecute the members of a specific group because of 'their *religion, ethnic origin or political beliefs*' are 'of the *same order as acts*' that are 'committed in the name of *race*' (Tatz, 1985 163).

Third, crimes against humanity are typically committed by the state because it is the only institution that possesses the means to implement an action plan on a mass scale.<sup>23</sup>

It is acknowledged that the decision to target civilians must be carried out in order to achieve a goal that is linked to the official policies and/or action plans of the state.

These conditions were present in South Africa. The vision of a free and liberated people living in exclusive 'white' urban enclaves was dependent on the deportation of black citizens from towns and farmland on an unprecedented scale. The use (and the threat of force) led to millions of citizens being removed from their legal place of residence.

The question also arises as to which additional acts led to crimes against humanity occurring during the period of history in which apartheid was in its ascendancy? First, it is an undeniable fact that the State decided to follow a policy that led to civilians being deliberately murdered inside and outside of the country. The policy of deliberately targeting individuals was dependent on the formation of specialist intelligence agencies. These agencies carefully choose their targets and communicated the consequences of their actions to senior politicians. Prominent activists were murdered. These acts were

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<sup>23</sup> In order for deportations to occur on a mass scale these acts must be planned and organised in advance of their execution. An example of this process occurred on the night of June 13<sup>th</sup> 1941. Eight days before Hitler broke the Molotov-Ribbentrop agreement by invading Russia, the Red Army began to organise the deportation of civilians from Tallin, Estonia. Roughly 10, 000 army officers, clerks and priests were put on cattle trains and deported to collective farms. The Soviets were determined to prevent the Estonian intelligentsia from declaring independence before they left the country. The decision by the Soviet authorities to carry out the mass deportation of civilians was a crime against humanity (Thomson, 2003).

planned, commissioned and carried out in order to terminate the lives of civilians who were perceived to constitute a serious threat to the security of the apartheid state.

In relation to the second criterion there is no evidence to suggest the National Party transferred, enslaved or exterminated civilians in a manner analogous to the way in which the National Socialist regime persecuted German Jews in the 1930s and 1940s. The enslavement or extermination of black South Africans was never a remote possibility. This is because the living standard of a white minority was dependent on the constant supply of cheap black labour in order for the economy to reproduce itself. Although the apartheid regime 'would harass ..arrest ..imprison ...sell ...beat ... control [the] movements and regulate the lives [of the black majority] ...they always wanted more of them' (Tatz, 2003, 120). In other words, interests central to the South African State wanted their only reliable supply of labour to be healthy and compliant. They did not want the mass of the country's population to be buried in a mass grave. Torture techniques were systematically used by the Security Branch of the South African police against civilians who were allegedly involved in activities that were judged inimical to the interests of the state and the system of white minority rule on which it was based. John Forster, the Prime Minister from 1966 to 1978, said that 'anyone could be held under the Terrorism Act forever, without any independent scrutiny' (Herbstein, 2003).

The deportation or transfer of a civilian population involves the use of force to transport men, women and children from a place in which they are lawfully present. The South African Government introduced the Group Areas Act in 1951. Its goal was to divide the entire country into a series of segregated zones. Each zone was to be exclusively inhabited by the members of a clearly designated racial or ethnic group. In furtherance of the goal of separating the living conditions of one racial group from the living conditions of another citizens were forcibly removed from their homes. The politicians who had been voted into power by an all-white electorate voted in favour of a legislation programme whose sole purpose was to create white zones of settlement. One of the worst affected settlements was Sophiatown, Johannesburg. Van Niekerk describes the devastation that these clearances caused in the following terms, 'when everything was flattened – it took almost three years – the dogs who had been left behind started crying. They sat on heaps of rubble with their noses in the air and they howled so loud you could hear them all the way to Mayfair' (1999, 5). The majority of



the victims of this policy were black citizens who were resettled in townships beyond the boundaries of a town or city or dumped in the so-called 'independent' homelands. The policy of forced removals was a crime against humanity. It was the consequence of elected politicians giving their formal 'legal authority' to a policy of forced removals.

Under its security and emergency legislation the apartheid state used a variety of means to deprive its own citizens of the capacity to exercise their personal liberty. The *General Law Amendment Act* of 1963 permitted a civilian to be detained without trial for a period of up to 90 days. Albert Louis Sachs who was detained for anti-apartheid activities in the Cape Town area described his incarceration in the following terms: 'the cell is completely bare; no bed, no mattress, no bunk, no chair, no table .. this tiny alien world ...looks peculiar ...I have it now; its not a room at all. Its an empty concrete cube with me, a human being, inside' (Sachs, 1966, 18-19). The security forces were legally permitted to renew the length of his detention once the 90 days were up. They were also allowed to release him only to arrest him afterwards. Dr Neville Alexander was served with a 'banning order' before he was released from his ten year prison sentence. He appealed against the decision. It was 'impossible for him to "further the aims of communism"' (as alleged by the Minister of Justice) whilst he was in a prison cell' (International Defence and Aid Fund, 1978, 129). His appeal was subsequently upheld.

The *Suppression of Communism Act* of 1950 empowered the Minister of Justice to impose restrictions on the freedom of movement of any citizen who had advocated communist ideals or had engaged in any activity that was likely to further its aims. Individual suspects were subject to what has become known as a 'house arrest'. The objective of this measure was to turn a 'suspect' into a non-person. If a person was unable to 'leave their place of residence' they could not 'participate in acts' that the Minister of Justice had already decided might constitute a risk to the security of the state. This measure was designed to turn the tables on a suspect. The 'detainee' had to prove that he or she was complying with an order in its entirety. If the request was made, then he or she had to prove they were at home at a specific moment in time. To enforce an order the security forces were permitted to make an appointment with a suspect at any time. What was likely to happen to a citizen who had been subject to a banning order if he or she could not account for his or her physical movements? In

principle, the security forces could charge a suspect with a breach of the order or a specific crime regardless of the location where it was known to have occurred.<sup>24</sup>

Many citizens who were subject to house arrest were also subject to a banning order. The purpose of these orders was to prevent a citizen from receiving more than one visitor. After her acquittal at the 1961 Treason Trial Helen Joseph was placed under house arrest. The order was kept in force for 20 years. On Christmas day, her friends would line the road opposite her cottage in Norwood Suburb, Johannesburg. One by one they would cross the road to bring her their news (International Herald Tribune, 1992). The *Internal Security Act* of 1982 made it an offence for the opinions of any 'listed person' to be quoted in a written (i.e. book) or a spoken form (i.e. a radio interview). Although she had been publicly silenced Helen Joseph refused to silence herself. The state used each of the policies set out above (detention without trial, house arrest and the banning or listing of a suspect) to systematically target individual citizens (and their families) whom its ministers and appointed officers decided had stepped out of line.

The presence of a plurality of competing political purposes served as the basis for leaders of the National Party to attempt to eliminate opposition to their form of rule by dividing the population into those who were 'with us' versus those who were 'against us'. It is necessary to remember that the National Party was militantly opposed to the idea that the problems that currently faced the national community should be solved through as many of the people as possible being given the right to govern their own affairs. The leaders of the National Party also agreed to persecute individuals who opposed its policies and the security forces were given the responsibility to neutralise dissent. The intention of these political motivated actions was to disperse the opposition and to allow no more than tokens acts of resistance to exist at the very margins of the community.

The Nuremberg Judgment also related the process whereby the members of one group were persecuted by the members of another group to the way in which a series of

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<sup>24</sup> The likelihood of a 'suspect' being sucked into a deepening spiral of criminality has been most eloquently expressed by Mahmoud Darwish in his poem 'Memory for Forgetfulness'. One of his incredible 'dialogue' sequences describes how, 'I must get back to them. To whom? To the Haifa police. I have to prove I exist, at eight in the morning. Prove you exist? And at four in the afternoon. And at night? At night they come without an appointment, just to make sure that I exist. And what if you don't exist there? I'd be held responsible for any incident that took place in this country' (Darwish, 1982, 4).

discriminatory laws led to and/or facilitated racially motivated acts of persecution. The use of the apparatuses of the state apparatus to introduce laws that led to the persecution of identifiable groups was judged to constitute a crime against humanity. The Tribunal identified the following measures that were used to persecute the victims of Jewish origin: (i) the passing of laws that limited the professions that were open to one group in comparison to another; (ii) the placing of severe restrictions on the family life of a specific group; (iii) the application of an administrative test that led to the removal of an individual's right to be a citizen in the country that he or she previously considered to be his or her's home; (iv) the exclusion of Jews from German life; (v) the movement of groups from their normal place of residence to ghettos where they were subject to further restrictions; (vi) the plunder of property; and (vii) and use of collective methods to punish a specific infringement (Secretary of State for Foreign Affairs, 1949, 61).<sup>25</sup>

Were the policies and practices that the South African state decided to follow crimes against humanity that were comparable to those that were inflicted on German Jews? Although black South Africans were systematically persecuted from the cradle to the grave the consequences were not comparable to the way in which German Jews (no more than 1 per cent of the population)<sup>26</sup> were deprived of their citizenship rights. Although the National Party used the law 'to subvert democracy and to dispossess the black majority' (Tatz, 2003, 120) the consequences that followed in the wake of specific acts of dispossession (such as the *Land Act* of 1913) were not permitted to continue if they led to a serious disruption of the country's major source of labour power.<sup>27</sup> Tatz also argues that the ideology of racial and (subsequently) territorial separation was based on the idea that the removal of the franchise would be *compensated for* through

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<sup>25</sup> The process of assimilation in Germany before the rise of National Socialism was unique. According to Hobsbawm (1993, 20) 'the German Jews wished passionately to be German'. However, they did so by assimilating themselves 'to the German middle class' and its 'values' rather than to the German nation.

<sup>26</sup> According to Michael Arditti (2003) the German Jewish Minority in Germany was only just over 1 per cent of the total population in 1870 when a united Reich was formed out of more than 30 independent states. By 1930 and before the Nazi takeover, the 'relative number of Jews had dropped to 0.8 percent' (Elon, 2003, 5). At the same time, the 'total German population had risen to sixty-five million'. The German Jews were a population group of 520, 000 persons at the beginning of this momentous decade.

<sup>27</sup> In the preface to Franz Fanon's, *the Wretched of the Earth*, Jean-Paul Sartre made a similar argument, 'Poor settler, here is his contradiction naked, shorn of its trappings. He ought to kill those he plunders, as they say djinns do. Now, this is not possible, because he must exploit them as well'. As a consequence, he is not able to 'carry massacre on to genocide and slavery to animal-like degradation' (1990, 14).

the allocation of separate homelands to the country's black population. The Native Affairs Commission of 1905 produced the first blueprint of this kind by deciding to trade 'the shadow of the vote' for 'the substance of the land' (Tatz, 2003, 110).<sup>28</sup> 13 per cent of the entire acreage of the land within the borders of the state was promised to black South Africans even though they constituted 80 per cent of the population.

From the 1950s onwards this became Verwoerd's grand vision of apartheid with its declared goal of removing the black majority to nine or ten independent homelands. Through a process of retribalisation black South Africans lost their citizenship rights and in return they acquired an ethnic 'political' identity within their own 'tribal' areas. Albert Luthuli noted that the 'aim of the Bantustan, [was] to wipe Africans off the South African map' (1962, 182) through the implementation of an irreversible policy. The creation of tribal structures was supposed to serve as proof of the primitiveness of the African, with 'the world [being] told that this is our traditional way' (1962, 182). The Bantustans were given limited autonomy but hardly ever 'independence'. White racists portrayed the homelands as the means by which 'Africans' could return to a tailor-made 'Garden of Eden'. The *Bantu Education Act* and the *Extension of University Act* were also designed to provide a syllabus appropriate to 'black station in life' and to prevent black South Africans from being able to graze 'in European pastures' (Tatz, 2003, 112). The use of these measures systematically undermined the idea that a belief in a common humanity that could bind a series of racial and ethnic groups together.

Although the policy of 'collectively denationalising those South Africans deemed to belong to a separate state' (Moodley, 1986, 191) was a crime against humanity it failed to achieve its objective. Black South Africans were politically erased from the map.<sup>29</sup> On the one hand, the imposition of an assigned tribal or ethnic 'identity' was resisted because it negated the right of the people to determine their own political affairs. On the other hand, white nationalists were unable to reverse the logic of their own ideas.

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<sup>28</sup> Tatz describes this in an earlier work as 'yet another example of Africans giving up what for them was the 'substance' in exchange for the 'shadow'. The whites who ruled the country turned this maxim around by supposing that they were granting 'substance' in exchange for the 'shadow' of the vote (1971, 207).

<sup>29</sup> Hannah Arendt noted the intensity of emotion that surrounds the policy of denationalization when she wrote in *The Origins of Totalitarianism* that (Arendt, 1958, 278) 'one is almost tempted to measure the degree of totalitarian *infection* by the extent to which governments use their sovereign right of denationalization' to deprive citizens who live within the territory of a state of their most basic rights.

Insofar as white nationalists agreed on a policy of 'each-to-his-own' area they could hardly object to the 'natives' taking pride in their own identity (Tatz, 2003, 120). The policies that the National Party promoted for the wrong reasons became the foundation for the resurgence of black resistance and the rejection of the rule of a white minority. The denationalisation and retribalisation policies had the unintended consequence of creating new spaces from which a system of minority rule could be challenged.

A further source of institutionalised persecution was the migrant labour system. The Pass Laws established a system of population and labour control that led to varying levels of racial discrimination between Africans, Indians, Coloureds and Whites. African labour was only allowed to move from one part of the country if there was a demand for their labour. The 'pass' was a set of documents that gave the bearer the permission to move from reserves or homeland to an area inhabited by whites. If an official made a request for an African male to produce his pass and he failed to do so a variety of consequences could follow. He could be fined or in default of payment imprisoned for six months for a technical (not criminal) offence (Tatz, 2003, 112). An offender who was imprisoned could be set into chains as a 'pass prisoner' and compelled to work for a private citizen at a rate of 10 cents per day per prisoner. The persecution of pass prisoners was similar to the establishment of a form of slavery.

Although the migrant labour system was responsible for the erosion of the family as a stable institution it was not designed to prevent black couples from having children. In white society, respectability was maintained by adhering to the fiction that since blacks had their areas, it was only right that whites should have their areas too. This led to the conviction that there was nothing intrinsically wrong with the system of migrant labour. Whites were not denying Africans the 'privilege' or the 'right' of conjugal relations with a partner of their choice. However they were not permitted to exercise this right until they completed their work and had returned 'home' to a designated native reserve. The return of the men from the mines, farms and towns often brought little reprieve. On their return, the men often infected their wives with sexually transmitted diseases. The migrant labour system destroyed family life within and between the generations. It caused immense mental and physical harm. It eroded but did not totally destroy the benefits that are normally associated with a 'stable' family structure. On the one hand, boys and girls grew up deprived of regular contact with a mother and a father. On the

other hand, the children who grew up to become the next generation of adults were also deprived of the prospect of regular social contact with their own children. The creation of this system comes as close as it is possible to come for successive administrations to be charged with the failure to prevent the emergence of conditions that permitted an outcome similar to those that follow from the attempt to commit an act of genocide. The migrant labour system caused serious bodily or mental harm to black South Africans by eroding the possibility of settled and continuous family relations. It is an undeniable fact that the 'destruction of family life, with legions of men and women growing up deprived of spouses, mothers, fathers, children' (Tatz, 2003, 115) resulted in black South Africans experiencing serious and lasting physical and mental harm.

The result was similar to but not identical with Article II of the Genocide Convention. The equation of the migrant labour system with the crime of genocide falls on two counts. According to Article 1 of the Convention genocide refers to any act committed with the 'intent to destroy, in whole or in part, a racial [or] ..ethnic ..group' (Sarnoff, 1997, 83). The first objection is the issue of intent. The architects of the migrant labour system did not create the Bantustans in order to destroy a social group in whole or in part. The second objection relates to the consequences of this system. The migrant labour system did not lead to the outcome whereby the social basis of a group's relationship to itself was destroyed in either a physical or a material sense. It did not lead to the end that Article 2(b) posits as the basis for an act of genocide to occur. The migrant labour system was neither consciously created nor deliberately designed with the intention to (Sarnoff, 1997, 83) '[inflict] on the group conditions of life calculated to bring about its *physical destruction* in whole or in part'. In summary, the migrant labour system did not lead to the physical destruction of black Africans. Nor did it destroy the fragile lifelines that sustain the links between one generation and another. Relations of stability were disrupted within and between the generations black couples continued to create new life. However, no systematic attempt was made by the state to 'mercy kill' children or to devise policies to 'sterilise' its black citizens (Tatz, 2003, 121). In summary, the migrant labour system does not pass the threshold that separates a crime against humanity from an act of genocide. In the making of this claim I am not denying the immense suffering that this system inflicted on the 'male and female servants quartered in [the] outhouses of white homes' (Tatz, 2003, 115). The creation of a system that led to children being cared for by their female grandparents in the reserves

and deprived of regular contact with their parents cannot be excused. Successive generations of men and women were 'forced' to leave their children behind. This occurred as a result of the laws of apartheid, the need to avoid the prospect of starvation and the necessity to acquire a higher standard of living for one's family. The migrant labour system did not destroy the social basis on which one generation could reproduce the next by preventing the birth of a new class of citizens. Nor did the architects of such an exploitative system of labour create the reserves and the Bantustans with the intent, foresight or calculation necessary for this brutal system to pass the threshold that separates a crime against humanity from an act of genocide. However, the Bantustans and the migrant labour systems were tied together like two strands within a wider thread. Both strands contributed to the persecution of black South Africans. First, members of the white population were provided with the means (i.e. the laws and the administrative powers) to coerce others and to derive benefits from their use. Second, the creation of a system of migrant labour led to civilians who had been coerced into this system of relations suffering acute physical and mental harm. This was passed via a weakened socialisation structure from one generation to the next. Third, the suffering that resulted from the presence of this system was systematic. All the members of the same sub-group of the population (black Africans) were judged and treated against the same invariant standard. Regardless of their social status (their age, class, ethnicity and place of residence) all individuals who became migrant labourers were reduced to the condition whereby others were permitted to treat them as if they were less than human.

#### **Apartheid as a denial of the right to self-determination**

The Republic of South Africa possessed some of the characteristics that define an autonomous state, namely, a government exercising internal control, a defined territory, and a permanent population who resided within its borders. However, it lacked a further characteristic that was necessary in order for it to be included within a community of nations as envisaged by the Charter of the United Nations. South Africa was not a democratic state because the presence of apartheid led to the majority of its people being denied the right to determine how they would rule themselves as a people. The existence of a system of white minority rule also prevented the non-white peoples who resided within South Africa from determining: (i) how they would govern themselves as a people; and (ii) the type of community that they wanted to become in the near future.

Although the idea of South Africa referred to a territory that was not subject to the legal control of another state it would be premature to conclude from this principle that the Republic of South Africa was a democratic state in the accepted sense of the term. If the criterion for judging the adequacy of an existing form of rule originates in the principle of national self-determination then it is impossible to conclude that apartheid was a legitimate form of rule during the period in which it was in its ascendancy. Insofar as the majority of the people were permanently prevented from exercising the right to determine how they would rule themselves within a single national community the Republic of South Africa was neither non-racial in form nor democratic in content.

Apartheid was a break with the enlightenment tradition of national self-determination. The rule of a white minority led to the laws of the state negating 'the legal personality of the great majority of the people' (Sachs, 1985, 52). Insofar as they possessed any legal personality at all the great majority of black South Africans were recognised as 'subjects' rather than as 'citizens'. They possessed the nominal right to be subject to an authoritarian form of rule within the Bantustans. The majority of black South Africans who resided outside of the homelands were deprived of the most elementary rights. Both groups were subject to a system of rule that discriminated against them on a racial basis. Although 'the state [was] independent [insofar as] ..it was not subject to the legal control of any other state, the people lacked sovereignty' (Sachs, 1985, 52). They were not permitted to decide who would be elected to govern the country on their behalf.

If the principle of national self-determination means what it is supposed to mean it is a contradiction for a state to describe itself as a 'constitutional democracy' and to deny its peoples from of the right to determine who should rule the people on their behalf. Sachs was correct to argue that 'the negation of the rights of the majority of the people of South Africa on the grounds of their [non-white] origin is the fundamental characteristic of apartheid from which all other features flow' (1985, 55). It follows that an important stage in the struggle to liberate the peoples of South Africa from oppression would consist of the creation of a constitutional state that selects its rulers in a democratic way and refuses to apply a racial test to determine who is eligible to cast the right to vote.

**Apartheid as a form of colonialism**



A defining feature of the apartheid state was that it created a unified system of rule that prevented the peoples of South Africa from imagining themselves as a single nation. The language of the law became the 'lexicon' of legitimacy of the Colonial state that South Africa became in two related sense throughout much of the 19<sup>th</sup> and 20<sup>th</sup> century. First, it established the terrain on which the relationships between foreign settlers and the indigenous peoples of South Africa became regularised. Second, it resulted in the creation of a system of direct rule for settlers and a system of indirect rule for the native peoples of South Africa. According to Mamdani, the system of rule that apartheid consolidated was not simply racial in form and non-democratic in content (1999a, 6). It was also 'despotic' in two senses of the term. First, white minority rule was based on legal authority being used to demarcate white civil society from African civil society. The power to promote specific goals was unequally distributed between each system of rule and different groups were compelled to live in a quite different political universe. Second, rather than simply freezing social relations the extension of customary rule to the black majority laid the basis for the emergence of a decentralised form of rule. This system of rule removed 'traditional' restraints on the exercise of power in rural areas and enabled the labour of the 'natives' to be bought and sold like any other commodity. The link between the two systems of rule (the direct and the indirect) was maintained through the creation of native authorities and the local recruitment of migrant labour.

In order to specify how the apartheid state sought to shape the political identities of the persons whom it ruled through the medium of each of these systems of rule it is necessary to spell out the combined but uneven impact of each of these systems. The aim of the first system was to turn a minority of whites into citizens. The state attempted to uplift the position of white citizens by using race as the prism through which their political identities were formed. On the one hand, the restriction of citizenship to whites only was confirmed by the state conceiving of settlers as individuals who had been civilised through the application of the rule of the law. The colonial state linked the identities of white settlers to the emergence of a tradition of rights-bearing citizens in a racially exclusive way. For example, the official registration of births (hence of names) and deaths (via the execution of wills) and the establishment of a permanent electoral roll contributed to the naturalisation of 'racial' differences. On the other hand, the state recognised that the process of turning whites into 'discrete' individuals depended on individual members of the same group of persons being

socialised to conceive of themselves as the bearers of exclusive rights and duties. White minority rule was conceived as a contract between the state and its white citizens to live a *racially segregated* existence related to but cut off from all indigenous influences.

The aim of the second system was to create a form of rule that was designed to engage with the 'historicity of the colony and the agency' (Mamdani, 1999, 5) of the non-white population groups who resided within the territorial borders of the South African state. National Party leaders decided to: (i) appoint traditional leaders to rule through native institutions; and (ii) to cast the political identities of the people who had been colonised through the category of ethnicity rather than through the category of citizenship. State administrators attempted to forge a link between the 'customs' each ethnic or tribal group and the identities of specific individuals by equating the legal personality of each 'subject' with the so-called customs of a particular 'ethnic' group. A 'native' subject was only recognised to be the object of a form of rule insofar as he or she agreed to accommodate him or herself to *the identity-forming principle* that he or she was only a person to the extent that he or she agreed to acknowledge an ascribed social identity. The 'social certification' of an ascribed political identity was based on black Africans being recognised by a state administrator to belong to one 'tribe' rather than another. The creation of indirect rule resulted in 'black' South Africans acquiring their civility *through* the observance of custom rather than the application of the rule of the law.

Direct rule was based on the principle that the ruled have the opportunity to remove those whom they appoint to rule over them if they acted in a despotic way. In contrast, the subjects of a traditional ruler were expected to submit to the authority of a tribal leader and were deprived of the means to be able to appoint or to remove this person. Because the system of indirect rule concentrated the administrative and judicial power of the state in a single person this form of rule always gave rise to a form of despotism. At a local level, the coerciveness of 'custom' was consolidated through a chief being permitted to use force if his subjects did not comply with his authority. It is an error to link the idea of 'custom' to the liberalism of a colonial power that was reluctant to impose a 'civilising' mission on the peoples who resided in a particular locality. There 'was nothing voluntary about custom in the colonial period' (1996a, 50). If compliance was not forthcoming the central state would enforce it 'with a whip, by a constellation of customary authorities – and if necessary, the barrel of a gun' (1996a, 50). The lack of

freedom that indirect rule created was reflected in the fact that the more 'custom' was enforced the more the lifeworld of the members of each 'ethnic' group was restricted to the creation of a world that was not of their making. Each tribe was placed 'under the [clenched] fist of its own native authority' (1996a, 51) and the local rural population were compelled to follow a series of customs that were not of their specific making. Adult males who had been recruited into the migrant labour system were expected to work in the towns and to return to their homes after the completion of a contract. It was their experience of this dual process that made them aware of their unfree status. On the one hand, a migrant labourer could feel 'out of place' as a custom-bearing ethnic subject who had been no choice but to provide 'uncivilised' labour for urban whites. On the other hand, he returned as a rights-bearing citizen to the countryside and was subject to the full force of a customary form of law that refused to recognise his individuality.

In summary, apartheid as form of rule was unable to sustain a culture of civility or to generate the singular *sense* that all South Africans belonged to the same community. Among black South Africans it became possible to identify two diametrically opposing conceptions of identity that criss-crossed the terrain between the countryside and the city. On the one hand, there was the subject who was not a citizen. On the other hand, there was the citizen who was not a subject. These conceptions yielded two notions of the nation. First, the 'civic nation' based on a liberal ethos of universal rights, free and autonomous citizens and individual entitlement. In opposition to this conception there was the 'ethnic' nation. It was based on group rights and a delegated system of rule.

### **Apartheid as a crime against the peace**

To maintain itself in power successive National Party administrations deliberately authorised acts of aggression that led to the destabilization of a neighbouring state. Particularly, from the middle of the 1970s the political leadership of the National Party ordered acts of aggression to be carried out against other states in Southern Africa. The states that were effected by these actions included: (i) the former United Nation Protectorates of Lesotha and Swaziland; (ii) the frontline states of Botswana and Zimbabwe, (iii) the occupation of Namibia; and (iv) the states of Angola and Mozambique that tentatively emerged out of the collapse of the Portuguese empire.

According to the Nuremberg Tribunal, a crime against the peace occurs when the official representatives of a state can be shown to have been involved in the 'planning, preparation, initiation or waging of a war of aggression' or 'a war in violation of international agreements or assurances' (Asmal et al, 1996, 192) with other states. Article 39 of the United Nations Charter states that it is the responsibility of the Security Council to establish whether the actions of a state has: (i) undermined the security of another state; or (ii) led to the termination of peaceful relations (Sarnoff, 1997, 409).<sup>30</sup> If it can be proven that a state disrupted or violated 'the sovereignty, territorial integrity or political independence of another state in a manner inconsistent with the Charter of the United Nations' (Djonovich, 1984, 393, Art. 1), it follows that the political leaders of that state have committed a criminal act for which they are personally responsible.

Article 3(a) refers to the following acts as crimes against the peace: (i) an armed attack on a state's territory; (ii) the invasion of a state's territory; (iii) the occupation of the territory of a state; or (iv) the annexation of one state by another. The common thread that links each of these acts together is that one state (the aggressor) decides to violate the frontiers that separate the population of one state from another in order to undermine the peace and the security on which the well-being of another people depends. The purpose of a campaign of aggression is to create a permanent sense of insecurity and fear amongst the population groups who have been physically attacked by an aggressor. In the land-locked areas of Southern Africa the South Africa Defence Force (SADF) used a variety of military tactics to penetrate the territory of their neighbours and to disrupt the mechanisms of reproduction on which the order of another state was based. They include the decision: (i) to carry out cross-border raids; (ii) to arm dissident groups; (iii) to encourage them to extend their territorial influence; (iv) to commit acts of sabotage; (v) and to prevent the delivery of essential goods such as food and fuel.

Article 3(d) defines an act of aggression as 'an attack by the armed forces of a state' though the utilization of armed force 'on land, in the air or at sea' (Djonovich, 1984, 143). It became a regular occurrence for the South African state to use lethal levels of

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<sup>30</sup> Article 39 of the Convention of the United Nations states that 'the Security Council shall determine the existence of any threat to the peace, or act of aggression and shall make recommendations, or decide which measures shall be taken in accordance with Article 41 and 42, to maintain or to restore international peace and security' after an act of aggression has occurred (Sarnoff, 1997, 409).

force to destabilize its neighbours, to disrupt the transport networks of another state through acts of sabotage and to restrict trade through the introduction of sanctions. The apartheid state's search for improved security did not lie in contradiction with the aim of bullying its neighbours by destroying the basic infrastructure of their economies. Economic destabilization was a potent form of political persuasion and acts of armed aggression were a continuation of both through the use of inter-related tactical means.

Article 5 of the United Nations Charter declares that the decision of one state to initiate a war with another state is unlawful. It does so by stating that 'no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression' (Djonovich, 1984, 143). The crimes against the peace that were authorised by the political leadership of the National Party rank alongside (but do not surpass) some of the worst atrocities that Southern Africans have witnessed. It is not just the number of civilians who were killed, persecuted or displaced that matters. The acts of aggression of the South African state also created a pattern of development that prevented the neighbours of South Africa from meeting the basic needs of their citizens.

The routine aggression of the South African state can be illustrated by an incident that occurred eleven months after the signing of the Nkomati Accord in 1984. The power lines that supplied electricity to Maputo were cut eight times between 1984 and 1985. Throughout this period not a trace of humanitarianism' (Tatz, 2003, 121) could be found in the 'official' or 'unofficial' actions of the apartheid state. Then 'on the 26th March, Maputo was hit by a disaster not of South African making' (Hanlon, 1987, 150). A cyclone uprooted 31 pylons along the main electricity line. The Government of Mozambique could only restore power by securing a loan from the United States to purchase reserves of coal from sources with their origin inside of South Africa. The shipments were due to arrive at the beginning of April at a rate of 1000 tonnes per day. Unfortunately the shipments were delayed for a further three weeks. This was due to the refusal of 'South African Railways' to provide wagons to transport each shipment. Finally, the railway authorities agreed to transport the shipment on the 27th of April. However, the shipment could not get through. The night before the coal was due to be transported a railway bridge across the border was damaged through an act of sabotage. This incident was one of many in which the South Africa state permitted acts of aggression to occur in order to compel its neighbours to adopt policy choices that were

consistent with its geopolitical interests. In the aftermath of these actions the rebuilding of Mozambique was dependent on foreign capital, its regional cooperation policy was in tatters and there was little prospect of its people sharing greater peace and prosperity.

### **Apartheid as a violation of the laws of war**

I shall now examine additional offences that the apartheid state was responsible for commissioning in the wake of the more general acts of aggression that it committed. The doctrine of 'belligerent equality' is one of the cornerstones of humanitarian law. Its application to armed conflicts has made it possible for states to agree and to develop binding legal rules that place limits on the kind of actions that a state's armed forces are permitted to implement without a breach of the laws of war having been committed. Article 3 of the Geneva Convention states that it is illegal for a state to commit the following acts against a protected person: (i) violence to life and person; (ii) hostage taking; (iii) outrages against personal dignity; and (iv) the passing of sentences or executions without a fully constituted court (Roberts et al, 2001, 198, 223, 245, 302). Common Article 50/51/130/147 defines grave breaches as the crimes that an occupying army commit during an armed conflict (Roberts et al, 2000, 215, 238, 296, 352).

Between 1974 and 1986 the South African state started a series of 'executive wars' (Seegers, 1996, 216). Although it is not possible to discuss all developments here it is possible to outline four contexts in which the South African Defence and Security Forces (SADF) committed actions that resulted in grave breaches of the laws of war. The key offences were: (i) the execution of guerrilla fighters in the occupied territories of Namibia; (ii) the killing of non-combatants who were living in refugee camps outside of South Africa; (iii) the targeting of civilians who posed absolutely no security threat; and (iv) the refusal to recognise that captured guerrillas were in fact prisoners of war.

### **Conclusion**

In the first part of this chapter I argued that it is possible to characterise the 'domestic' crimes that are associated with apartheid as a form of rule in four distinguishable ways. It was: (i) a criminal form of rule; (ii) a system of rule that committed crimes against humanity; (iii) a form of colonialism; and (iv) a decisive obstacle to democratic rule.

The value of the categories that I used to frame this section of my analysis derives from the way in which I have used them to specify how the apartheid state used a series of measures (legal and non-legal) to sustain a centralised system of political repression. The presence of this system enabled the authors of these and other acts to harass, persecute and subjugate citizens because of their membership of a particular group. The depth and range of these acts of persecution begs the question as to whether it is possible to work through the consequences of the past on the present in circumstances in which the political and racial basis of these acts has not been adequately recognised. On the basis of the evidence that I have outlined I conclude that it is an error to suppose that it is possible to work through the normative consequences of the past in the present in circumstances in which the core motives of the perpetrators has not been established. The judgment that a community can work through the normative consequences of the past in the present by establishing the identities of all the persons who committed gross human rights violations (i.e. acts that led to the killing, torture, or severe ill-treatment of a victim) leaves unanswered the question as what should be done to address the legacy of all the other offences that fell outside or beyond a commission's frame of reference.

Although the leaders of the first post-apartheid government agreed that it was illegitimate for specific perpetrators to commit gross human rights violations it would appear that the decision to change a society's social structure is far less objectionable. My analysis of apartheid as a colonial form of rule demonstrated that it is not possible to separate the identity-changing impact of specific forms of rule from the way in which this system created liberty for some at the expense of the subjugation of many others. In other words, the effectiveness of apartheid originated as much in its ability to use a series of means to engineering a change to the relationship between existing political and social structures as it does from the fact that it was a uniquely racist form of rule.

Although a truth-telling process may be well suited to dealing with singular offences it is not at all adequate in relation to the need to address the social-structural changes that the apartheid state was responsible for perpetuating over a period of four decades. The value of my analysis derives from the fact that I have highlighted the presence of emergent properties that make it difficult for different offences to be equated together. There is also a limit to the extent that legal categories can be used to specify the severity of the offences that were committed in order to sustain a system of white minority rule.

Throughout this chapter I argued that the idea of a civilising offensive is a useful idea insofar as it refers to the fact that if a state is able to retain a monopoly of the means of violence then civilising and decivilising processes need not be mutually exclusive. These processes can operate in tandem through a country's elected leaders using the state (and its army and police forces) to regulate the lives of its black citizens at the same time that they extended the freedoms that were granted to other racial groups. In *The Germans* Elias took this argument one step forward by claiming that (1986, 308) 'shifts in one direction can make room for shifts in the opposite direction,' so that 'a dominant process directed at greater integration could go hand in hand with a partial disintegration'. Apartheid set the logic of a similar set of processes into motion. The implementation of the doctrine of minority rule bound some whites together but only at the expense of turning the ideological advocates of this system of rule against all the other members of the population who rejected the consequences of this doctrine.

In relation to the idea of a series of accountability-creating processes it has to be acknowledged that there is no reason why the categories that I have used to unravel the cruelty of the crimes of apartheid will coincide with the memory of each of the persons who suffered as a direct result of the impact of a series of civilising offensives. It also needs to be acknowledged that if a society's political culture is to be meaningfully revised then all of its members must acknowledge the suffering that occurred as a result of the National Party's decision to wage a series of wars against its own people. Reducing the scope of the solution to the question as to why such and such 'a crime' occurred does nothing to address the impact of a series of civilising offensives.

In the making of this claim I take it as axiomatic that the purpose of a society's political culture is to prevent the ideals that guide a society's political culture from degenerating to the point at which their application is no longer judged to be possible or practical. A refusal to uphold the values that lie at the heart of a society's political culture is likely to lead to a deterioration of the quality of the relationships between its members. This can be substantiated through the demonstration that specific individuals: (i) failed to care for the welfare of other members of the same community; (ii) consistently refused to take responsibility for the unbearable suffering that their form of life imposed on other members of the community; and (iii) became embittered when they were confronted with evidence of their refusal to acknowledge the basic human rights of other groups.



Seen from this perspective, the formation of a 'defective' political culture is hardly of less significant than the crimes that it permitted individual perpetrators to carry out.

In relation to the need to break the spell that a political class has cast over its core constituents it is not obvious how one can revise key aspects of an existing political culture at the same time that one also attempts to preserve its identity-affirming features. Paraphrasing Adorno, anyone who makes a case for the preservation of the political culture that made the crimes of apartheid an actually existing possibility may turn him or herself into an accomplice of a system that was responsible for the occurrence of grave crimes.<sup>31</sup> The leaders of the Government of National Unity evaded this issue when they established the mandate of the South African Truth and Reconciliation Commission. There was no clean break in the period after the first free elections. The decision of the African National Congress to enter into a pact with the National Party in order to end the rule of a white minority was followed by a series of agreements being made that could not be undone once they had been formally entered into. The ANC's acceptance of a series of 'sunset clauses' resulted in: (i) leading members of the National Party; (ii) high-ranking state officials; and (iii) their allies in civil society being permanently indemnified from the possibility of a Nuremberg style trial. The agreements that were reached during the final negotiations resulted in the rejection of the judgment that it was also necessary for all parties to work through the consequences of the past in the present by documenting the criminality of apartheid as a form of rule.

It is also at this point that we encounter the limit of a negotiated settlement. The emergence of majority rule was based on the reconstruction of the nation-state as the positive horizon within which the basic rights of its citizens would be recognised. However the politics of reconstructing the nation-state was also a negative horizon insofar as custodians of the old order were permitted to set constraints on future action. The leaders of the National Party claimed that unless the terms of the negotiated settlement were honoured the agreement to share power might be severely jeopardised. It is possible that had the ANC pushed for a fuller settlement of damages the National

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<sup>31</sup> Adorno has argued that 'in the face of this, one is caught in an antinomy: for anyone who pleads for the preservation of this culture makes himself an accomplice of its untruth and of ideological illusion in general: but whoever does not do so and demands the creation of a *tabula rasa* directly promotes the barbarism over which culture had elevated itself and which the mediations of culture had actually moderated' (2003, 444).

Party and its allies may have made the decision to leave the Government of National Unity and thereby undermine the 'pacts' that both parties had agreed to honour.

Paraphrasing Adorno, it is possible that the opponents of a system of rule that made the crimes of apartheid an actually existing reality may also promote the seeds of a new form of barbarism by depriving individuals who grew up within this system of the ongoing ability to secure access to the sources of moderation within their culture.<sup>32</sup> If a given form of life is jettisoned in its entirety and individuals are deprived of the means to acquire access to the moderating influences that coexist alongside other aspects of their culture it is possible that the members of a group who have been deprived of facets of their life-sustaining identity may react negatively to each perceived loss. Seen from this perspective it was entirely legitimate for Nelson Mandela and others to go to quite extraordinary lengths to win over his political opponents to his vision of the future.

Neither the affirmation nor the denial of a form of life can lead us out of this circle. Therefore perhaps we need to reflect on the tension that exists between the complete affirmation of a given form of life and its complete denial. According to Adorno, the most appropriate course of action may be to 'detect the vibration, between these two otherwise so flatly opposed possibilities' (2003, 435). This argument implies that although it may be unwise for the leaders of a society to embark on a plan that results in the rejection of another group's political and cultural form of life in its entirety it may be possible for the members of a newly constituted system of rule to revise particular aspects of the culture that made it possible for gross violations to occur in the past. The creation of a truth and reconciliation commission was compatible with this solution.

The problem is that if a truth and reconciliation commission fails to reveal the depths to which a particular system of rule was prepared to fall in order to accomplish its goals its leaders may only partially modify the values that underpin a society's development. A full revision of a society's existing political culture depends on the mandate of a commission being extended in scope to encompass the social-structural causes that made it possible for perpetrators to commit specific offences on a systematic basis.

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<sup>32</sup> Even within a system of rule as destructive as National Socialism the presence of at least some moderating influences serve to insulate our imaginations from the possibility that the senior leaders of this form of political rule might persecute their own constituents with the same level of abandon as their sworn ideological enemies. Adorno formulated this insight in his lectures on metaphysics (2003, 435).

If a full settlement of damages cannot be promoted due to the impact of a negotiated settlement is there a 'next best option' that the participants could decide to follow? Perhaps the alternative is to attempt to revise aspects of a society's political culture by setting one's sights on the universality and the particularity of specific offences. A truth-telling hearing could be designed so that every person who was socialised into a given form of life are encouraged to ask themselves the following question. Why would *why anyone* who suffered as a result of an act of cruelty (for example, being beaten in a police cell until one's bones break) agree to *continue to live* in a society that permits an action such as this to be committed on a regular basis by its leading representatives?

Once again the problem is that if a breakthrough of thought and action is judged to be exclusive property of a newly reconstituted state its previous leaders may be well placed to restrict the basis on which it is possible for the culture of their society to be revised. The National Party and its allies were able to use the agreements of the past to argue that it would be too damaging or too disruptive for a truth commission to be permitted to investigate the causes and consequences of more than a limited range of offences. This was most evident in relation to the external offences of the South African state. The appointed members of the South African Truth and Reconciliation Commission (TRC) could only take action against state-based perpetrators vis-à-vis the mandate that they had been instructed to follow after it was formally agreed by their political masters. As a transitional body it possessed neither the means nor the resources to act by itself and its ability to fulfil its mandate was dependent on the support of the state. In this context, it is more accurate to state that a consortium of the most important political parties sought to establish their hegemony over the major outlines of this process. They did so by deciding that it was not in their interest for the actions of their predecessors to be subject to the intrusion of a series of detailed and systematic investigations. The capacity of the leaders of South Africa's major political parties to prevent the actions of their leaders from being subject to the scrutiny of an independent agency was a central dynamic that underpinned the basis on which the commission was formally established. It was by no means obvious how the appointed TRC commissioners could reverse this imbalance given the means that their political masters had placed at their disposal. This outcome was a direct reflection of the traditional exercise of power and influence within a newly reconstituted state rather than the result of a far more decisive change of heart.

As I have shown in the second half of this chapter successive leaders of the National Party attempted to rule the territories of South Africa as if it was their own backyard. The office-holders who authorised acts of aggression against their neighbours never had to walk down a street where the blood was so thick that it spoiled their nice city shoes. Although the leaders of the National Party and senior officials of the state agreed to unleash the overwhelming power of the arms at their disposal to illegally attack other states they were not subsequently held to account for the consequences of these actions. It was likely and even probable that the perpetrators would not be called to account for their actions because the TRC was not explicitly permitted to investigate the causes and consequences of the executive wars that the National Party agreed to initiate in the past.

Clearly there is a limit to the extent to which the state can use the means at its disposal to settle its accounts with the past by agreeing to adopt a series of measures that are designed to compensate each victim for each and every life-altering transformation. If we take the cruelty of the crimes of apartheid as our 'normative' standpoint it would be necessary for the state to offer its citizens a remedy for a multitude of offences that resulted in individuals suffering severe ill harm during the period of grand apartheid. In hypothetical terms, the harm that each citizen suffered may have been the consequence of a series of policy choices that were introduced by the state during the apartheid era. For instance, black South Africans suffered as a result of: (i) the denial of the franchise; (ii) their forced resettlement and movement to communities not of their choice; (iii) the imposition of the political identity that led to an individual being recognised as a subject rather than a citizen; (vi) the imposition of conditions of life that deprived successive generations of a form of life similar to other members of the community; and (v) the creation of a form of migrant labour that resulted in the creation of unrelenting hardship. The citizens who were likely to benefit the most from a thorough 'working through' of the consequences of the past in the present were the majority of its black African citizens. The citizens who lost the most when a more complete 'settlement of damages' was rejected were also the very least advantaged members of South African society. Paradoxically, the politicians who established the mandate of the South African Truth and Reconciliation Commission did all they could possibly do to ensure that no remedy was available to the citizens who suffered the most as a result of impact of successive acts of social engineering during the period when minority rule was in operation. The Government of National Unity rejected the judgment that the only criterion that would

enable all its people to evaluate the past and present conditions against the ideal of a better future is one that acknowledges the severe ill-harm that was inflicted on groups who were denied an existence free from the impact of unreasonable levels of force. The agreement to follow through the implications of this standard of judgment was rejected due to the cost of compensating a multitude of individuals for the immense suffering that they and their families endured before and after the formal demise of apartheid. In a Habermasian sense, the losers of a less generous settlement of damages were the millions of non-white citizens who were not 'legally allowed' to pursue their own remedy for the harm that they suffered as a result of the actions of the National Party.

In the next chapter I argue that the truth-telling process contributed to the revision of aspects of the country's political culture in one area but crucially not in others. On the one hand, the truth-telling process disclosed specific truths that contributed to the pacification of the relationships between the state and at least some of its citizens. On the other hand, the terms of reference that the commissioners of the South African Truth and Reconciliation Commission (TRC) were expected to follow were far too narrow to address the immense life-denying consequences of a system of white-minority rule. This tension led to the outcome whereby a series of actions that left a legacy of non-civility within South Africa society were neither fully denied nor fully accepted by the political leaders who agreed to restrict the scope and the content of the TRC mandate. It also led a series of policies that were central to the defence of the politics and the economics of apartheid were excluded from the mandate that the appointed commissioners of the South African commission were permitted to investigate. Between the grandiose idealism that the truth-telling process would lead to social reconciliation and the wishful attempt to forget the criminality of apartheid as a system of rule one could detect the presence an unspoken but no less real form of collusion.<sup>33</sup>

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<sup>33</sup> A notable feature of the South African state's treatment of its black South African citizens has been the way in which they have been treated on the basis of a series of double standards. According to Tatz, 'Africans ..have had to surrender real and established rights in exchange for promises of compensation (1971, 209). First, Africans were 'deprived of a right to free purchase of land on the explicit understanding that definite areas would be set aside for their exclusive purchase and occupation' (1971, 209). This promise was not fulfilled. Second, Cape Africans were asked to surrender their individual franchise by exchanging the shadow' of the vote in exchange for the 'substance' of the land. The content of this promise has 'not been fulfilled to this day' (1971, 209). Third, Africans were 'deprived of their Parliamentary representation: the *quid pro quo* is the promise of future political rights in their own areas' (1971, 209). It is possible that the promises that were made by the TRC to the individuals who appeared at its Human Rights Violation hearings add a further page to a century (and more) of failed blueprints.

The attempt to forget the cruelty of a considerable range of the crimes of apartheid was no laughing matter for the millions of South African citizens whose suffering was excluded from the mandate that the South African TRC was permitted to investigate. In the next chapter I will develop the implications of this argument in far greater detail.

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## **PART 2**

### **Analysing the proceedings of the Human Rights Violation and Amnesty Committee hearings**



Source: TRC Report – (Volume 1, Chapter 7, final page)

### **Chapter 3 - The impact of the mandate on the action plans of the commission**

#### **Introduction**

The aim of the last chapter was to examine whether it was possible to establish the consequences of the past in the present by specifying how the routine operation of a system of rule led to the incidence of unprecedented levels of suffering. My conclusion was that one could detect the emergence of a process of collusion between the grandiose idealism that the truth-telling process could promote reconciliation and the conscious attempt to ignore the way in which the presence of a system of white minority rule determined the occurrence of the human rights violations during the mandate period.

The emergence of this fault-line begged the question as to how the commissioners of the South African TRC would decide to tackle this issue or avoid it. Would they reinforce the Government of National Unity's partial settlement of damages? Would they do so by agreeing that the parties who caused the occurrence of specific violations should pay the least costly premium that it was possible for them to pay? This chapter provides a preliminary answer to these questions by showing how a panel of commissioners attempted to translate the mandate that they had been instructed to follow into an action plan that promoted some outcomes at the expense of others.

This chapter aims to answer this issue by formulating an analytical framework that specifies how a series of strategic constraints interacted with an embryonic ideology of reconciliation to determine the accountability-creating purpose of the Human Rights Violation and Amnesty hearings that the commission was permitted to organise. A distinctive aspect of my methodology is that I aim to demonstrate that the strategic decisions that were made by the TRC's political masters were as equally significant as the decisions that were made by the commissioners who led the South African TRC. I argue that the impact of both sets of factors on the accountability-creating purposes of the commission should not be minimised in favour of an either/or approach. I seek to overcome this dichotomy by examining how the purposes of the South African Truth and Reconciliation Commission changed in relation to internal and external pressures.



I also argue that although the ends that the TRC decided to promote at different moments in time changed as a result of the impact of a series of contingent events its commissioners were not always aware of the consequences that followed from the decision to prioritise one aspect of the commission's mandate at the expense of another. On the one hand, I acknowledge that the conduct of the TRC was based on a solemn ethic of responsibility. Individual commissioners and their support staff were expected to promote the best possible outcome given the means that were placed at their disposal. On the other hand, it is also necessary to question whether the terms that particular commissioners have used to describe the achievements of the commission as a whole are consistent with the outcomes that the commission was actually able to produce.

The advantage of organizing my analysis in terms of the impact of a series of 'strategic' factors on the mandate of the TRC is that this approach has enabled me to clarify the difficulties that its commissioners (and support staff) encountered when they attempted to address the issue of how they should agree to translate the mandate they had been officially instructed to follow into a feasible and achievable programme of action.

A key aspect of this analysis are the nine tensions that I have identified as the basis for explaining the contradictions that emerged between the ends that the TRC was expected to promote and the means that were placed at the disposal of its commissioners. The emergence of specific conflicts within the commission does not imply that the inability of a commissioner to deploy a wholly effective accountability-creating mechanism to secure a particular outcome also implies that his or her action was wholly ineffective.

I make no attempt to defend the argument that supposes that if a truth-telling process failed to contribute to the emergence of an ideal standard then it automatically follows that the outcomes that the commission was able to produce were also flawed. However I defend the argument that the commission could only build a realistically robust bridge between the past and the present in circumstances in which its leading commissioners were able to establish a truth-telling environment that enabled all the participants in a hearing to work through the full meaning of the past in relation to the present. To the extent that the commission failed to design its hearings in order to promote this end it became complicit in the process of collusion that I highlighted at the beginning of this chapter. I have situated my analysis between the extremes of normative idealism on the one hand and sociological realism on the other hand in order to develop this argument.

Although each of the tensions that I have identified can be shown to have had a cascading impact on each other I was unable to judge the weight that should be attached to each factor insofar as they were aspects of a more general sequence of causes. However it is my hope that by linking one factor to another it will be possible for the reader to acquire some sense of the difficulties that the TRC commissioners encountered as they attempted to implement their own accountability-creating action plans in a changing, highly-contested and politically charged internal and external environment.

The mandate of the Truth and Reconciliation Commission (TRC) was established after the *Promotion of National Unity and Reconciliation Act*. It was passed in July 1995. It set out a concept of truth-telling that was based on the goal of laying bare the causes and consequences of gross human rights violations through a series of open public hearings. The argument that the TRC should be even-handed in its approach to all human rights violations was based on the judgment that the newly enfranchised citizens of South Africa would only 'fall into line' with the aims of the Act insofar as the state could guarantee that the victims of *all* acts of violence would be judged in the same way. According to Dullah Omar (the Minister of Justice in the Government of National Unity) 'the idea of a Truth Commission goes back to ANC decisions' (Krog, 1998, 5). After the National Executive Committee of the African National Congress discussed the gross violations that were committed by its own members, 'there was a strong feeling that some mechanism must be found to deal with all violations in a way that would ensure that we put our country on a sound moral basis. And so a view developed that what South Africa needs is a mechanism which would open up the truth for public scrutiny' (Krog, 1998, 5) The ANC's executive committee concluded that it would not be possible to establish a break with the past in the absence of a durable accountability-creating exercise. In response to this specific issue Mr Omar proposed the tactic of combining the granting of amnesty to perpetrators with the use of victim hearings.

The Act established the principle that the victims of acts of violence should be located on the same analytical continuum irrespective of their relative proximity to a violation. At one end, a victim was anyone who "(a) individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights as (i) a result of a gross violation of human rights; or (ii) as a result of an act associated with a political

objective for which amnesty has been granted' for the perpetrator (Section 1(1) (XIX) Act No. 34, 1995, 3). In addition, a person who 'suffered harm ..as a result of such a person intervening to assist persons contemplated in paragraph a who were in distress or to prevent [the] victimization of such persons' after an attack' was also judged to be a victim (Section 3) (b), Act 34, 1995, 3). Third, the category of a victim was extended to include the 'relatives or dependants of the victim' who experienced suffering or loss as a result of a ...violation' that occurred during the mandate period (Section 3 (c)).

### **The granting of asymmetric rights to perpetrators and victims**

The first tension was the asymmetry of means that the Act proposed in relation to the rights-based continuum that linked the perpetrator of a gross human rights violation to each of the applicants who were acknowledged to be the victim of a specific violation. The judgment that the perpetrators of all types of political violence should be treated in an even-handed way was linked to the decision to apply a norm of equality to all of their victims insofar as they fell within the scope of the commission's mandate. The rationale appears to be that if the process of establishing the truth was to promote *an ethic of reconciliation* it would be inappropriate for violations committed by the state to be investigated but for those committed by the resistance movements to be ignored.

In spite of the rhetorical commitment of the *Promotion of National Unity and Reconciliation Act* to the restoration of the dignity of the victims of a gross violation a basic logical contradiction ran like a single thread through the work of the TRC. The legislation that created the South African Truth and Reconciliation Commission failed to extend similar 'rights' to victims as it agreed to grant to each amnesty applicant. The roots of this discrepancy had its origin in the decision of the ANC to grant a conditional amnesty to individual perpetrators in exchange for the security forces agreeing to supervise an orderly transfer of power prior to the national elections of April 1994.

Although there is some truth to the claim that the content of the *Promotion of National Unity and Reconciliation Act* originated in an unavoidable (if rather vague) act of expediency the binding consequences of this decision should not be exaggerated. The decision to grant a perpetrator a conditional amnesty was compatible with a wide range of methods in order to work through the consequences of the past in the present. The

problem was that from the moment that the Government of National Unity attempted to translate a hasty and poorly thought through compromise into *more than* an act of expediency it ran the risk of representing a partially justifiable decision as the foundation or the source of an irreversible programme of political engineering. The risk emerged that the rhetoric that the proponents of the commission used to justify its creation would matter far more than the outcomes that it was able to deliver for the persons who suffered harm as a result of the occurrence of a specific violation.

### **The partial subversion of the rule of law**

The second tension was that the commission was instructed to implement a mandate that led to its commissioners being expected to implicitly subvert the rule of law. From the moment that the elected ministers of the Government of National Unity decided to replace an agreed normative principle (that everyone should be treated equally under the law) with an expedient political compromise they ran the risk of undermining the rule of law in a society that contained very few values that were common to all of its members. The creation of the commission undermined the idea that the norms associated with the rule of law are only effective insofar as they cannot be negotiated away. In a democratic society the standard justification for the rule of law is that general norms can only be altered if the decision to change the rules of the game is based on the consent of all the persons who could be reasonably affected by such a drastic change to their basic rights. The consent of South Africa's citizens was not sought between April 1994 and the passing of the *Promotion of National Unity and Reconciliation Act* in July 1995.

By agreeing to establish the *Promotion of National Unity and Reconciliation Act* the Government of National Unity was doing more than simply confirming the parameters of the settlement that was agreed before the national elections were held in April 1994. Through this action it was also attempting to neutralize or to lessen its political, legal and normative responsibilities for the actions and the policies of its predecessors. The emergence of this consensus went hand in hand with the legislative goal of removing the responsibility of the state for the criminal actions of its own office-holders. In other words, the provisions of the act were used as the strategic means by which the government decided to declare the illegitimacy of all other competing forms of redress. Instead of the consequences of specific human rights violations being treated as a

constitutional matter that could only be resolved through the provision of an effective legal remedy the Government of National Unity decided to remove the rights of its individual citizens to press for the criminal conviction of an 'alleged' culprit. The principle that conditional amnesty should be upheld in exchange for a full disclosure of the truth relating to a particular gross human rights violation took precedence over all other considerations including the 'actionable' guarantees of the interim constitution.

The use of legislative 'means' to subvert the rule of law was also dependent on the state becoming a 'silent partner' in the amnesty granting process (Wilson, 1995, 44). The Ministry of Justice was given the responsibility to coordinate its action plans with each of the committees that the appointed commissioners were formally instructed to create. Although the consequences of this partnership were far-reaching they were not well publicized and the basis of this decision fell into the depths of a very hazy background. The upshot of this was that perpetrators were given the incentive to apply for amnesty. First, as soon as the Amnesty Committee was satisfied that all the relevant parties had been informed of the date and time of a hearing it could request the exemption of an individual amnesty applicant from the occurrence of any pending criminal prosecution. Second, if an applicant complied with the full requirements of the act by making a full disclosure of each act or omission that he or she was responsible for the state was compelled to uphold the *Promotion of National Unity and Reconciliation Act* by preventing the relatives of the victims from pursuing a civil claim for damages. Third, in circumstances in which an applicant was granted an amnesty it was the duty of the commission to inform him or her that any sentence or penalty that had been set by a court of law would be declared null and void and removed from the applicant's record. Fourth, the applicant who was granted amnesty was free of all civil or criminal liabilities. Fifth, the organisation or the movement whom the applicant claimed to be a member of was freed of any liability for any offence that he or she had committed. The amnesty granting process became the means by which the culpability of the state (and the liberation movements) for their criminal acts was transferred to individual agents. The amnesty clause provided the new government with a 'get out of jail' clause. It 'unilaterally' indemnified the state (and its political opponents) from any legal claims that might be brought against them either by its own citizens or by a foreign national. Wilson is correct to note that the 'process of *individualizing responsibility*..[was linked to] the less publicized programme of indemnifying the state itself. The commission will

remove citizen's rights to civil claims for damages; if a former government agent is granted amnesty ...then the state will automatically be indemnified for damages' (1995, 44). The agreement to uphold the 'amnesty clause' led to the first democratically elected government granting (via the TRC) amnesty to the perpetrators of gross human rights violations. At the same moment in time the Ministry of Justice upheld the ruling whereby the relatives of victims were not permitted to pursue their own legal remedy.

### **The individualisation of responsibility**

The third tension was a product of the fact that the mandate was designed so that it became possible for all responsibility for the offences of the past to be 'individualized'. The Amnesty Committee was expected to judge the *political conduct* of each of the applicants who applied for amnesty and fell within the limited remit of the mandate. The central purpose of the mandate was not to question the system of relationships that made it possible for gross human rights violations to occur on an unprecedented scale. The central emphasis of the *Promotion of National Unity and Reconciliation Act* was that it was the action of each applicant that should be judged and not the system of relationships that made it possible for different types of violations to be carried out.

The mandate of the commission consolidated this gradual slippage in perspective. It upheld the principle that the investigation of the causes and the consequences of all gross human rights violations was dependent on every single *individual* who could reasonably be believed to be a perpetrator being treated in the same way. To consistently promote the achievement of this goal the TRC had to make a clear but subtle distinction between the aim of being *even-handed* in its treatment of all potential perpetrators and the feasibility of *achieving* this goal in relation to other priorities. The limited evidence at my disposal supports the conclusion that the commission implicitly decided to prioritise the hearing of some types of violations at the expense of others.<sup>34</sup> The likelihood that the TRC might not use all the powers at its disposal to investigate 'suspected' perpetrators was implicit in the legislation that established the TRC. A further constraint was the way in which the leadership of the TRC tended to take a more

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<sup>34</sup> Chapter 10 expands the focus of this argument by distinguishing between two types of amnesty applicants. The first group consisted of individual who had previously been charged or convicted of a criminal offence. The second group consisted of applicants who voluntarily applied for amnesty for a specific offence but had not previously been called to account by a police officer or by a court of law.

accommodating attitude towards political leaders who were suspected of having 'authorised' particular policy choices but was more hard-hitting towards individual applicants who admitted their involvement in the occurrence in an actual violation.

As the commission became more conscious of the complexity of the mandate that it had been tasked to deliver there was also a greater realization that if it was to be more even-handed in the way in which it attempted to identify all potential perpetrators it must complement an emphasis on *individuals* with a focus on the command structures within which they operated and from which they often acquired the authority to act. In other words, there was a realization that if the truth was to 'come out' it was also necessary to investigate the intellectual authors of particular human rights violations as well as the persons who were given the responsibility to implement frontline directives. The principle that the TRC should consistently uphold the principle that the causes and the consequences of all gross human rights violations should be fully investigated was never likely to be easy given the limited resources that were placed at its disposal. On the one hand, the principle that all the perpetrators of a gross human rights violation should be treated in an even-handed way was dependent on the appointed members of the amnesty committee applying the rules at their disposal in a consistent manner. Although *it was* morally compromising for the members of this committee to authorize the decision to let the worst amnesty applicant to walk free this is what they had to do if an applicant could be demonstrated to have satisfied all the conditions of the Act. On the other hand, the commission could only achieve its goal of treating all the perpetrators of a gross human rights violation in an even-handed way in circumstances in which its various committees reached the agreement for the intellectual architects of specific types of violations to be investigated alongside the lower-level executioners. The problem with the legislation that the TRC was expected to follow is that it failed to specify what should occur in circumstances in which the architects of the systems of security on which the state depended refused to apply for amnesty even though they had been personally implicated in specific events by a number of lower level operatives. The commission completely failed to investigate the activities of the Broederband.<sup>35</sup>

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<sup>35</sup> According to Terry Bell, the Broederbond 'was central to the development, maintenance and eventual revision of the system' of apartheid. Henning Klopper was a founding member of the organisation. It was founded in 1918. He made the claim fifty years later that since it got into its stride this organisation 'has given the country its governments. It has given the country every prime minister since 1948 ... Our nation depends on the Broederbond ... Show me a greater force on the whole continent of Africa. Show me a

The *Promotion of National Unity and Reconciliation Act* defined the term ‘gross human rights violations’ in a far-reaching way insofar as an open interpretation of the terms – ‘to incite’, ‘to instigate’, ‘to command’ and ‘to procure’ – would place the intellectual authors of specific offences on an equal footing with the frontline operatives. As I demonstrated in Chapter Two it is an indisputable historical fact that a centralized apparatus of repression was created and used by senior leaders of the National Party to commit acts of aggression that led to the occurrence of different types of violations. If the principle of investigating perpetrators in an even-handed way was to promote meaningful consequences in practice it was necessary for the leadership of the TRC to address the criminality of apartheid as a system of rule at different stages in its development. To do so they had to reach a consensus concerning the following issues. First, they had to agree that although it was morally compromising for their colleagues on the Amnesty Committee to authorize the decision for individual amnesty applicants to be set free this is what they must in fact do in relation to the very worst perpetrators. Second, they had to face up to the fact that it would be an even greater compromise for the TRC to be seen to fail to investigate the involvement of the architects of these systems alongside the applicants who admitted their involvement in specific violations.

### **The failure to investigate all perpetrators**

The fourth tension was a product of the difficulties that emerged when the TRC committed itself to the goal of widening its attempt to detect high-ranking perpetrators. In relation to the day-to-day operation of the Amnesty Committee the probability of a moral compromise was written into the decision-making structures that the *Promotion of National Unity and Reconciliation Act* set into motion via the specification of its mandate. Although particular commissioners might arrive at the conclusion that it was inexcusable for an amnesty applicant to be set free the commission’s Amnesty Committee was obliged to authorize this outcome if it could be demonstrated that an individual applicant had fully complied with all of the requirements of the Act.

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greater force on earth, even in your so-called civilized nations. We make our contribution unobtrusively. We carry it through and so we have brought our nation to where it is today’ (2003, 27). This organisation was not investigated by the TRC despite the immense power that it welded during the mandate period.



In this context, it was due to the fact that the *Promotion of National Unity and Reconciliation Act* failed to specify how the goal of even-handedness should be managed that it became easy for the TRC's decisions to fall into disrepute. It is necessary to reiterate the judgment that there is a difference between the decision to implement a mandate over which one has limited room for manoeuvre and refusing to follow a non-prescribed course of action because it involves the occurrence of risk.

In circumstances in which the decision was taken not to identify the identities of all the persons who were responsible for the commissioning of an offence the question arises as to whether the outcome that follows is consistent with the need to be true to the memory of the individual who suffered as a result of a perpetrator being given the means to decide who shall be allowed to live and who shall be forced to die? The key point is surely that the persons who suffered as a result of a gross human rights violation did so as a result of the acts and the omissions of a variety of individuals who occupied senior positions in a variety of related (but distinct) institutional sites. In circumstances in which it is possible to identify the identities of the office-holders who did nothing more (and nothing less) than to: (i) to authorize a decision; (ii) to organize the behind-the-scene logistics; or (iii) communicate detailed instructions the refusal to name the persons who made it possible for a violation to occur contradicts the principle that the identity of the perpetrators should be disclosed in an even-handed way. In short, the refusal to follow through the causes and the consequences of a specific violation is a different matter than the compromises that emerged when the appointed members of the TRC's Amnesty Committee agreed to implement a legally prescribed course of action.

A series of incremental interventions made it more likely that a conciliatory tone would become a defining feature of the commission's investigations of the events of the past. This led to the inconsistency whereby 'suspected' perpetrators were treated differently. This outcome emerged because decisions had to be made throughout the life of the TRC as to who should appear before it in a particular capacity and at a particular forum. One of the problems was that it was in response to *ad hoc circumstances* that the commission decided to complement the Human Rights Violation and Amnesty hearings with special hearings. These hearings extended the scope of the truth-telling process but only at the expense of restricting the scope of its detailed investigations into the causes and the consequences of the different types of violations that occurred during the past.

The Human Rights Violation hearings were designed to enable applicants who had been acknowledged to be the victim of a gross human rights violation to give testimony. Their purpose was to restore the dignity of the person who was the victim of an offence through an official acknowledgement of the suffering that he or she had experienced. The TRC's regional offices were instructed to select by applying the following rules: (i) 'victims on all sides of the conflict should be heard'; (ii) the testimonies given should be 'time consistent with the thirty-four year mandate'; (iii) 'women as well as men should be heard' and (iv) an attempt should be made to provide an 'overall picture' of the violations that occurred in each province during the past (TRC 5, 1998, 5, 1, 1). Through the use of these rules the commission selected a 'suitable' sample of victims. The Amnesty hearings permitted individuals who admitted their involvement in a specific incident to disclose their perspective (and understanding) of the circumstances that surrounded the occurrence of a violation and the factors that led to its occurrence. Individual applicants were instructed to attend a truth-telling session *in chambers* or at a *public hearing* depending on the gravity and the seriousness of the disclosed violation.

The mandate also gave the commission the responsibility to investigate all of the 'violations' that were 'committed by all parties to the conflict'. As a consequence, its appointed commissioners made the decision to invite 'political parties, institutions and sectors of civil society' to make a series documentary submissions to the commission. Through this process it aimed to document 'their role in the conflict' (TRC5, 1998, 5, 6, 2) and to establish who should be held responsible for the different type of human rights violations that occurred during the mandate period. A procedure was established whereby the country's main political parties were invited to answer a series of questions and to submit their answers their replies in the form of the submission of a document. Following this exchange the representatives of a party were invited to attend a hearing. At a hearing a panel of commissioners were able to utilize the source materials that the commission had been able to establish to interrogate a political party representative. In addition to '21, 000 statements on human rights violations, [a panel member] could consider the evidence contained in numerous submissions, amnesty applications and other documents' that the TRC had formally established (TRC5, 1998, 5, 6, 2).

By agreeing to adopt the procedure whereby the leaders of specific political parties were instructed to appear at a public hearing and lower level operatives were expected to

appear before a Human Rights Violation or Amnesty hearing the commission tended to perpetuate the imbalances of power that were established during the apartheid era.

### **The decision to delay specific investigations**

The fifth tension is that the TRC failed to investigate the big fish with the same degree of rigour as it investigated the small fry who had submitted an amnesty application. The risk was that the TRC would fail to address the way in which the impact of an earlier decision had a cumulative impact on the way in which a later decision was perceived. As part of the process of deciding who *should appear* before the TRC the tendency emerged for its commissioners to delay their detailed investigations of the big fish. There are a number of reasons why this was the case. First, there was an absence of a purge of senior personnel in the period that followed the national elections of 1994. Political leaders, civil servants and individual members of the judiciary were permitted to stay in office and continued to derive the benefits of having been allowed to do so. As a result they were placed in a far less vulnerable position than perpetrators who were incarcerated in a prison cell or living under the shadow of an act of vengeance. Second, much of the evidence that incriminated the highest echelons of the state in criminal actions was destroyed before the formal transfer of power was scheduled to take place. This process occurred with the full knowledge of the leadership of the National Party. Terry Bell notes that ‘in little more than six weeks ....while the political parties of the apartheid state [were negotiating] with representatives of the liberation movements, some forty-six metric tons of records from the headquarters of the National Intelligence Service ...were destroyed’ (2003, 9). So much information was scheduled for destruction that the ‘state incinerators could not cope. The furnaces of private companies such as the Steelmaker Iscor also had to be used’ (2003, 10). The beneficiaries of this process were the leaders of the National Party and the generals and brigadiers who had been appointed as members of the of the state’s security council. The destruction of files, microfilm, computer tapes and discs also benefited informers and collaborators in business, civil society and the various anti-apartheid structures.<sup>36</sup>

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<sup>36</sup> Terry Bell describes the destruction of state records as an Auschwitz like process. It was ‘an attempt to eradicate all evidence of the nightmare memories of the tortured and the living dead, to obliterate all trace of those victims whose physical remains lay scattered countrywide in unmarked graves’. In relation to the reliance of the security forces on the use of informers to establish information regarding their opponents he also describes the physical destruction of any paper traces of these acts in the following terms: ‘into

Third, leading members of the commission did not always share the same outlook. They were not always able to reach an agreement with each other. A key issue related to the question as to how extensive their investigations should be. Moreover, the way in which individual commissioners interpreted the causes and the consequences of specific types of gross human rights violations was conditioned by the view that they themselves were the beneficiaries of an as yet unfinished democratic 'miracle'. Rocking the boat too much was not without its risks. It was still possible that the fragile vessel might capsize. Fourth, the belief that the search for the truth was non-negotiable in principle was undermined by the way in which the commission selectively requested the presence of 'potential' perpetrators at a special hearing rather than any of its other hearings. The architects of the systems on which the so-called 'security' of the state depended were requested to 'paint a backdrop' of the reasons why violations occurred during the past. The refusal of the TRC to subpoena persons who had allegedly misused the authority with which they had been invested undermined its action plans in a damaging manner.

Through its own acts of omission the TRC was putting into question the extent to which the search for the truth was *non-negotiable* with respect to the actions of the leaders, constituents and allies of the country's political grouping during the mandate period. These acts of omission sent out a message that the commission was never able to unravel. On the one hand, the message was established that some acts were more acceptable in a normative sense than others. For example, it was legitimate for senior politicians to utilize all the means at their disposal to defend the presence of a given system of rule but it was less so for lower level operatives to step outside the rule of the law. On the other hand, the failure to investigate those at the top with the same vigour as those at the bottom led to the conclusion being drawn that some leaders could use their

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the flames went the files of the frightened ones, their craven acceptances of compromise and collaboration etched in dry officialese, but still sweating fear from each syllable. There were also the records of the venal individuals whose greed had driven them to verbal betrayals and beyond. The pasts of thousands of part-time whisperers of secrets and betrayals were turned to ashes. Who and what they talked about, to whom and why, was either vaporized in the furnaces, or shredded to strips, then sold by the kilogram to companies such as Nampak and Sappi to be pulped. A new generation would pen its secrets on the recycled remains of much of a nation's memory' (2003, 10). The pulping of the records demonstrated that a particular value was sacred to the participants in this transaction. Business was business. The destruction of the nation's memory was no barrier to the making of a profit. This was neither the first nor the last time 'that the facilities of private businesses were made available to the state' (2003, 10).

influence to stand outside the rule of law. In contrast, the lower level operatives who possessed fewer means of influence were unable to follow the same course of conduct.

As a result of the TRC agreeing to follow a line of *least resistance* what started as a provisional compromise spiraled into a compromise of immense proportions. The leadership of the TRC initiated its own compromises through its own initiatives. Individuals at the summit of various state structures (the army, the police, the state security council and so on) were not fully investigated whereas individuals who had been deployed at a far lower level of seniority were subject to far greater scrutiny. Once this imbalance in focus emerged it became clear that the commission was unable to use the means that had been placed at its disposal to reverse these imbalances. A variety of factors present themselves as the basis for explaining why this occurred. Was the failure of the TRC to investigate all 'suspected' perpetrators in an even-handed way built into the legislation that established the mandate for the TRC to follow? Was the failure of the TRC to use all the powers at its disposal a consequence of the decisions that its leading commissioners made in the course of carrying out their duties? Was the process of calling some individuals to appear before the amnesty committee and others to appear before the special hearings a consequence of a decision that the commission made to pre-empt the charge that it was rocking the boat far too much? Was it pursuing too much of the truth at the expense of far too little reconciliation?

In relation to the first possibility the limited evidence at our disposal does suggest that it is not obvious how one can distinguish the way in which the provisions of the *Promotion of National Unity and Reconciliation Act* promoted a culture of compromise from the way in which senior members of the commission interpreted the mandate that they had been instructed to follow by their elected 'political' masters in government. The parliamentary representatives within the upper echelons of the country's major political parties (the African National Congress, the National Party, the Inkatha Freedom Party, and the Freedom Front) had much to hide from public view. According to Bell, 'many private agendas were working to deflect, blur or stymie demands for full and frank disclosure. There was broad agreement that too much of the truth would be a bad thing' (2003, 285). In these circumstances it was likely (but not inevitable) that the concept of a full or complete 'truth-telling' process would be emptied of its imputed 'positive' content through a series of revisionist acts and interventions. The danger was

that the truth-telling process might be reduced to the level of an empty slogan. In other words, it might signify the perpetuation of the compromises of the negotiated settlement in another form with the rhetoric of face to face reconciliation between perpetrators and their victims being turned into the means for its actual achievement. The prospect that this outcome might occur was made more likely through individual commissioners being permitted to replace the universality of amnesty for all *suspected* perpetrators with a relativistic conception of the commission's overall truth-telling functions. This slippage in perspective was reflected in the judgment that the need to investigate the causes and consequences of all gross violations should be institutionally displaced in favour of a fundamentally religious attitude towards the prospect of reconciliation.

In relation to the second possibility the limited evidence at our disposal does imply that the TRC encountered problems using the investigative powers that it had been granted. Section 3(1)A of the *Promotion of National Unity and Reconciliation Act* states that a central function of the commission was to establish 'as complete a picture as possible of the causes, nature and extent of gross violations of human rights ...including the antecedents, 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' (Act No. 34, 1995, 3). In order to achieve this goal it was permitted to carry out investigations and to hold extensive public hearings in order to establish who was responsible for planning, directing, commanding or ordering specific violations. It was also invested with the authority to subpoena witnesses to appear before it. However, its power to compel a material witness to answer a specific question with relevance to the commission's mandate was subject to exacting qualifying conditions. First, the TRC had to acquire the permission of the Attorney General. Second, he or she had to be convinced that it was absolutely necessary for the 'desired' information' to be obtained through direct contact with a particular person. In order to establish the merits of a particular case the following factors had to be taken into account: (i) was the request reasonable? (ii) necessary? (iii) justifiable? and (iv) was the Attorney General convinced that a person who had refused to cooperate was likely to continue to do so?

The Investigation Unit was also given the 'power to seize any article or thing which in the opinion of the commission is relevant to the subject matter' (Act No. 34, 1995, 17). For instance, a culprit who 'hinder[ed] the commission, furnish[ed] the Commission

with any information which is false, fail[ed] to attend [a hearing] at the time and place specified in the subpoena, fail[ed] to remain in attendance, refuse[d] to answer fully' (24) could be charged with a criminal offence and brought before a court of law. If the accused was convicted of an offence then he or she could be fined or imprisoned for no longer than two years. Although these powers were made available to the commission the majority of the cases that involved a gross human rights violation were not followed up with detailed investigations after they came to the attention of the commission. In relation to its ability to discharge its function as an investigative truth-telling agency, 'the TRC has not demonstrated a capacity to dig deep' (Pigou, 2001, 229). This is largely because its 'investigative and research components were given unrealistic tasks, within an unstructured environment with largely ineffective and inadequate resources'.<sup>37</sup>

### **The delegitimation of the politics of the past**

The sixth tension was a product of the fact that the TRC's 'even-handed' approach to the issue of amnesty had the consequence (intended or otherwise) of motivating individual applicants on all sides to disclose their involvement in 'excesses'. The problem was that if all excesses were equal to each other in a legal or an administrative sense then the appeals of the commission for all applicants to come forward was bound to blur the boundaries between the offences that different perpetrators committed. The judgment that all perpetrators should be placed in the same factual or forensic category led to the applicants who sought to uphold a system of rule (at any cost to themselves and others) being equated with the applicants who used different means to contribute to the outcome whereby an illegitimate system of rule was unable to reproduce itself. A process of distortion was also evident from the moment that levelling comparisons were made between the actions of one side in comparison with the actions of another. The judgment that different acts were 'comparable' to each other in a procedural sense led to the causes and the consequences of acts that were carried out for dissimilar reasons being equated with each other regardless of their preceding historical antecedents. An additional problem was that as soon as the TRC articulated a moral discourse that equated a particular virtue such as honesty with full disclosure and non-disclosure with its absence it became possible for competing organisations to 'relativise' the

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<sup>37</sup> Piers Pigou is Project Manager at the Community Agency for Social Enquiry (CASE). He was previously assigned to the Investigation Unit of the South African Truth and Reconciliation Commission.

consequences of their actions by comparing the violations that their members had 'allegedly' committed with the violations that had been committed by their opponents.

### **The failure to establish a programme of redress**

The seventh tension that ran like a thread through the work of the TRC was the result of a bargaining process that occurred between the leaders of the country's political parties. The Government of National Unity attempted to translate a poorly thought through political compromise into a far more comprehensive programme of social engineering. The action plans that the commission decided to promote were based on the idealist illusion that the disclosure of specific truths at a series of public hearings would lead in and of itself to the emergence of a process of reconciliation on an enduring basis.

The initial decision to establish a truth commission occurred in an environment that was marked by great hopes within the new government as to what the truth-telling process could achieve and even greater expectations within civil society at large. Although there was a perception in some quarters that the commission's mandate was incomplete it was acknowledged that some kind of mechanism was needed in order to establish a series of truths that previous administrations systematically sought to conceal from its citizens.

At the moment when the commission's mandate was established it was tacitly assumed that the Government of National Unity would begin to address the immense problem of social reconciliation by delegating specific issues to 'related' legislative programmes. This would occur through, 'the human rights commission [dealing with] current and future violations, the gender equality commission with gender related problems [and] the RDP with [the] economic inequalities' (Hamber 1995, 3) that were continuing to mount up. A minority also claimed that the removal of economic inequalities from the big picture would contribute to the depoliticisation of the commission's mandate. However their voices were very much in a minority at that particular moment in time.

From the point of view of the country's national liberation movements the reason why the political struggle mattered so much was because it was necessary to find a way to combine different tactics together in order to terminate an illegitimate system of rule. Apartheid was a system that successfully combined political domination based on race with economic exploitation based on differential access to the means of production. Seen from this perspective, the major problem with Section 1(IX) of the *Promotion of*



*National Unity and Reconciliation Act* is that it sought to restrict the search for *the truth* to the investigation of 'gross human rights violations' over a very limited time period.

The depoliticisation of the truth-telling process was also achieved through the articulation of the idea that the only violations that really mattered were those that were committed in the course of the political struggle to maintain or to resist the systems of rule that were created during the apartheid era to sustain the rule of a white minority. The TRC concurred with a similar point of view. It did so by loosely agreeing with the judgment that gross violations were the product of two related routes. The first pathway was the least complex. The argument was made that 'individual' actions led in a top down (the strategies of the oppressor) or bottom up (the actions of the oppressed) sequence to the occurrence of a gross human rights violation. This emphasis led to the occurrence of an incidence being reduced to the individual acts that led to 'the killing, torture or severe ill-treatment of any person' during the course of a specific political struggle (Wilson, 1995, 45). The second route was more complex. The incidence of a particular type of human rights violation was related to an analysis of the factors that may have contributed to its occurrence as part of a particular conjuncture of events. The *National Unity and Reconciliation Act* proposed that gross human rights violations were more likely to occur in circumstances in which individuals possessed the authority and the means to *attempt* to commit, to *conspire* to commit, or to *incite* others to commit an action that led to the violation of the rights of others (sub-section 1(IX)(b)). The same clause also refers to the attempt to *instigate* an act, to *command* an act or to *procure* an act as unique classes of conduct that the commission was also permitted to investigate. These terms gave the commission the legitimacy to investigate the actions of the leaders of the National Party who sought to defend a system of white minority rule by using means in excess of those that were legally permitted at the time when they first occurred. These terms also gave the commission the leeway to use the same terms of reference to investigate the offences that were allegedly the product of the actions of the leaders, members, supporters and allies of the country's national liberation movements.

A related problem is that the commission's mandate was far too narrow to address the issues that mattered the most to many of the country's most dispossessed citizens. Many black South Africans linked the issue of reconciliation to the issue of reconstruction.

This issue was sidelined. The central emphasis of the Act was the occurrence of

excesses. In other words, actions that went beyond the already wide latitude of abuse that was permitted by the laws that were designed to perpetuate white minority rule. Judging the meaning of the past in the present in terms of excesses tended to excuse and make 'normal' the way in which violence was routinely employed at a variety of different levels of the state in order to shore up an unjust political and social order. The mandate was a legal codification of a compromise of the highest order. It would have been far more appropriate if the most senior members of the commission had stated at the outset of the process that it was extremely unlikely that the truth-telling process would promote social reconciliation. However, they consistently failed to do so.

### **The creation of unrealisable expectations**

The eighth tension was a product of the fact that TRC created expectations that it was unable to deliver. The mandate that it was instructed to follow made it possible for politicians and opinion-formers to *allow themselves* to believe that if the community went through a process of catharsis together a process of reconciliation might follow. This is also what many ordinary South Africans may have in some sense 'hoped for'. Perhaps, therefore, it was logical for senior commissioners to attempt to keep the bandwagon rolling by promoting similar expectations via their media statements. The problem is that the appointed members of the commission failed to make a clear distinction in their public statements between those aspects of individual reconciliation (the inter-subjective relations) that the TRC was able to influence and aspects of social reconciliation (linked to the payment of reparations) that lay outside of its control. From the moment that individual commissioners expounded the judgment that the mandate of the commission legitimised the search for mechanisms of social reconciliation between the members of different racial (ethnic and political) groups it generated a series of expectations amongst the people whom it came into contact. The commission was unable to satisfy the demands of particular groups of victims. The gap between the ideal and the actuality was expressed via the contradiction between the specific actions plans that the TRC could fulfil (such as recruiting individual victims to enter its communication with their alleged tormentors at a Human Rights Violation hearing) and other ends that it could promise but was unable to deliver (such as the guaranteeing that all recognised victims would receive a regular reparation payment). The key fault-line problem was that from the moment that the TRC articulated the claim that the disclosure of specific truths might establish the basis for a process of social

reconciliation between the members of different groups it was at the mercy of political and economic forces over which it had no influence and little to no effective control. Had the Government of National Unity dealt more effectively with the issue as to how to redistribute resources across pre-existing boundaries of race and class the success of its initiatives may have turned the tide in favour of the TRC's truth-telling activities. In practice, a breakthrough at the level of redistributive relations failed to materialise. This was because the Government of National Unity abandoned a populist programme of reconstruction and redistribution in favour of a neo-liberal economic strategy. Despite the initial expectation that the commission might contribute something to the process of social reconciliation between the members of different racial groups the successes of the TRC were undermined by the pro-business policies that the Government of National Unity decided to follow in the period between 1994 and 1999. At the heart of the problem was the failure of an interim administration to reverse the vast inequalities that resulted from the consolidation of a system of racial capitalism.

### **The appropriation of the testimonies of the victims**

The final tension was a product of the fact that the TRC appropriated the testimonies of the individual applicants who appeared before its hearings but unable to give them little in return. In its final stages the commission related the testimonial evidence of the victims who appeared before it to the other sources of evidence that it had established. These sources were selectively included in the five volume report that it produced. The basic contradiction was that the aim to restore the dignity and the status of the victims by acknowledging the 'normative' wrongness of specific violations was at odds with the way in which the commission appropriated aspects of their 'lived' experiences. The problem was that what was 'functional' for the state (and the TRC) in terms of their pressing political and/or economic realities *did not necessarily coincide* with the needs of the individual victims who took an enormous risk when they agreed to reveal aspects of their own experiences before the rest of the community as part of a public spectacle. When specific victims agreed to give testimony at an open hearing they were 'not coming there only as a member of a political party or a victim of a human rights violation, they were coming there because they [were] structural victims .... because they [were] black, poor, marginalized, that is the real reason for coming to the TRC' (Hamber, 1998, 2). They approached the TRC because they had nowhere else to go.

The problem was that by focusing exclusively on the occurrence of a human rights violation in abstraction *from everything else* that had also happened to an individual victim the commission tended to miss out where he or she was in the world. The element that was lost from the equation was the political and economic circumstances of each of the individuals who agreed to disclose aspects of their experiences to others. The victims who agreed to give testimony before a Human Rights Violation hearing did not stop being at risk simply because the occurrence of a specific violation was acknowledged by Tutu, Boraine or any of the other members of the commission. Many of the victims who gave testimony were on roads and in circumstances that left them with few options to change the conditions they found themselves enclosed within.

The perception within the Government of National Unity was that once the TRC was established *it* could be used to promote the 'intended' goals of unity and reconciliation. Its value as a temporary agency was that it could be used to create a space within civil society where the hurt and the pain of an oppressed people could be finally expressed. The problem with this approach is that it went hand in hand with the judgment that once the TRC had identified the immediate needs of the victims (via the formulation of its interim reparation policy) there would be no need for civil society associations to continue to raise unsettling issues regarding the consequences of the past in the present. The limitation of this perspective is that it was based on the presupposition that the Government of National Unity should only 'tolerate' the voices of the victims insofar as their testimony they established could be used to construct a narrative of reconciliation. By attaching primacy to such an instrumental point of view the Government of National Unity was forced to acknowledge the unintended consequences of its own actions. Once it had given its seal of approval for aspects of the truth to be established by a semi-autonomous fact-finding commission it also had to acknowledge the possibility that it might not be able to put the genie back into the bottle after he had been set free.

In addition, it made little to no sense for leading figures in government (such as Mandela) or the TRC (i.e. Tutu or Boraine) to claim either that the truth-telling process had gone too far or that a return *to normality* was required in order to offset a period of abnormality. For the victims and their relatives the need to continue the process of working through the causes and the consequences of the past in the present was likely to continue until the moment when they (and subsequent generations) were ready to

conclude the process. This process could only be terminated, if indeed it could be terminated at all, by addressing the priorities of the victims and their relatives. It was also likely that the voices of the victims would no longer be perceived to be legitimate within the central bureaucracies of the first post-apartheid government after the TRC's hearings had been completed and a package of reparations had been agreed. This outcome occurred in spite of the fact that neither the state nor the TRC authorised the creation of the institutional spaces that would enable the victims to diagnose their own remedies to the conditions that they continued to endure within their communities.

The tendency of the government to encourage forgetfulness rather than memory and to delegitimise rather than to work with the voices of the victims was not unexpected. The problem was that although it was tempting for the Government of National Unity (and its successors) to maintain this position it did little to enhance its overall reputation. One of the consequences of the administration's inaction is that it made it possible for the persons who were acknowledged to be the victim of a gross human rights violation to forge a link between their official status and their unchanged social circumstances. In the circumstances in which the 'victims' realised that very little had changed they were also more likely to perceive that they had been *used by the state (and the commission)* to achieve a series of ends that failed to remedy the basic causes of their suffering.

## **Conclusion**

During the mandate period the apartheid state was able to use the powers at its disposal to deny the allegation that it was responsible for the occurrence of specific violations. One of the key successes of the TRC is that it changed the parameters within which all South Africans could interpret the meaning of the past in relation to the present. It promoted this particular outcome by establishing a difference in perspective between the statements that the people could only partially validate to be true under the old regime and the statements that individual perpetrators agreed to disclose to the TRC once the likelihood of a criminal prosecution or a civil action was removed from view. As a result of this change the truth-telling process shifted the emphasis from the discourses that could be expressed during the period when apartheid was in its ascendancy to the truths that could be disclosed at the commission's public hearings.

This is a significant change given the history of political repression in South Africa. The level of censorship was so extensive during the 1970s and 1980s that the authors of works of fiction literature decided to include censored events and facts in their novels. Nadine Gordimer included a pamphlet in 'Burgher's Daughter'. It documented the response of Soweto students to the Sharpeville Massacre on the 16<sup>th</sup> of June 1976. Gordimer decided to include this source at the end of a lengthy work of fiction.<sup>38</sup>

The second conclusion of this chapter is that it is important not to overstate the successes of the commission's interventions as against their failures. It needs to be underlined that the strategic factors that I have outlined above limited the scope and the strength of the accountability-creating mechanisms that the TRC was able to deploy. The partial breakthroughs in understanding that the commission was able to promote occurred in spite of the content of the commission's mandate rather than because of it. If a precise memory of all the offences of the past is a necessary precondition for addressing the legacy of apartheid as a criminal system of rule then one of the important consequences of the legislation that created the commission's mandate was how it could be used to sidestep the implications of this omission without appearing to do so. From the moment of its inception the TRC was expected to implement a flawed mandate.

The next chapter will develop this focus further by arguing that the revision of a society's political culture depends on whether a commission is able to promote a consensus of convictions that specifies the meaning of the past in the present by persuading its members that it is in their interests to change their given form of life.

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<sup>38</sup> The first paragraph of the pamphlet reads as follows: 'Black people of Azania remember our beloved dead! Martyrs who were massacred from the 16 June 1976 and are still being murdered. We should know Vorster's terrorist wont stop their aggressive approach on innocent Students and people who have dedicated themselves to the liberation of the Black man in South Africa – Azania. They shall try at all costs to suppress the feelings of the young men and women who see liberation a few kilometres if not metres. There's no turning back, we have reached a point of no return as the young people in this challenging country. We have proved that we are capable of changing the country's laws as youths this we shall pursue until we reach the ultimate goal – UHURU FOR AZANIA' (Gordimer, 1979, 346).

## Chapter 4 -

### The attempt to promote durable accountability-creating mechanisms

#### Introduction

The previous chapter showed that the truth-telling process was but one moment in a complex and open-ended process that arose out of the need to work through the causes and consequences of a multitude of distinct but empirically related political conflicts. As with any blueprint whose practical realization was dependent on reciprocal relations between different interest groups – the unanimity of purpose that appeared to be present at the moment when the TRC was initially legally instituted - was subject to a series of challenges as soon as the mandate was translated into an actually existing action plan.

The last chapter demonstrated that each moment of the truth-telling process was subject to a series of contingent events that reduced the power and the strength of the accountability-creating mechanisms that the commission was permitted to utilize. These included: (i) the ‘relativism’ that was introduced into the truth-telling process through the participants being permitted to make levelling comparisons between the gross human rights violations that were committed by the members of different groups; (ii) the tendency for the frontline executioners to be scrutinized more fully than the intellectual authors of a particular apparatus or system of repression; and (iii) the pressure that was exerted on the victims to agree to participate in a public hearing. The fact of the matter is that the relatives of many of the victims had nowhere else to go. They could only alleviate the source of their suffering by participating in a hearing. Paradoxically, the need to work through the causes *and* the consequence of gross human rights violations applied as much to *individual* perpetrators as it did to their *victims*. Perpetrators who agreed to fight on behalf of their political masters were expected to adjust to the loss of protection that followed from the break up of a systematic political programme that aimed to defend the interests and the dominance of a white minority.

Chapter 4 also showed that a series of external and internal ‘strategic’ factors shaped the way in which the commission organised the truth-telling process. There was a tendency for particular commissioners to adopt an accommodating attitude towards ‘alleged’

perpetrators who continued to exercise authority within the community as a result of their leadership of a political party or their appointment to a public office of the state.

The first section of this chapter uses a single strand of Habermas's thinking to establish whether individual commissioners were able to use the mechanisms at their disposal to promote credible outcomes during each of the truth-telling hearings that they organised. I argue that the truths that emerged from the TRC hearings were more credible to the extent that the participants were able to express the fullness of their own perspectives. I use the concept of the ideal speech situation to test the following proposition: to the extent that the design of specific hearings conformed to the conditions of this ideal the more likely it was that the participants would be able to produce a credible outcome. I decided to raise the issue in this way in order to counter the objection that my analysis presupposes a direct or an immediate correspondence between the ideal that Habermas has proposed and the practicalities that shaped the design of specific public hearings.

In the analysis that follows I explicitly acknowledge that whilst some aspects of the ideal speech situation were institutionalised by the TRC other aspects were not. Although it does make sense to argue that the truth-telling process drew on particular aspects of the ideal speech situation the hearings that the TRC was permitted to organise also made a number of significant departures from the conditions of this model. The absence of a one-to-one fit between the ideal speech situation and the dialogues that emerged during a session was apparent in relation to: (i) the risks that were involved in treating perpetrators and victims as equals; (ii) the value of open debate; (iii) and the use of legal sanctions to compel individuals *to agree* to participate in a particular hearing.

The focus of the analysis begs the question as to what kind of truths the TRC could produce in circumstances in which its truth-telling hearings fell short of the ideal. In order to contextualise my argument I shall now make a slight detour. A few preliminary remarks are needed in order to clarify the reasons why it is not obvious how it is possible to relate the categories that I am using in this chapter to judge the accountability-creating outcomes of the truth-telling hearings of the commission. One of the difficulties that emerged from the attempt to use external standards to judge the outcomes of particular hearings is that it was not obvious how the standard of the ideal speech situation could be used to judge the conduct of the immediate participants.



An additional difficulty is that the commission failed to specify the rules (or guidelines) that it decided to use in order to judge the performance levels of the officeholders who were responsible for leading the testimony of the participants in a particular hearing. The official report of the commission does describe the similarities and the differences between different truth-telling hearings. However, it fails to specify whether its commissioners were consciously instructed by their superiors to fulfill one end in preference to another. As a result, it is not obvious how it is possible for an observer to make a clear cut distinction between: (i) the circumstances in which an individual commissioner consciously intended to achieve a specific goal but was unable to do so (due to the impact of a series of factors that were not subject to his or her influence); and (ii) the circumstances in which an individual commissioner failed to promote a specific end or outcome because he or she had not been formally instructed to do so (either by a colleague inside the commission or by a political leader outside of it).

In relation to the first possibility it can be credibly claimed that if a commissioner can be shown to have promoted one end in preference to another then it follows that his or her conduct can be judged in relation to the consequences of that particular decision. The argument can also be made that the commission's mandate shaped the conduct of its commissioners by encouraging them to design the truth-telling hearings that they were given the responsibility to organise in order to strike a balance between the disclosure of specific truths and the promotion of relations of reconciliation. To the extent that this was indeed the case it follows that it would be possible to judge the level of effectiveness of specific commissioners or investigators in relation to the standard that they consistently promoted the achievement of one end at the expense of another.

In relation to the second possibility it may be possible to demonstrate that it is not appropriate to use an external standard to judge the outcome of a particular hearing or the conduct of the individual commissioners who led the testimony of the participants. This is because the commissioners who were given the responsibility to design a particular truth-telling hearing were not consciously aware that it was their specific ethical responsibility to consciously promote the realization of a particular outcome. If a group of commissioners were not consciously aware that they should promote a specific end it follows that there is little that they could have done to promote its occurrence. In short, it makes little sense to criticize a specific commissioner for his or her failure to

promote a specific outcome in circumstances in which he or she was not consciously aware that his or her conduct was likely to be judged against that particular standard.

The commission's lack of clarity on these matters was not without its costs. It resulted in the ambiguity whereby one cannot be certain whether specific commissioners: (i) consciously intended to promote a specific end but were objectively prevented from being able to do so because of a range of factors that they could not consciously control; or (ii) failed to promote a specific end because they made a conscious decision to restrict their focus to the promotion of the goal that were included in the mandate or to follow a course of conduct that was consistent with the instructions of their masters.

An additional difficulty that emerges from the use of the TRC's mandate to judge the outcomes of particular hearings is that it was not always possible to derive a specific code of conduct from the mandate that its commissioners agreed to acknowledge. Two sets of factors contributed to the outcome whereby it was not self-evident how the conduct of the commissioners who agreed to design and to implement specific truth-telling hearings should be judged against a series of external standards of evaluation.

On the one hand, it was necessary for the participants to avoid the temptation whereby they reduced the outcome of a truth-telling hearing to a series of easily attainable objectives. This was especially the case in circumstances in which the relationship between the process and the product was contested before, during and after a hearing. The commission failed to disclose the standards that it was using in order to judge whether the conduct of its commissioners fell short of its expected standards. It also failed to disclose which of its commissioners did realize a series of agreed targets as against the commissioners whose performance levels fell below the same standard.<sup>39</sup>

On the other hand, it was necessary to avoid the temptation whereby the TRC reduced the outcome of a hearing to goals that could be directly derived from its mandate. A

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<sup>39</sup> The administrative report of the Human Rights Violation Committee states that 'whilst the Act outlined certain statutory obligations of the Human Rights Violation Committee, it gave it the latitude to develop its own unique operational procedures' (1, 120, 279, 7). The same paragraph makes the following claim: 'inevitably, a primary focus of the regular, national business meetings was to provide an operational policy framework for work in progress and anticipated work, processes, and procedures'. Subsequent sections of the report do not specify the standards that the TRC used to judge the conduct of the commissioners who were responsible for designing and implementing the TRC's 'victim hearings'.

series of divergences did emerge between the explicit action plans that the mandate permitted the TRC to follow and the implicit changes that its commissioners made to its literal meaning by deciding to concentrate on one facet of it at the expense of another. The relative operational autonomy of the TRC allowed its commissioners to promote the occurrence of ends that could only be implicitly derived from its original mandate.

A final problem is that the emergence of a gap between the ideal and the reality makes it necessary for me to declare from the outset that the TRC was never able to design its hearings so that its commissioners were able to promote a pure form of understanding. Following the lead of Habermas it is necessary to ask whether one can conceive of the possibility of a pure form of understanding emerging out of the Human Rights Violation or Amnesty Committee hearings that the TRC was given the responsibility to establish? The answer is no. The likelihood of a pure meeting of minds was hard to come by in each of the truth-telling forums that the commission was legally permitted to organise.

Although I recognize that the prospect of a pure form of understanding was unlikely to emerge out of particular truth-telling hearings the inability of the participants to live up to the ideal of a pure form of reason should in no way invalidate the attempts that were made by some of the participants to come to terms with aspects of their experiences. Having removed the standard of pure ends from our field of vision it is necessary to formulate a less exacting standard in order to judge the extent to which particular truth-telling sessions contributed to the emergence of other significant ends or outcomes. Although it was likely that an impure form of rationality would emerge from particular truth-telling forums the strategic danger did arise that specific commissioners might equate a partial meeting of minds with a more complete consensus of convictions. In relation to this issue the distinction between strategic and communicative action is a useful regulative ideal. It draws our attention to the normative (and factual) dangers that may follow whenever the participants in a truth-telling process attempt to equate a partial meeting of minds with the emergence of a more lasting or complete consensus. Contrary to some readings of Habermas's theory of communicative action I do not use the contrast between a strategic and a communicative resolution of a matter of public concern to make a value judgment concerning the communicative competence of the individuals who agreed to participate in the hearings that the TRC was able to organise. In circumstances in which the participants in a hearing were only able to articulate the

content of an impure form of rationality it does not follow that the contribution that each of the participants made to the establishment of a specific truth was of negligible value.

The second section of this chapter reverses the first section. It sets out a retrospective analysis of a series of hearings in order to criticize some of the ambiguities that are contained in Habermas's consensus theory of truth. Instead of using the ideal speech situation to specify the incompleteness of particular truth-telling hearings I use the testimonial evidence that was disclosed by the participants in particular hearings to criticize the arguments that Habermas has used to defend the consensus theory of truth. The model that I outline in the second section of this chapter specifies what would need to occur in order for a hearing to produce a well-founded consensus of convictions. In relation to the likelihood of its actual occurrence I argue that it was not possible for the participants in at least some hearings to reach a consensus of opinion relating to the reasons why a gross human rights violation occurred during the mandate period. Although some hearings did lead to an acknowledgement that specific violations occurred in the past reaching an agreement as to the reasons why they occurred and who was responsible for their occurrence was often far beyond the reach of the participants. In this context, the distinction between strategic and communicative action serves as a useful regulative ideal insofar as it guards against the tendency for the participants in a hearing to link a breakthrough at a factual level with either the presence or the achievement of a well-grounded and complete consensus of convictions. Having outlined the issues that this chapter addresses I shall now return to the first section. I shall do so by demonstrating how the ideal speech situation enables us to identify the gaps that emerged between the Habermasian ideal the actuality of specific hearings.

### **The feasibility of the ideal speech situation**

To the extent that open dialogue is recognised as one of the keys to the unlocking of the meaning of the events of the past the truth-telling process is dependent on the goal of grounding communicative acts in a process of dialogue between speaking subjects. It is necessary to recognise from the outset that one can never be entirely certain that an inter-subjective *dialogue* that appears to be free from the use of force will make it possible for a plurality of truths to emerge from a particular truth-telling hearing. I agree with Habermas that the outcomes that do emerge from a dialogue will fall short of the

ideal insofar as the participants are unable to express the fullness of their perspectives. For instance, a decision that has been unilaterally imposed by one agent on another cannot be accepted as a consensual agreement that binds the action of the two parties together. According to Habermas this is because ‘something that patently owes its existence to external pressure cannot be considered as an agreement’ (1990, 134).

The ideal speech situation describes ‘an unconstrained dialogue to which all speakers have equal access and in which the force of the better argument prevails’ (Outhwaite, 1994, 40). According to Habermas, it will only be possible for the participants in a public debate to work through the full meaning of the past in relation to the conditions of the present to the extent that a truth-telling hearing meets the following standards:<sup>40</sup>

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<sup>40</sup> According to Gouldner, the occurrence of Habermas’s ideal speech situation depends on the presence of four elements. These are: (1) non violence; (2) permeable boundaries between public and private speech; (3) allowance of traditional symbols and rules of discourse to be made problematic; and (4) insistence on equal opportunities to speech (1976, 142) The analysis of the ideal speech situation that I have set out above is derived from Gouldner’s analysis of the work of Habermas during the 1970s. I have expanded the focus of Gouldner’s analysis where it was appropriate for me to do so in relation to the TRC hearings. The contested use of the ‘ideal speech situation’ is a matter of considerable debate. One aspect of the problem is that Habermas has defended its validity by making a series of related arguments in its favour that do not appear to be consistent in terms of their logical implications. For instance, although everyday conversation is not the same as the ideal Habermas has consistently argued that the ideal is ‘anticipated’ in every instance of intersubjective communication. The following quotation specifies the kernel of this claim: ‘No matter how the intersubjectivity of mutual understanding may be deformed, the *ideal* of an ideal speech situation is necessarily implied in the structure of potential speech, since all speech, even of intentional deception, is orientated to the idea of truth. This idea can be analysed with regard to a consensus achieved in unrestraint and universal discourse’ (Habermas, 1972, 144). This quotation gives us an abbreviated vision of rationality based on a conception of total self-awareness. The difficulties emerge when he has attempted to specify the exact uses to which this construct can put. On the one hand, Habermas has argued that the ideal speech situation is a transcendental concept: ‘Insofar as we master the means for the construction of an ideal speech situation, we can conceive the ideals of truth, freedom, and justice – which interpret each other – only as ideas of course (144). On the other hand, he has argued that the conception of an ideal speech situation can be used to judge deviations from the ideal: ‘one must be able to demonstrate the deformations of pure intersubjectivity which are induced by the social structure on the basis of asymmetries in the performance of dialogue rules. The uneven distribution of dialogue constitutive universals in standard communication indicates the particular form and deformation of the intersubjectivity of mutual understanding which is built into the social structure’ (Habermas, 1972, 144). This example shows how Habermas has conflated the differences in the same article. He has also complicated his defence of the ideal speech situation by arguing that there is no single criterion by which we can observe *even under ideal conditions* whether a consensus was rationally arrived at by each of the participants. Therefore, it would appear that the most that an observer can do is to determine whether the conditions that may have contributed towards the promotion of the ideal appear to be present in one empirical context but not in another. Habermas has repeated the same confusions elsewhere by arguing that ‘the ideal speech situation is neither an empirical phenomenon nor simply a construct, but a reciprocal supposition or imposition (*Unterstellung*) unavoidable in discourse. ...I would prefer to speak of an anticipation of an ideal speech situation ...This anticipation alone is the warrant that permits us to join to an actually attained consensus the claim of a rational consensus. At the same time it is a critical standard against which every actually reached consensus can be called into question and checked (Habermas as quoted in McCarthy, 1984, 310). The final sentence of this paragraph appears to imply that the ideal speech situation can be conceived in *procedural* terms. In a reply to his critics, Habermas has conceded that although the model of the ideal speech is an “anticipation” possessing the

## (i) Non-Violence

In order to avoid the outcome whereby one participant is able to use force to overwhelm the other participant the discussion must be free from the overt use of force or coercion.

## (ii) Equality of Opportunity

It is not appropriate for greater weight to be attached to the views of one participant in preference to another because of visible differences in their power, wealth and status.

## (iii) Reason as the basis for persuasion

The participants must give reasons why they have interpreted an issue in a particular way by grounding their judgments in reasons that can be understood by others.

## (iv) Sincerity of expression

The participants must sincerely express the fullness of their own experiences.

## (v) Unconstrained dialogue

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status of a “practical hypothesis” it is also subject to the following qualifying conditions: (i) “Pure modes of understanding; normally the orientation to truth, rightness and truthfulness are ....broken up under the pressure of problems that arise”; (ii) “Negotiated descriptions of situations, and agreements based on the intersubjective recognition of criticisable validity-claims are diffuse, fleeting, occasional and fragile”; (iii) “Naturally, communicative acts taken on explicitly linguistic forms only in exceptional cases; nevertheless, the semantic content of indirect expressions, non-linguistic expressions, gestures, etc., is of a linguistic nature” (Habermas, 1982, 235). This reply restates the original problem using different terms. Habermas has failed to provide a full answer to the question as to how we could ever know whether the participants in a *particular* dialogue did ‘in fact’ have an equal opportunity to participate in the shaping of the outcome of a hearing. Lakomski has made a valued contribution to this particular aspect of the debate. He has argued that if the only evidence that currently exists consists of ‘self-reports which may be consciously or unconsciously misleading, or plain false, even a retrospective assessment’ would not solve this problem (Lakomski, 1999, 58). Habermas’s argument that the ideal speech situation is ‘an ideal that can serve as a guide for the institutionalization of discourse and a critical standard against which every actually achieved consensus can be measured’ is invalid insofar as the ideal speech situation ‘is *in principle* unrealizable’ (Lakomski, 1999, 58). It is perplexing to realize that for this ‘theory to work, we must assume as given, what, on his own account, does not exist but is supposed to come into existence as a result of the theory’ being put into practice (Lakomski, 1999, 58). The implication is that if it is not possible to *know, in principle*, whether or not distorted communication is present in a particular context we are left with a series of speculative claims rather than a theory that can be shown to be true or false. The theory of systematically distorted communication (Habermas, 1976) also falls short of this standard.

If the dialogue is orientated to the search for enduring 'truths' there should be no arbitrary barriers that set limits to the issues that the participants discuss together.

(vi) The revisability of all public traditions

If the events of the past are to be subject to critical discussion it is impermissible for one participant to limit the discussion to a particular issue to the exclusion of all others as this might foster a spirit of conformity that limits the expression of different viewpoints.

A few remarks are necessary in order to explain why the promotion of all of these conditions is necessary in order for the search for a multiplicity of truths to occur. First, if threats are made before a hearing has begun this may limit the ability of a participant to express the fullness of his or her's perspectives in an open dialogue. A speech act refers not just to facets of one's own experiences. It also refers to the consequences of one's actions insofar as they also shape the responses of others. The language of a participant will not be orientated to a process of understanding if the weight and the force of his or her speech was *distorted* by the pressure to comply with a sanction that was imposed on him or her by a third party who is not physically present. The if-then structure of a threat would effectively limit the ability of a participant to put into speech what they perceive the truth to be in relation to their own experiences. In summary, if the testimony of a participant in a hearing is shaped by strategic factors their presence in his or her mind may distort the replies of that person to a question. In other words, the presence of a threat may ensure that what the witness is actually communicating in his or her speech is a caricature of that person's actual perception. A witness may disclose 'facts' that correspond to the interests of a third party rather than the lived experiences of the person whose objective ability to speak was distorted.<sup>41</sup>

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<sup>41</sup> This is not to deny that there may not be special circumstances in which violence (or the threat of its use) can lead to the removal of distortions on dialogue. Gouldner refers to cases where violent acts are 'ambiguity-reducing communications' (1976, 143). These acts clarify the intentions of one party relative to another. For example, suppose a party leader says to his or her civilian opponent, we are prepared to kill to achieve our ends. He then asks, 'can they state that, with any greater clarity than by killing?' (1976, 143). According to Gouldner, an act of violence may indicate that certain issues are up for discussion whereas others are not. The occurrence of a violent act may cause a dialogue to come to an abrupt end. An act of violence may subsequently motivate two parties to re-enter into a discussion with each other. Within those limits an act of violence may encourage two or more parties to seek a conclusive agreement. In short, an act of violence may precipitate a process of communication between different interest groups.

Second, if the condition of equal opportunity is to be realised it is impermissible for the point of view of one group of participants to be assumed *in advance* of the discussion to be more significant than the perspective of any of the other participants. The condition of equality implies that no-one possesses a monopoly on correct interpretation. It also implies that they should aim to reach an understanding by establishing the most plausible argument given the sources of evidence that are present before them.

Third, the search for specific truths also requires that all participants should have the opportunity to put forward their interpretation of the events that they were involved in. Accepting the principle that all participants should possess an equal opportunity to speak the truth also implies that a process of self-criticism is built into this process. It is because the persons who lead the truth-telling process are always expected to make the normative judgment that some values are more important than others that it would be a mistake to assume that the truth-telling process also entails an ethic of neutrality. The act of criticism is never neutral in its consequences. This is because the truth-telling process may draw attention to the fact that a participant who is subject to the criticism of others may uphold a conviction that cannot be defended through the use of reason. Clearly, an individual who has been socialised to place a high value on the rationality of his or her convictions will find it unsettling to discover that the only way that he or she could act consistently uphold the norms of his or her group was 'by acting in a socially-destructive way towards others' within the same community (Steyn, 1999, 274).

Fourth, the condition that all traditions are subject to public scrutiny and revision is dependent on the initiation of a debate in which there is no limit to the extent to which existing practices can be translated into problematic issues that can then be discussed. Open discourse is only likely to emerge to the extent that 'dominant' traditions of thought and action are deprived of their normative force and compulsive factuality. The question of who decides which traditions will be treated as given and which matters should be subject to revision in a public place is precisely what should be discussed. Accepting the idea that all public traditions can be revised does not imply that all barriers to dialogue should be removed or that every single value that lies at the heart of a society's political culture can or should be contested at the same time. In addition, there is no reason why any of the participants should be encouraged to publicly declare anything that suddenly appears in his or her head. Nor is there any reason why any of



the participants in a dialogue should be unconditionally obliged to listen to everything that the other party is attempting to express in an open public conversation. Although there is every reason to subject existing normative traditions to public scrutiny it would be counter-productive for the participants in a dialogue to examine the appropriateness of all traditions at the same moment as this will generate confusion.<sup>42</sup> A debate that questions all the aspects of a common culture at the same time is more likely to lead to the emergence of nihilism than to the formal establishment of a credible alternative.

Fifth, it is important to respect the role of criticism in the ideal speech situation. In the most elementary sense the commissioners who are responsible for organising a truth-telling hearing are making the judgment that some values matter more than others. For instance, they are supposing that one value (telling the truth) is far more important than another value (telling a lie). Given this starting point it may also become necessary for a commission to distinguish between an individual participant whose public actions maximised the first value (to a greater or lesser degree) and an individual participant whose public actions resulted in the ongoing negation of the same value. The ideal speech situation does not abolish the distinction between the actions of a group who consolidated the truth-telling process and the actions of a group who opposed its emergence. Rather it establishes a system of stratification based on its own norms. In other words, it encourages the architects of an open debate to make an informed judgment as to how the disclosures of some of the participants consolidated the truth-telling process whereas the evasions of others arrested or held back the same process.<sup>43</sup>

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<sup>42</sup> It is likely that Habermas is aware of this. However, other theorists of the truth-telling process appear to be less aware of the consequences of this constraint on the truth-telling process. Asmal et al, link the revision of the public traditions of South Africa to a *catalogue* of fifteen truth-telling goals by arguing that the TRC should have promoted the following outcomes: '[i] achieving a measure of justice for the victims of our horrifying past; [ii] collective acknowledgement of the illegitimacy of apartheid; [iii] a culture of ethics that will make room for genuine reconciliation; [iv] the decriminalization of resistance; [v] corrective action in dismantling the apartheid legacy; [vi] laying bare the roots of violence; [vii] illuminating the humanistic values of the anti-apartheid resistance; [viii] demonstrating the morality of the armed struggle; [ix] establishing equality before the law; [x] placing property rights on an equal footing; [xi] enabling privileged South Africans to face up to their collective understanding, and, therefore, responsibility for a past in which only they had voting rights; [xii] acknowledging the wrong done to the countries of Southern Africa in our name; [xiii] acknowledging the correctness of international mobilisation against apartheid; and [xiv] allowing the excluded to speak for themselves' (1996, 10).

<sup>43</sup> It is also important to note that a stress on the centrality of truth alone can introduce a certain degree of arbitrariness into any debate relating to the ends that a truth-telling process should or could promote. This emphasis begs the question as to whether it is legitimate for justice to be jettisoned in order for individual perpetrators to be persuaded of the need for them to agree to participate in a hearing. The manner in which this fault-line has been ignored is surprising given the emphasis that opinion-formers close to the Truth and Reconciliation Commission have placed on the truth-telling process as a form of justice.

Although the hearings that the TRC organised were similar to those of the ideal speech situation part of the significance of its truth-telling hearings is that they failed to meet all of the conditions that would follow from the attempt to fulfil such an exacting standard. The absence of a one-to-one fit between the ideal and the reality was most visible in relation to: (i) the issue as to whether perpetrators and victims should be judged as the equals of each other during a particular hearing; (ii) the value of promoting open public debate; and (iii) the TRC's reliance on the use of strategic threats *and* rational appeals to persuade perpetrators *to agree* to apply for amnesty.

In relation to (i) the idea that the point of view of all parties should be disclosed with equal consideration was difficult to achieve in circumstances in which the perpetrators were expected to share the same public space as a victim or a victim's relatives. The idea of equality requires that perpetrators should have the same opportunity as any other party to set out their interpretation of a particular event. However, there was always the danger that an alleged perpetrator might use the spectacle of the occasion to excuse him or her from the need to work through the full consequences of his or her actions. On the one hand, the goal of a hearing was to establish: (i) what happened before, during and after an incident; (ii) the consequences that followed as a result of the occurrence of a gross human rights violation; and (iii) the identities of all of the culprits who were responsible for its occurrence at a given moment and place during the mandate period. On the other hand, the goal of encouraging perpetrators to take responsibility for the narration of at least part of their testimony ran the risk of allowing them to explain away their *original motives* or to gloss over the normative consequences of their actions. This would amount to the utilisation of a strategy of evasion whereby a perpetrator decided that their most appropriate course of action consisted of the attempt to settle their account with a shady past by paying the lowest premium that it was possible for him or her to pay. Although this outcome was noted during the German Historians debate Habermas has not related its implication to his analysis of the ideal speech situation.

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According to Parlevliet 'in case after case, it has been asserted that the pursuit of justice may be negotiable depending on the political circumstances but the truth is not. Truth has assumed the position of an absolute value, one that cannot be renounced under any circumstances' (1998, 142). This claim is not very persuasive. The search for the 'truth' was never as absolute as this statement would appear to imply.

At some Amnesty hearings it became apparent that individual perpetrators were responsible for the occurrence of the events that led to a gross human rights violation. The problem was that a partial breakthrough relating to the reasons why a violation occurred was not necessarily followed by a perpetrator deciding it was appropriate for an applicant to revise their ethical beliefs or to alter the basis of their own convictions. Some perpetrators found it very difficult to engage in a process whereby they were expected to explain why they felt so little towards the persons who had been their victims.

Second, although Habermas suggests it may not be possible to specify in advance what kind of truths are likely to emerge from a truth-telling process it should be possible to identify the procedural conditions that will enable aspects of the truth to emerge. In practice, a central weakness of the Habermasian approach is that it seems to imply that the successful establishment of a free and open dialogue will always depend on the participants in a public debate entering participating with the fullness of their being. In relation to some hearings it has to be acknowledged that it was far more common for a perpetrator to enter into dialogue with his or her victims with the smallest fraction of his or her being than for him or her to express the fullest amount that is imaginable.

Third, although the requirement that a discussion is free of force is desirable in practice there are any number of concrete reasons why individuals may not be prepared to come forward and to express the fullness of their own experiences in an open public hearing. Some of the factors that contributed to a less than full 'truth-telling' outcome included the reluctance of perpetrators to make statements of fact, to accept the wrongness of their actions or to disclose subjective experiences that might show them in a bad light.

The commissioners who were responsible for managing the truth-telling process were also aware that the results of particular hearings could be significantly destabilised in circumstances in which the perpetrators of an event failed to apply for amnesty. Given the presence of this possibility the participation of: (i) perpetrators; (ii) victims; and (iii) relatives of the victims of a violation were never entirely free of an element of coercion. Many of the disclosures that were made during an Amnesty Committee hearing were predicated on the fact that individual applicants were forced to make a strategic choice. The amnesty process was based on the legally codified 'if-then' logic of a threat. If a perpetrator refused to disclose their *individual* involvement in a human rights violation

and new evidence came to light then he or she might be prosecuted in the future. Therefore, it makes sense to argue that the majority of the persons who applied for amnesty were motivated to do so because they wanted to avoid criminal *and* civil liabilities rather because they wanted to communicate something about a past event. This section has shown that the issue as to whether a hearing could promote a durable accountability-creating outcome was partially dependant on whether the individual who agreed to participate in a hearing did so in order to communicate their specific truths. My first conclusion is that one can only judge the outcomes that followed from particular truth-telling hearings by taking into account the interests of the participants. Although the outcomes of particular hearings were enhanced by the adoption of at least some aspects of the ideal speech situation these aspects were also undermined by the legal peculiarities that structured the relationships between perpetrators and victims. The absence of a pure form of rationality should not lessen our awareness of the efforts that *were made* by some perpetrators and victims to work through the consequences of the past in relation to the present through an open and frank exchange of their opinions. These encounters occurred in a fluid political-cultural context in which the participants on different sides of the 'pro' and/or 'anti' apartheid divide were fully aware of the fact that the negotiated settlement had altered the balance of power between each party.

My second conclusion is that it is not self-evident how the TRC could persuade the perpetrators to participate in a truth-telling process with the fullness of their being. The truth-telling process was never entirely free of coercion because perpetrators were expected to participate in the process on the basis of a legally sanctioned threat. The *content* of this threat was structured in such a way that perpetrators were acting entirely rationally when they decided that they would only reveal particular aspects of the truth. Although the chronological factors that led to the occurrence of an offence were established in many cases the precise reasons why an individual perpetrator decided to follow one course of action in preference to another was not unambiguously established. This was because many of the perpetrators who agreed to disclose the reasons why they had committed a specific offence ran the risk of being refused amnesty if it could be shown that the offence that they caused to occur was the result of a malicious motive. Given this peculiarity it is difficult to imagine how the agreement to disclose specific factual truths might be followed by a perpetrator agreeing to pay the highest (rather than the lowest) accountability-creating premium that it was possible for him or her to pay.

The decision to promote a legally effective accountability-creating outcome was at odds with the imperative to establish a pure form of understanding between the participants.

### **The ambiguities of the consensus theory of truth**

For Habermas the presence or absence of truth is similar to the concept of rationality insofar as it 'has less to do with the possession of knowledge, than with how speaking and acting subjects acquire and use knowledge' (1997a, 8) to accomplish their goals. Habermas distinguishes between two limiting cases as to how speaking and acting subjects utilise an existing body of knowledge in order to mutually influence each other. At one end of the spectrum a rational action may be based on a strategic purpose. Starting from the ontological presupposition that the world is the sum total of all that exists an agent acts *rationally* by selecting the technical means that will enable him or her to acquire mastery over a process, a thing, an event, a person or a group of persons. An action is strategic insofar as one party *exerts influence* over the other party in order to achieve an outcome that the first party intended the second party to comply with. For instance, a pickpocket who temporarily distracts the attention of a victim by bumping into him or her does so in order to achieve a consciously intended objective. In this case, the aim is to acquire possession of the property of another person without the victim knowing that an act of transfer (or an act of dispossession) has taken place. This act is strategic because the culprit decided to use a behaviour altering means (the force of distraction) to achieve a consciously intended purpose (to steal an item of property).<sup>44</sup>

At the other end of the spectrum rationality refers to the goal of communicating understanding by expressing a statement that can be judged to be true in language. Communicative action refers to the way in which the unity of an inter-subjectively shared lifeworld is established through two or more actors entering into dialogue with each other and using this occasion to reach a mutual understanding with each other.

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<sup>44</sup> According to Habermas 'what is at issue is the question of whether there is an alternative to the solution of conflict by violent means, or in general, to overwhelming: to wit, the freely achieved commonality of well-founded convictions. Contrary to the stereotype occasionally drawn of me, I would like to insist that I am by no means advocating a linear continuation of the tradition of the Enlightenment. After all, I have studied the *Dialectic of Enlightenment* just as extensively as others, I have continued to pursue Max Weber's paradoxes of enlightenment and have sharpened them into the thesis of colonisation' (1990c, 127-128).

An act of argumentation refers to ‘types of speech in which participants thematise contested claims’ and support or criticise them through the use of reason (1997a, 18). Habermas claims that from the moment that a speaking and acting subject has made a statement its status as a potentially truthful statement can be evaluated by the persons to whom it is addressed judging the following aspects of its validity: (i) the factual truth of a statement; (ii) the rightness of a norm in relation to the audience of the person; and (iii) the sincerity of expression of the speaker’s declaration. If there is a persistent disagreement between the participants in a dialogue they can thematise their respective differences by deciding whether the issues that they are unable to resolve refer to ‘something objective, something normative, or something subjective’ (1990a, 136).

According to Habermas, the uniqueness of communicative action derives from the fact that ‘the process of reaching an understanding functions as [the] mechanism for coordinating action ..through the participants [reaching a rational] agreement concerning the claimed validity of [the] utterances of a [speaker]’ (1997a, 99). In relation to the goal of attaining a consensus of convictions based on justifiable reasons the participants in a dialogue are judged to be able mobilise the *rationality potential* that resides in each actor’s relation to the truth, the rightness and/or the sincerity of each spoken statement.

First, in relation to the truth of a statement *validity* refers to the extent to which a propositional statement corresponds with the facts insofar as they can be verified. In relation to gross human rights violations the corroboration of their incidence would involve the examination of the oral and written testimonies of the victims and perpetrators of a violation and the establishment of the reasons why they occurred.

Second, in relation to the rightness of a norm *validity* refers to the way in which interpersonal relationships have been (and continue to be) regulated by norms. The rightness of a norm can be judged by the recipients of a speech act in relation to their perception of what a speaker said as well as a perception of what he or she omitted.<sup>45</sup>

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<sup>45</sup> In relation to the goal of working through the meaning of the past in the present the *rightness* of a norm can be interpreted from a number of different vantage points. First, the decision to concentrate on the need to question particular norms to the exclusion of others may reflect the fact that the truth-telling process might not have occurred unless concessions were made to the parties who opposed its occurrence. Second, the rightness of a norm can be interpreted in relation to the normative standards that emerged out of the complex decision-making processes that followed the negotiated settlement. The sources of

The rightness of a norm can also be interpreted in relation to the idea that it must satisfy certain formal conditions in order for it to acquire a more general normative legitimacy.

Third, in relation to the sincerity of a speaker *validity* concerns the extent to which the implicit intention of a speaker to disclose the truth concerning privileged aspects of their own experiences leads to the truth and nothing but the truth being expressed. The principle of honest disclosure is particularly important in situations in which the *sincerity* of a speaker is established through the way in which he or she discloses 'subjective' experiences that no-one but him or herself could possibly have access to.<sup>46</sup>

In summary, the three relations of the actor to the world are ascribed to speakers and listeners who participate in a dialogue whose purpose is to produce a consensus. It is the participants themselves who by entering into dialogue with each other attempt to establish a consensus by deciding whether the statements that they have expressed can be rationally assessed in relation to the criterion of their truth, rightness and sincerity. The participants in this process claim 'truth for statements or existential propositions, rightness for legitimately regulated actions and their normative content and truthfulness or sincerity for the manifestation of subjective experiences' (Habermas, 1997a, 99).

If a hearing does make it possible for the participants to reach a shared understanding of a problematic theme this would give rise to a common definition of reality. This is a freely achieved commonality of convictions relating to a particular issue or theme. Arriving at a shared interpretation of an issue denotes that all the participants affirm the validity of a statement insofar as their 'yes' replies communicate the idea that a specific utterance does meet at least one of the conditions of validity referred to above. These are 'the representation of states of affairs [that are factually true], the maintenance of an

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evidence that emerged out of these complex processes were not available to me. Third, the rightness of a norm can be interpreted in relation to the application of specific human rights standards to the individual cases where it was (or was not) disputed that a specific gross human rights violation had in fact occurred.

<sup>46</sup> The question is whether it is possible to persuade an alleged perpetrator to agree to give testimony without sanitizing or denying their *personal* responsibility depends on a variety of situational factors. On the one hand, one might investigate whether the intention of a speaker to tell the truth was consistent with the way in which he or she performed under questioning by disclosing aspects of his or her's experiences. On the other hand, the moral reflexivity of a representative may also depend on whether he or she is able to admit that specific human rights violations occurred when he or she was in charge of a specific office.

interpersonal relationship [that are regulated through norms] and the manifestation of a lived experience [that has been uttered in all sincerity]' (Habermas, 1990a, 137).

In relation to *the validation of an empirical truth claim* the idea that a consensus of convictions may emerge from a shared dialogue implies two further conditions. First, a true statement refers to an event that falls within the realm of possibility rather than something that lies outside of it. In relation to a hearing one's hypothesis would have to be that the more the procedures that were followed enabled the participants to distinguish between statements that lie within the realms of factuality versus those that do not the more likely it was that its findings would acquire a status of credibility. As a consequence of this process the establishment of well-grounded statements of fact would reduce the total number of entities about which a true statement can be made. For example, by reaching a common definition of the perpetrators who were responsible for commissioning and/or carrying out human rights violations it may be possible to narrow the range of illegitimate denials and to extend the scope of informed public debate.

In relation to *the world of legitimately ordered inter-subjective relations* it may also be possible to agree on a common definition of the totality of normative relations that the system of apartheid breached during the period in which it was in its ascendancy. The truth-telling process may also lead to realignment of the relationship between competing explanations of the past by corroborating some accounts and ruling out others. This process may also make *possible in principle* for the participants to rule out particular codes of conduct that the wider community cannot possibly return to in the present.

Finally, the process of giving testimony at a hearing may enable victims, perpetrators and the representatives of particular parties to express unique aspects of their experience that they alone have access to. The disclosure of subjective experiences may also establish a benchmark that reveals the true feelings of one person towards an adversary.

To avoid misunderstanding it is necessary to reiterate the claim that Habermas equates the ideal of communicative action with the achievement of a consensus of convictions rather than with the intentions of the participants to *bring about* such an outcome.

Although the communicative exchanges between the participants denotes the mechanism by which their action is coordinated there is no guarantee that the free exchange of opinions will lead to a well-grounded consensus of convictions. Habermas



qualifies his argument by arguing that the success and failure of a dialogue will also depend on the motivations, the competence and the relative sincerity of the participants.

He also acknowledges that there may be circumstances in which an agreement that has been arrived at through a dialogue does not rest on a rationally defensible basis. A consensus can be imposed by one participant on another through the use of sanctions that aim to change the convictions of the other persons from a *yes* to a *no*. An agreement that has been obtained through dialogue but conceived through the use of force does not count as an agreement that binds all of the participants to the consequences that follow. A speech act is only successful if the other participant accepts the offer contained in it by taking (however implicit) a 'yes' or 'no' position on each of the agreed statements.

This example shows how indistinct the boundaries may be between a legitimate and an illegitimate outcome. However, Habermas implicitly defends his argument by claiming that the conditions that enable a strategic act to be carried out are different than those that need to be enacted in order for a consensus of convictions to emerge. Whilst an actor who intervenes in the world 'strategically' is able to take the credit for the success of his or her intervention the same principle does not apply to a speaker in a dialogue who uses reason to persuade others of the correctness of his or her case. Whilst the causal creation of an intended state of affairs in the strategic world can be ascribed to the actor *alone*, the success of a communicative process *depends* on the yes/no responses of each of the persons who agreed to participate in a dialogue together.

In relation to the prospect that a particular hearing might establish a well-founded consensus of convictions it was always a little unrealistic for the participants to be expected to judge the validity of every statement that was uttered by the participants. To achieve this outcome it would have would been necessary for each person to judge: (i) the truth of each statement; (ii) the rightness of each norm in relation to the speaker's audience; and (iii) the sincerity of expression of each speaker in relation to privileged aspects of the subjectivity of the other speaker to which only they have full access to.

The idea that the participants in a truth-telling hearing could (or should) be able to arrive at a freely achieved consensus of convictions does provide us with a standard against which it is possible to assess the outcomes of a particular hearing. However, it

was far always too utopian to suggest that even the most expert participants could be able judge the truthfulness of every single speech act in such an unpredictable setting. It is also difficult to imagine how the participants could forge a consensus with each in circumstances in which the perpetrators agreed to reveal selective aspects of the truths.

A second source of ambiguity relates to the presupposition that a truth-telling hearing is supposed to produce a well-grounded consensus of convictions. Some hearings did lead to an acknowledgment that an atrocity had occurred. However, it was not always possible for the parties who agreed to enter into dialogue with each other (the perpetrators and their victims) to reach an agreement relating to the reasons why a specific violation occurred or the question of who was responsible for its occurrence. In relation to the identity of the persons who were responsible for a violation there is a clear difference between the judgment that an act of torture may lead to suffering and the acknowledgement that the suffering of a victim was caused by a specific perpetrator. In this context, one of the unacknowledged limitations of Habermas's theory is that the division of validity into truth, rightness and sincerity is far too general to be of use. It is never entirely clear whether the purposes that the truth is supposed to serve as a regulative idea could (or do in fact) overlap with the normative concerns of each of the perpetrators and victims who were either: (i) interacting with each other across the room of an Amnesty hearing for the first time; or (ii) resuming eye to eye contact with each other following a series of intimate but asymmetrical encounters on a previous occasion.

What is missing from Habermas's account is an analysis of the reasons why specific aspects of the 'truth' appear to matter more to some individuals than they do to others. It would appear that not all individuals are endowed with the same normative convictions. In relation to the Amnesty and Human Rights Violation hearings the truths that appear to matter the most for the victims and/or their relatives were not factual or narrative truths. It was 'moral or interpretative truth and always an object of dispute' (Ignatieff, 1996, 114) between the perpetrators and victims who agreed to attend a hearing. Although it was necessary for the parties to agree on a shared chronology of events what mattered to the victims was whether moral responsibility could be attributed to the persons who ordered a violation to occur as well as to the persons who carried them out.

In summary, during the Amnesty hearings the participants were able to promote a far lower level of truth than the establishment of a well-grounded consensus of convictions. In circumstances in which particular the perpetrators were permitted to relate a series of plausible facts to an implausible interpretation of the meanings of those facts only a partial consensus was likely to occur as a result of each party agreeing a set procedure. The attempt to establish particular truths by exploring all points of view did not always establish a factual consensus in the Amnesty and Human Rights Violation hearings. The most that the truth-telling process could achieve was for the participants to draw a distinction between those statements that were obviously false and those statements that were more than likely to be true that false within the limited remit of the TRC mandate. In summary, the most the hearings could do was to 'narrow the range of lies' that were permissible given particular disclosures and to extend the range of statements about which there might be 'reasonable disagreement' in the future (Ignatieff, 1996, 114).<sup>47</sup>

A further problem with Habermas's methodology is that his performance-based model fails to specify the means that would enable us to judge how a series of constraints that were established prior to the occurrence of a hearing shaped the dialogue that followed. The distinction between a strategic and a communicative resolution of a public issue does alert us to the fact that when the TRC was created – via the agreement of its mandate – some truths were remembered at the expense of others. However, it is difficult to imagine how Habermas could respond to the objection that his theory fails to explain the reasons why some 'resolutions' are far less complete than many others. How will it be possible for the best argument to prevail if one party has forced another party to follow a mandate that is based on a principled refusal to acknowledge that the criminality of a system of rule extended beyond the occurrence of individual excesses? Habermas fails to consider how the impact of a series of procedures that were established prior to a hearing limited the types of truth that the participants were permitted to discuss and prevented the participants from expressing a fuller perspective.

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<sup>47</sup> Michelle Parlevliet worked as a researcher at the South African Truth and Reconciliation Commission. She notes in a footnote to her paper *Considering Truth. Dealing with a Legacy of Human Rights Violations* that when the Ignatieff quotation 'was brought to the attention of staff members of the South African TRC, the response was generally *very positive*. Staff considered it useful, feeling that it set more realistic and achievable goals for the TRC (rather than endlessly focusing in 'The Truth')'. She also states that 'it highlighted what the Commission had already been able to do. The quote ended up being circulated in the TRC, with staff suggesting claims that could no longer be supported' (1998, 159).

Finally, there are sound 'sociological' reasons to believe that even if all the conditions for producing a common definition of the meaning of an event are present the most that a dialogue could achieve is to lead to a realignment of the opinions of the participants. It is not self-evident how a truth-telling process that aims to disclose the reasons why an offence occurred will lead to a change of the normative convictions of the participants. A detailed understanding of the political-cultural context of apartheid as a system of rule was the precondition for the participants to 'work through' the reasons why specific offences occurred at different moments in time and with such an alarming regularity. Given this starting point it was probable that the disclosure of the reasons why specific groups of perpetrators were able to commit specific gross human rights violations would create conditions of normative discord amongst their supporters and their allies.

In summary, we have arrived at the paradoxical outcome whereby the truth-telling process created a system of stratification by that divided the participants in a hearing into: (i) those for whom specific factual disclosures created a greater 'normative' accord; and (ii) those for whom the occurrence of a specific disclosure created greater 'normative discord'. Given this outcome, it is not evident why it is reasonable for Habermas to arrive at the conclusion that the consequences of the past in the present can be rationally 'resolved' through perpetrators and victims agreeing to participate in a public debate that is orientated to the achievement of a commonality of convictions. One of Habermas's central contributions to the German Historians debate was the idea that it would only be possible to work through the consequences of the past in the present if the participants agreed to pay the most costly 'normative' premium.<sup>48</sup> If this principle is to form the basis for a settlement of damages it is hard to imagine how the participants in a truth-telling process could agree to resolve their 'specific' differences.

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<sup>48</sup> Habermas used the term 'A Kind of Settlement of Damages (Apologetic Tendencies)' in an article that appeared in *Die Zeit* on the 11<sup>th</sup> of July 1986. The article includes a number of formulations whereby he questions the tendency for persons in the present to pay their responsibility for a shady past by paying the least costly premium that it was possible for them to pay the victims of the crimes of National Socialism. The start of the article singles out Alfred Dregger. He was a senior member of Chancellor Helmut Kohl's Christian Democrats. He 'commanded an infantry battalion in the second world war and proudly describes himself as a member of the war and reconstruction generation which rebuilt Germany out of the ashes of 1945' (von Waldensee, 1995). Habermas took issue with the attempt by Dregger and his friends to reject the view 'that one should distinguish between the culprits and the victims of the Nazi regime' (1988a, 26). Habermas argued that someone who 'insists on mourning collective fates, without distinguishing between culprits and victims, obviously has something else up his sleeve' (1988a, 27).

The question as to whether a participant will experience accord or discord may depend on how they judge a statement in relation to the conditions in which it was uttered. A heightened level of discord is more likely to occur in those circumstances in which a people's conception of itself as a 'just' and a 'reasonable' people has been publicly revealed to be at 'partial truth' at most or a series of downright 'lies' at the very least.

Although it was not always possible for the participants in a hearing to alter the normative basis on which the convictions of the other party was based the distinction between the strategic and communicative uses of a dialogue should be retained. This distinction is a valuable regulative ideal. It draws attention to the risk of individual commissioners equating a partial meeting of minds at a 'factual' level with the judgment that the participants resolved all the issues that divided them in the past. It is always tempting for the participants in a truth-telling process to repeat the mistakes of the past in the present by equating the use of force with the achievement of a consensus. Habermas is correct to argue that the causal creation of a desirable state of affairs in the realm of politics can be ascribed to a political leader who uses behaviour altering means (such as the passing of a law) to compel others to fall into line with his or her intentions. He is also correct to argue that it makes no sense to apply the same model to the dialogues that emerged between the participants in a series of truth-telling hearings.

He reminds us that although it may be tempting to substitute an agreement achieved through the use of force with a consensus based on a rationally defensible consensus of convictions it is counter-productive to do so because one of the unintended consequences of this process is that may negate the experiences of the participants. In circumstances in which the achievement of an agreement can only be established through the well-founded convictions of the participants themselves it also makes no sense to equate a partial understanding with the emergence of well-founded consensus.

## **Conclusion**

This chapter has argued that it is possible to understand and explain the normative ends that the TRC could and could not influence via two distinct but related strategies. On the one hand, I used the concept of an ideal speech situation to judge whether leading members of the TRC were able to use the means at their disposal to establish hearings

that enabled perpetrators and victims to settle their accounts with the past. On the other hand, I reversed this focus by using particular aspects of the Human Rights Violation and Amnesty hearings to pinpoint the ambiguities of the consensus theory of truth.

This chapter has shown that one of the problems that the TRC was unable to resolve was how to encourage the participants in a hearing to rationally resolve the conflicts of the past at the same time that the procedures that it utilised undermined this outcome. It was not possible in the vast majority of circumstances to persuade perpetrators to pay the highest normative premium that they could possibly pay. This is because the procedures that the commission permitted the Amnesty Committee to utilise enabled specific groups of perpetrators to disclose some truths at the expense of many others.

On the one hand, I have argued that it is not evident how the truth-telling process could be designed so that the ideals that Habermas has proposed could coincide with the normative ends that the commission intended to promote and set out to realise. This was most apparent in relation to the need to encourage perpetrators and victims to participate in a truth-telling process that was based on uneven asymmetries of influence. On the other hand, this analysis has established that the truths that mattered most to the victims did not always coincide with the truths that emerged from a particular hearing. The limit of the commission's truth-telling hearings was most apparent in relation to the issue as to whether the corroboration of specific facts was likely to be followed by a breakthrough in understanding at the level of a participant's normative convictions.

The results of this chapter imply that there is an irresolvable tension between the facts that perpetrators were prepared to disclose and the disclosures that the victims requested in order to facilitate their understanding of the reasons why a specific event occurred. The space between perpetrators and their victims were particularly frosty due to the procedures that the Amnesty Committee used to grant amnesty to an applicant. The absence of a correspondence between the ideal and the reality was shaped above all by the procedures that the TRC used to persuade a perpetrator to apply for amnesty. Perpetrators only agreed to participate because of a legally sanctioned threat. Moreover, the content of this threat was structured so that perpetrators were unlikely to disclose the factors that motivated them to commit a specific offence if the consequence of doing so was that their application for amnesty was denied as it fell beyond the remit of the Act.

Paradoxically, the perpetrators who were granted an amnesty were legally permitted to do so by paying the lowest accountability-creating outcome that it was possible for them to pay to an immediate victim or to the relatives of a victim who was no longer alive. There was also a tension between the TRC's use of the means at its disposal to offer a quick and immediate resolution for individual perpetrators and the means that were placed at the disposal of the victims to ensure that the truths that were disclosed at a hearing were not limited to a series of plausible but one-sided self-justifications.<sup>49</sup>

Once again one it is possible to identify the tendency for the commission to collude in the legitimation of the outcome whereby the interests of the perpetrators were given greater procedural emphasis or weight in one truth-telling forum rather than in another. Much attention has been paid to the judgment that the hearings that were organised by the Human Rights Violation Committee enabled the dignity of victims to be restored. My analysis has shown that the kind of justice that informed the work of the TRC in that forum was not consistently translated across to the Amnesty Committee hearings. In the latter hearings the attempt to correct imbalances and to restore broken relationships 'with healing, harmony and reconciliation' (1, 1, 9, 36) was less successful. This was because there was a tension between the forms of justice that informed the design of the hearings of the Human Rights Violation Committee and the procedures that the Amnesty Committee decided to use in each of its public hearings. Paradoxically, the forum within which it was most necessary to promote an awareness of the factual and normative reasons why perpetrators were motivated to commit a

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<sup>49</sup> Gillian Slovo (1998) has revealed that the perpetrators of her mother's death attempted to prove that the letter bomb that they decided to put together was sent to a legitimate (i.e. Joe Slovo) rather than an illegitimate target (i.e. Ruth First). To support this argument the two amnesty applicants (Craig Williamson and Roger (aka Jerry) Raven) decided to apply for amnesty for the attempted killing of Joe Slovo and the actual killing of Ruth First. They decided to do so because their application might be turned down if it could be shown that they acted out of malice by deciding to kill the wife of Joe Slovo rather than the man himself. To support this lie Williamson had to 'persuade the panel that, although the envelope was genuine and although he saw its stamp (top right), its logo (top left) and its address (bottom centre), he never saw the name of the addressee. Figure that. And the lie entraps Jerry Raven as well as he struggles to convince us that he could have tailor-made a bomb and fitted it, fingerprint-free, in an envelope without ever looking at the envelope in question' (1998). Gill Slovo concludes by stating that, 'they sent the bomb to Ruth because they couldn't get him. She didn't lay down her life in the struggle ... she was murdered. When George Bizos cross examined Williamson it became apparent that his partial self-justifications could easily turn into venomous rage at the prospect that he was being called to account for his own actions. Bizos asked him: 'And you didn't care whether the victim was killed – or his wife, or his child?' Williamson replied 'When you say I didn't care ...it made absolutely no difference to me whether I killed Joe Slovo or Ruth First'. According to Gillian Slovo, 'he glares at George, his voice is venomous ' am man who hates enough to kill "... but I never in my life targeted an innocent child" he quickly finished' (1998). The truths that emerged out of these hearings had to be fought for at every step.

specific offence was also the forum in which the victims were least able to acquire an understanding of the reasons why a specific incident occurred during the past. The procedures that the Amnesty Committee decided to use allowed individual perpetrators to disclose specific facts without disclosing the full reasons why an incident occurred. Perpetrators were permitted (as Habermas might have suspected) to pay a very small premium to the victims in exchange for a complete and irreversible amnesty. The TRC report acknowledges that the granting of amnesty came at a very high price for many of the victims. The lack of a resolution that followed specific hearings (1, 5, 121, 65):

was made even more difficult by the fact that those who applied for amnesty did not always make full disclosure; perpetrators recounted versions of events that were sometimes different. The inability to reach a clear version of truth in respect of particular incidents led to confusion and anger on the part of many victims' families and members of the public.

The 1998 report fails to reflect or to offer any reasons why this outcome emerged. I argued at the end of the second chapter that if a precise memory of the offence is a precondition for addressing the multiple legacies of apartheid - as a criminal system of rule – the fault lies in the legal blueprint that was used to create the South African TRC. The use of the mandate to promote a culture of reconciliation was based on the principle that ordinary South Africans would not be permitted to draw on or to express the full meaning and the actuality of their experiences of apartheid as a criminal system of rule.

In order to establish the reasons why the truth-telling process failed to establish a break with the values that dominated South Africa during the apartheid era we need to establish what the TRC excluded from our field of vision. We also need to consider how the procedures that the TRC decided to follow prevented a settlement of damages emerging that balanced the needs of the victims with those of the alleged perpetrators. Although Habermas does specify some of the intellectual resources that are needed to address the origins of this complex issue we need to break company with him in order to specify how the use of specific procedures limited the TRC's overall field of vision.



## **Chapter 5 – Evaluating the outcomes of the Human Rights Violation and Amnesty Hearings**

### **Introduction**

In the previous chapter we discovered that it is one thing to acknowledge that the participants in a truth-telling hearing acted as rational subjects who deployed a series of mediums (communicative and strategic) to justify competing conceptions of the truth. It was quite another to suppose that it was also possible for the participants in each of these hearings to reach an agreement with each other concerning the purposes that the truth-telling process was supposed to serve at different stages in its development. Although Parlevliet has claimed that ‘what [the] truth is cannot be separated from [the question of] what we want from it’ (1988, 149) she does not provide us with the means to identify the ends that the commission was (and was not) able to decisively alter. In order to fill this gap I decided to devise a series of standards that could be used to specify the purposes that the South African TRC was able to directly influence versus those that were implicit in its practice but far less central to its day-to-day functioning.

The standard justification for a truth and reconciliation commission is that in order for the conflicts of the past to be overcome it is necessary to reject a form of justice that is orientated to the goal of punishing the convicted perpetrator of a criminal offence in favour of a form of justice that aims to restore the dignity of the individual victims. On the one hand, it is argued that restorative justice is a more appropriate model for the members of a deeply divided society to follow because it rejects a narrative of criminality by depriving a victim of the legal means to prosecute a perpetrator. On the other hand, it is claimed that this model can contribute to the restoration of relations of civility between the victims and their perpetrators by enabling perpetrators to disclose the reasons why a specific violations occurred and restoring the dignity of their victims.

Dyzenhaus claims that the restorative model of justice ‘seeks to make those who were most abused by the old regime full participants in the political community which is forged during the transition. At the same time, it seeks to integrate those most responsible for perpetrating the abuses back into the same community’ (2000, 474). It also aims to avoid the outcome whereby one party gains the satisfaction of seeing a

convicted offender being sent to jail following a successful public prosecution. By granting victims *and* perpetrators the right to be accepted back into the community it also aims to promote relations of reconciliation between one party and another.

Due to the uniqueness of the amnesty granting process the mandate that the South African Truth and Reconciliation Commission was expected to follow did not establish an absolute division between retributive and non-retributive forms of justice. The applicants who applied for amnesty on an individual basis by disclosed their full involvement in a violations were expected to supply the incriminating evidence that would enable those who failed to apply for an amnesty to be investigated in the future. The commission justified its decision to combine restorative and retributive remedies together by that their use could contribute to the promotion of greater social cohesion. It was 'concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation' (1,1, 9, 36). Seen from this perspective, the successes and the failures of the commission could be evaluated in terms of whether the procedures that it decided to utilise contributed to: (i) the restoration of the dignity of the victims of a gross human rights violations, (ii) the promotion of the outcome whereby a perpetrator acknowledged the harm that his or her actions had caused in the past; and (iii) the promotion of the outcome whereby the observance of due process led to the rights of both parties being equally respected.

It may appear to be self-evident that the outcomes that resulted from particular truth-telling hearings should be evaluated in terms of the standards that emerged out of the commission's interpretation and development of particular facets of its mandate. In practice, it not evident how it is possible to identify these what these standards refer to. This is because the ends or the goals that the commission decided to promote at different stages in its development can only be partially derived from the mandate that it was instructed to follow or its reported support of the paradigm of restorative justice. In practice, the ends that the commission decided to follow came from a variety of sources.

The concepts and principles section of the report claims that the commission sought: (i) to establish 'as complete a picture as possible' of the conflicts and divisions of the past'; (ii) to establish the identities of the persons who were 'responsible for such violations [killing, torture, abduction, and severe ill treatment]'; (iii) to establish their 'political

accountability as well as [their] moral responsibility'; (iv) to uncover their 'motives and perspectives' as 'part of the quest for understanding'; (v) to use the amnesty process 'to contribute to the 'rehabilitation' of perpetrators and their 'reintegration' back into [a] new society (1, 5, 130, 96-99). The next section of the chapter 'responsibility and reconciliation' extends the purposes that the commission supported one step further:

'it is ..not only the task of the members of the Security Forces to examine themselves and their deeds. It is for every other member of the society they served to do so. ...the emergence of a responsible society, committed to the affirmation of human rights (and, therefore to addressing the consequences of past violations), presupposes the acceptance of individual responsibility by all those who supported the system of apartheid (or simply allowed it to function) and those who did not oppose violations during the political conflicts of the past .... it is not enough to identify a few high profile 'criminals' ...the essential nature of a crime against humanity does not lie in the detail or the nature of the actual deeds in a particular system that is judged to be a crime .... Rather, it relates to the political structures that result in sections of the society being seen as less than fully human ...it condemns the identified group to suffering and violence as a matter of birth, over which the individual has no influence, control or escape ....Finally, it promotes moral decline within the dominant group'. The report then states that 'history suggests that most citizens are inclined to lemming-like behaviour – thoughtless submission rather than thoughtful accountability ..this is a tendency that needs to be addressed' (1, 132, 101-105).

On the basis of these different readings of the commission's key 'concepts and principles' I decided to relate the terms that the commission used to identify its explicit aims to an analysis of the secondary purposes that its plans were implicitly linked to. The terms that the commission used to describe the relationships that emerged between perpetrators, victims and other members of the same political culture support the conclusion that its commissioners were expected to use the means at their disposal to persuade each party to revise aspects of the form of life that they were socialised into. On this basis I have arrived at the conclusion that the successes and failures of the TRC can be judged in relation to a series of standards that can be explicitly *and* implicitly derived from the commission's reported interpretation of facets of its mandate. The

paragraphs that I went out above support the conclusion that the TRC aimed to: (i) establish an authoritative record of human rights violations; (ii) diagnose what went wrong in the past; (iii) unmask oppressive traditions of thought and action; (iv) restore the dignity of the vanquished and victimised; (v) rehabilitate perpetrators back into the community; (vi) revise the identity-forming traditions of the participants; and (vii) legitimise rituals that led to the formation of solidarity-creating rituals. The value of the standards that I have established as a result of my reading of the goals of the TRC is that they can be used to judge the relative ability of its commissioners to use specific truth-telling hearings to promote a variety of outcomes at different levels of abstraction.

In each of the sub-sections that follow I used each standard to interpret the outcomes of the truth-telling process in relation to the experiences of the victims and perpetrators who agreed participate in a hearing by giving testimony before a panel of officials. For ease of understanding the standards that I have devised are framed in terms of a series of 'normative breakthroughs' that can be empirically assessed in relation to the testimonial evidence of the persons who participated in a hearing either directly (as a perpetrator, a victim, or a commissioner) or indirectly (as a journalist or as an observer). Having explained the origins of the 'analytical' standards that I have devised I shall now use them to assess the 'normative' breakthroughs that the TRC attempted to promote through the medium of the hearings that it was permitted to organise. The order in which I introduce each aim reflects the need to integrate the standards that I have devised with the sources of evidence that were available to me. The sub-sections that follow are not presented in a rank order that establishes their relative importance.

### **The creation of an authoritative record of human rights violations**

The first standard involved the attempt to establish an authoritative record of the causes and consequences of all of the violations that occurred during the mandate period. The normative breakthrough that was associated with the establishment of such a record is that it was supposed to prevent perpetrators from initiating a revisionist offensive. The focus of such an offensive would include, but is not restricted to, the process whereby 'assassins of memory' attempt 'to reshape history, to rehabilitate the perpetrators [and] to demonise the [accounts of the so-called] victims' of a violation (Tadz, 2003, 129).

The likelihood that perpetrators could use the hearings to deny the testimony of victims was made less likely as a result of the rituals that the commission decided to adopt. The carefully crafted disclosure of oral testimony enabled its commissioners to ensure that the testimony of the victims acquired a direct access to 'the public ear' (Krog, 1998, 8). The 'ubiquitous *microphone*, so typical of the process with its red indicator light and translation headphones ...became *the* symbol of the commission' (1998, 7). It was through the daily use of this technical instrument that the testimony of victims and perpetrators was expressed and amplified to the community in the most dramatic way. The use of the microphone became the means through which a 'continuous vocal record' of gross human rights violations was transmitted to the entire community. Rituals of reconciliation were also adopted in order to demonstrate that even though the members of a specific *local* community may have been divided from each other in the past the disclosure of new truths might enable them to perceive each other differently. The truth-telling process also enabled the participants to 'put *who we are* on the table'.<sup>50</sup> As a result individuals were able to publicly say for the very first time, 'I now know what happened, and who did it, and what my role was. And so deep down all of us are negotiating and wrestling with *ourselves* about these facts and emotions' (1998, 16).

The disclosure of specific truths made it at least *possible* for a victim to reveal the presence of wounds beneath a surface of calm and for the immense harm that resulted

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<sup>50</sup> Four rituals were institutionalised during the Human Rights Violation Hearings. The first involved the 'Acknowledgment of Sacred Space', 'the Commissioners enter the hall in procession and this procession creates a *sacred space* for the victims. That space is separated from the rest of the audience and even from the Commissioners themselves. It contains reverential markers such as the Candle, the Litany for the Dead, and the Silence of Remembrance' (1998b, 10). Krog goes so far as to suggest that it is *as if* 'the Commission has been *sent* to the people from the newly elected government' (1998b, 10). After the Chair asks the audience to stand, 'the *victims* are led to their allocated seats. In East London, the victim's seats were right at the front: behind *them* sat the dignitaries, ministers, majors and the press' (1998b, 10). Then whilst everyone is standing 'the candle is lit by the chairperson and the names of the victims and the dead are read out. This is followed by a moment of silence. The hearing is then opened with scripture, a prayer, a song, or a time for silent prayer. After each of the Commissioners has been introduced, the first victim is called. The second ritual is 'Initiation Into Being One of the Few Who Have Been Chosen'. The use of a more intimate one-to-one approach grounds the hearing in the zone of each person who is giving testimony. The commissioner might say 'Mama tell us more about Vusi; How was he? What kind of child was he?' (1998b, 11). The third ritual consists of 'Letting Go of the Bad or the Exorcism of the Terrible Memories'. The victim or relative of a victim tell the panel their own story. The narrative is punctuated by questions. Their purpose is to unveil the specifics of a particular event. The fourth ritual is 'Becoming Part of the Blessed Greater Community'. The final phase 'is when the chairperson thanks the person for coming, for sharing. He or she then offers that person strength and prayers. This is when Tutu is at his best. He always manages to transcend (while not minimizing) the peculiarity of a story: he fits it into the broader, higher scheme of things' (1998b, 13). At times, Krog also notes that he was also at a loss when he was confronted or asked to interact with a witness or a perpetrator who did not profess a belief in God.

from the occurrence of gross human rights violations to be formally acknowledged. Although it is of course possible to dispute the claim that the commission established an authoritative record of all of the gross human rights violations of the past it is an undeniable fact that 'the TRC and its workings [were] *known* to almost all South Africans. And so whether we hate it or love it, it [does] affect us all' (1998, 16).

In conclusion, Krog is correct to characterise the truth-telling process as an attempt to change the way in which South African citizens perceived the past in the present. What she fails to mention is that there were limits to the extent to which the TRC was able to reveal the suffering that occurred as a result of the occurrence of specific violations. The problem is that although the truth-telling process contributed to the establishment of a partial record of the violations that occurred during the mandate period the mandate of the TRC acted as an obstacle that prevented a full understanding of the past emerging. The incompleteness of the commission's investigations made it difficult for its commissioners to credibly justify the claim that they achieved the goal of establishing an authoritative record of every violation that occurred during the mandate period.

### **The diagnosis of the reasons why specific violations occurred**

The second goal was to identify the pathways that made it possible for acts of aggression abroad to be followed by acts of violence within South Africa. The commission acknowledged that the security forces of the South African state gave their assistance to vigilante groups (the Black Hundreds of the South African revolution) and used local groups to destabilise their opponents most notably in Kwa-Zulu Natal.<sup>51</sup> The breakthrough that was expected to follow from these disclosures is that they would

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<sup>51</sup> According to Martin Legassick 'from 1985 onwards the [South African] state began to support and promote black vigilante groups in the townships – the Black Hundreds of the South African Revolution – in Natal Inkatha, and others elsewhere.' The South African state decided to deploy the counter-revolutionary acts of aggression that it employed abroad to prevent a revolutionary situation emerging inside South Africa. The acts of violence that followed were part of a vertical invasion led from above. The seemingly spontaneous emergence of armed bands of men attacking civilian activists and spreading terror amongst other members of the community led to what Nicholas Haysom characterizes in his book *Mabangalala* as 'a rapid escalation in the scale of conflict and violence in South Africa' (1986, 1). The term *mabangalala* (or 'vigilante') is associated with 'potentially murderous gangs, intent on intimidating, injuring or killing anti-apartheid activists (1986, 2). Vigilante groups were used to change the balance of power in the townships via the slogan of 'law and order'. According to Haysom, 'the South African Police (SAP) and South African Defence Forces (SADF)' deliberately used terror tactics to 'combat popular organisations'. They also intervened in particular communities by assisting vigilante groups.

destroy the illusion that the violence and suffering that occurred on a mass scale was the product of events that were unrelated to the defence of a system of white minority rule. The politicians who assembled the building blocks of counter-insurgency (at different stages in its development) did not arrive from nowhere. Nor once they had authorised the creation of these structures did they disappear into the background. The policies of the security forces interacted with a pre-existing political culture that was home grown. The commission made some progress documenting apartheid era violence and using the sources of evidence that it established to prove that particular denials lacked substance. It became less and less credible for persons who had grown up in the system of political relations that the National Party had established to ignore a mounting body of evidence that revealed the participation of their leaders in a series of human rights violations. A key element of the destabilisation strategy of the South African state was the creation of 'middle groups' or 'counter-guerrilla' forces to use violence against their political opponents who were perceived to be the key proponents of a revolutionary onslaught. According to Bill Berkeley 'this was the basis for Pretoria's support for RENAMO [Resistance National Mozambicana] and UNITA [National Union for the Total Independence of Angola], [and] it became the basis for its support for Inkatha as well. Pretoria viewed Inkatha ..as a bulwark against internal revolution. Its aim was to build up Inkatha as an anti-revolutionary force' (2001, 168). The Malan Trial documented the similarities between the strategies that the SADF used to establish clandestine supply lines with Renamo rebels in Mozambique and its plan to use Inkatha as an offensive military force that could be used to destabilise its opponents within South Africa. The architects of Operation Marion<sup>52</sup> attempted to 'use the RENAMO option, which had brought Mozambique to its knees, inside South Africa itself' (2001,168). Military bases in Northern Namibia were used to train 200 Inkatha fighters. The alliance between Inkatha and the security forces also evolved into a permanent institutional relationship

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<sup>52</sup> Operation Marion was the code word for the alleged Malan-Buthelezi conspiracy. It 'derived from "Marionette". It implied that Buthelezi was a puppet'. Even though he was a staunch critic of apartheid as a system of rule he has also been accused of being a stooge and a collaborator. In an interview with Berkeley at the offices of the Minister of Home Affairs Buthelezi flatly denied such charges: 'I am not going to respond to the propaganda of my enemies!' he seethed. 'I'm not going to get into these insults! Everybody knew I was anti-apartheid,' he said. 'Everyone knew!' (Berkeley, 2001, 188-189). 20,000 black South Africans were killed in political violence between black South Africans between 1985 and April 1994. In Natal, nearly 2,000 victims were killed in 1993. This was well above a decade-long average of 100 deaths a month or 3 to 4 killings per day. According to Berkeley, a similar number of persons were wounded. Bush knives, spears, grenades and guns were the main weapons that were used during these armed conflict. 100, 000 citizens were also driven from their homes (2001, 153).

with the ZwaZulu police acting as an extension of the SAP. From the point of view of the generals, Chief Buthelezi was merely a cog *in their* machine. According to Howard Varney,<sup>53</sup> 'Prince Gideon Zulu (then KwaZulu Minister of Welfare and Pensions), B. B. Biyeal (then Major of Esikaweni), Mrs Lindiwe Mbuyazi (prominent IFP member in Esikaweni)' and many others 'played a role in establishing the Esikaweni Hit Squad ....support actions included general direction; the identification of some of the targets; the provision of arms and ammunition; vehicles; and the cover-up of crimes committed by the hit squad' (1997, 25). The Esikaweni hit squad was suspected to have been responsible for 10 murders and at least 7 attempted murders between 1992 and 1993.

The TRC was less successful in addressing the reasons why the routine operation of a supposedly 'democratic' system of rule enabled the most senior decision-makers in the country to approve the use of violence to destabilise or to eliminate their opponents. One reason for the lack of focus to the commission's investigations was the tendency for its senior commissioners to use the idea of restorative justice to interpret the past. It was claimed that the promotion of relations of reconciliation was necessary in order to put an end to relations of enmity between one group and another and to serve as the basis for the participants to settle their differences by forgetting the events of the past. The ethic of forgetfulness was justified by reference to a doctrine of reconciliation. It was based on the idea that forgiving one's enemies for their actions and refusing to specify the criminal nature of their actions was more appropriate to the priorities of the government than the declaration that justice depended on no stones being left unturned. The Government of National Unity refused to observe international legal standards by rejecting the duty to punish criminal acts in favour of the 'potentially disastrous practice of treating *state crime* as requiring no accountability and no responsibility' (Tatz, 2003, 152).

In summary, the leaders of the National Party were well and truly let off the hook. There was 'no trial of the key [political] and [criminal] issues' (2003, 152). The leaders of the National Party and high-ranking officials refused to accept the judgement that the acts of aggression that they authorised in the course of the struggle were illegal acts. In the

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<sup>53</sup> Howard Varney was the Chair of an Independent Task Force that investigated a series of crimes that were allegedly committed by senior members of the security forces of the South African state.



face of overwhelming evidence to the contrary the claim was made that the persons who authorised 'these acts' did so in good faith and were not guilty of a criminal offence. Neither individual representatives of the state nor the leaders of the National Party acknowledged that a series of policies that they agreed to follow were in fact illegal. The decision to grant perpetrators a conditional amnesty established the precedent whereby the state could authorise criminal actions with impunity. The occupants of specific state offices were not held to account for the consequences of their actions.

### **The unmasking of oppressive traditions of thought and action**

The third end was a product of the fact that the TRC attempted to use the testimonial evidence of perpetrators and victims to unmask oppressive systems of thought and action. The prospect of a breakthrough was made possible through perpetrators and their victims being given the opportunity to disclose the circumstances that led to their *personal* involvement in the events that preceded the occurrence of a specific violation. The testimonial evidence that was disclosed at the Human Rights Violation hearings Committee led to an implicit acknowledgement that the acts of violence that were used to defend a criminal system of rule were (depending on one's perspective) were also counter-balanced by acts of violence that sought to undermine the same system of rule.

The commission failed to make explicit the historical factors that resulted in the ANC and others deciding that they had no choice but to participate in the armed struggle. It also failed to acknowledge that the reason why the liberation movements committed acts of violence was in order to force the National Party to enter into negotiations. The TRC agreed to grant amnesty to individual perpetrators in exchange for their agreement to disclose the reasons why they participated in the occurrence of a specific incident. By using the same procedures to treat all perpetrators in exactly the same way it became extremely tempting for the commission to overlook the differences between the violence of the state and the violence that emerged out of a national liberation struggle. The failure of the commission to acknowledge the different causal factors that gave rise to the occurrence of different types of violence led to the small number of offences that were committed by a movement of national liberation being used by their adversaries to excuse or minimise the human rights violations that were also committed on their side.

The commission attempted to promote the outcome whereby the testimony of the victims and the perpetrators appeared at its hearing could be used to delegitimise the acts of violence that were committed by all the participants in the conflicts of the past. Boraine defined this issue as follows, 'the thesis is White power, the antithesis is Black power, and what we have to struggle together for in this country is a synthesis that will resolve the basic conflict between White and Black power' (2000, 23/24). The creation of the commission occurred at a momentous moment and the liberal beneficiaries of the negotiated settlement used it to delegitimise the politics of the past in the present. In doing so they laid the basis for the emergence of a form of politics without extremes.

On the 2<sup>nd</sup> of September 1996 Annie Silinda sat down with her daughter at a hearing in Nelspruit and recalled the circumstances that surrounded the death of her son. Frank worked for SASOL (the South African Coal, Oil and Gas Corporation). He returned home from work at the end of the day. Later a gang of youths came to wake him. It was six thirty in the morning. He was taken to a meeting of comrades. When he queried the purpose of the meeting he was told that his father was already there. He therefore, 'jumped the fence [and] went to the meeting' (Case 1323, 1996, 1). Other local boys agreed to go with him too. Annie then notes that '*they burnt them and my boy ...they took an axe and they actually axed him on the head. Two boys who recognized him ran to my home and said to me 'stand up, Frank has been burnt to death'. I asked what wrong he had done? ..they said no we don't know. I then left, I decided to run across the river and behind me the other men called ...[they said 'please come back, where are you running to?'. ...'they said no, come on we have seen a person running from the opposite direction, ..black with ashes ...and thinking it was my son I went back ..and I asked him, I said, what happened to you? Who injured you? And he said. I do not know. ..and he said, I don't know who the perpetrators of these acts are. And he said to me he did not know the people who burned him. I said to him, 'Not even one of you can identify the people who did this to you?' And he said 'I will tell you tomorrow'. He said I will tell you when I arrive in the hospital. I said to him, 'please tell me'. ..*He only opened his mouth like a bird and then closed his mouth again* and his eyes were now turning their colour and I cried'* (Case 1323, 1996, 1 & 2). Frank was just twenty-four years of age when he was murdered. Mrs Silinda's son was not an activist. Nor was he well-known as a person who was involved in political activity. After the killing of her son the police failed to investigate the cause of his death. It was alleged that he was killed because he

was an informer and no case was made against his killers. Anna concluded by stating that it was her wish to be permitted to meet the perpetrators face to face. Then they could 'tell me what happened and why did it happen. Maybe [then] my soul can have peace. Because I never really knew what killed my son' (Case 1323, 1996, 4). Hugh Lewin responded to Anna's final request by acknowledging that 'there were factions on *both sides* and the actions *they conducted* were *really* terrible. People were burnt to death.' He noted that the people gathered here today 'feel the pain that you felt' and concluded by stating that the TRC would 'try and make some investigations as to who the perpetrators were' and would enquire whether they would 'come and make peace with you' (Case 1323, 1996, 5). He thanked her for her courage and for telling her story.

Although it was generally acknowledged that the killing of a person suspected of being in league with one's political opponents could in no sense be defended the question did arise as to whether the disclosure of aspects of the 'factual' truth would encourage the perpetrators to acknowledge the need to revise the basis of their own convictions? It is not obvious how one can gauge the impact of the testimony that I outlined above on the convictions of the persons who agreed to carry out the murder of Mrs Silinda's son. I have found no evidence to suggest that Frank's killers applied for amnesty for this act.

In summary, although the TRC was able to establish the causes of specific offences it was unable to unambiguously unmask the rational (and non-rational) basis of the systems of thought and action that created the impetus for specific offences to occur. In order to grant amnesty in an even-handed way the Amnesty Committee tended to judge each case more in terms of its consequences than in terms of its motivating causes. The judgment that specific offences were the result of different chains of reasoning was minimised in favour of a forensic investigation of its procedurally conceived causes. Given this starting point it was not obvious how the commission could unmask the rational (and non-rational) origins of pre-existing systems of thought and action.

### **The restoration of the dignity of the vanquished and the victimised**

The fourth aspect of the truth-telling process is that it was supposed to restore the dignity of individuals who suffered as a result of a gross human rights violation. This emphasis begs the question as to whether the process of giving voice in speech to the

suffering that an individual had endured could lead to the outcome whereby a specific individual was able to regain a measure of control over the meaning of a past event. In relation to the outcome of this process two variations were likely. First, through the narration of unique aspects of an individual's life history it may be possible to show how the impact of a specific experience tested the very deepest levels of their resolve. Second, there may be a cathartic moment to this process insofar as the telling of a story to others may enable them to acknowledge the extremity of a victim's experiences. The following extract of testimony has been selected to illustrate each of these possibilities.

On the 3<sup>rd</sup> of September 1996 Johanne Frederick Van Eck entered into conversation with Yasmin Sooka, Hugh Lewin and Alex Boraine. He had been on holiday with his family. Their time together was punctuated by the occurrence of an event that changed his life forever. He started his testimony by saying that it was too traumatic for him to talk about the 'land mine experience step by step'. Therefore he would give his testimony 'in the form of questions. But questions ...that can be answered by you, yourself ...[Mr Chairman] ..do you know how it feels to be blasted by a landmine? Do you know [how] it feels to be in a temperature of between 6000 and 8000 degrees? Do you know how it feels to experience .. a blast ..so intense that even the filings in your teeth are torn out? Do you know what trouble reigns if you survive the blast and that you must observe the results thereof? Do you know how it feels to look for survivors, only to find the dead and the maimed? Do you know how it feels to see crippled loved ones lying and burning? Do you know how it feels to look for your three-year old child and never, Mr Chairman, never to see him again and forever to wonder where he is?' (Case 0707, 96, 4).

Mr Eck was travelling with the De Neyschen family near Messina. Six days before Christmas and around 5 'o' clock in the afternoon the vehicle in which they were travelling hit a landmine. It exploded under the right back wheel causing the death of one of his sons. It was five hours before help arrived at the scene. The next day Mr Van Eck and his son buried three of his family members and a day later his three friends, the de Neyschens. Following the incident his business faltered: 'this incident meant that I degenerated into nothing but a poor burden in society' (Case 0707, 96, 4). Mr Van Eck asked the panel 'are you going to take this up or are you going to turn a blind eye?' Despite the suffering that he endured Mr Van Eck concluded by stating that 'the God in

whom I believe is the one who gives me the strength to be able to sit here before you today and speak without crying. He clears my thoughts and he consoles me and it is the only way I can overcome it. How it is going to work in other people's cases I do not know' (Case 0707, 96, 4). Alex Boraine's replied by saying that, 'the story you have told is like a nightmare. Its a horror story ...a story of a family having fun ..suddenly blown to bits'. Mr Van Eck's testimony was also an elegy to his survival and a reminder of the harm that resulted from the incident.<sup>54</sup> Mr Van Eck's testimony bore witness to the fact that the past is the present that *in his case* was never ever likely to pass away.

In summary, the TRC was able to restore the dignity of some of the victims of a gross human rights violation in an even-handed way. However, it did so by equating the offences that were committed on one side with those that were committed on the other. The presentation and selection of the testimony of the victims in a 'even-handed' way resulted in the commission making the offences that were committed by the liberation movements more visible and under-representing those that were committed by the state.

### **The rehabilitation of perpetrators**

On the one hand, the truth-telling process could not in and of itself change the way in which perpetrators and victims perceived the relative decency of each other. On the other hand, the Amnesty hearings created a symbolic space that permitted individual

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<sup>54</sup> Mr Johannes Petrus Roos also gave testimony at the Nelspruit hearing. His wife was driving a car in front of him. He remarks that 'you could see the lights at our home. ..my wife said to my son "here are the house keys, please unlock the doors for us". He leant over from behind her and at that moment she detonated the landmine. I saw the flames underneath the car and I saw the car being tossed into the air ..pieces of metal and dust were in the air ...I pulled up and jumped out and said "God why?", I went closer ..she was severely injured ..and she couldn't feel her legs anymore.' (Case 0707, 1996, 2) Mr Roos concluded by saying that 'these weren't easy times for me. It was not ..an easy time for my five year daughter who had turned six ..that child never cried. That child doesn't cry today either ..My child Johan was 15 months old at the time, [he] dealt with the matter in a much better way. He is a very happy child'. (Case 0707, 1996, 3) At the end of his testimony Mr Roos requested permission from the Chairperson to say a prayer for South Africa whilst he was sitting there. This is that prayer 'Dearest God, thank you that we can be here and praise you this afternoon. Thank you for being a living God. Thank you Lord Jesus that you are the one who knows and that you are the one can determine what happens to everyone. Oh, God, we pray this afternoon for this Commission, and we pray for the people who sit here and give evidence. That you grant them the necessary support and strength. We pray oh, God, for this country. We pray oh, God, that you will grant us peace in this land and that You, oh, Lord, will be recognized as the Almighty God. I ask this all through the name of Almighty God. Amen'. (Case 0707, 1996, 7). At the end of the hearing Antjie Krog returned to her hotel, 'it is dark when I enter the foyer of the Nelspruit Hotel. I cannot put things together. The cries of the night are in my ears, the jolly faces in the bar and the air that smells of spring – how do I integrate it?' (1998a, 142) She then found a note waiting with her door key. It says 'this life is so terrifying ..I stare at my words. The tight knot of my heart shivers' (1998a, 142).

perpetrators to ask the relatives of the victims whether they would agree whether it was appropriate from them to agree to lift or to remove the sanction of vengeance. Hannah Arendt is correct to note that ‘forgiveness is the exact opposite of vengeance, which acts in the form of reacting against an original trespass’ (1958, 240–41). Although the cause of each response is the same – the need to work through the implications of a perceived injustice – the outcomes of these responses differ considerably. Whilst the act of forgiveness ends the cycle of violence an act of vengeance is self-perpetuating. If perpetrators are to be publicly rehabilitated then a rejection of the ethic of revenge has to be linked to the relatives of the victims agreeing to embrace an ethic of forgiveness.

Agreeing to forgive a perpetrator for the act that he or she committed is not easy. Following through one’s own convictions and agreeing to meet the person who committed an offence is never easy in circumstances in which the object of an act of forgiveness is ‘lit up in all its purity after the most deeply felt wrong’ (Tavuchis, 1991, 36). At the end of the amnesty process many perpetrators were not forgiven. In the circumstances in which the relatives of a victim decided to agree to forgive a perpetrator for his or her actions the tension was so great that one could sense the drop of a pin.

Piet Meiring was approached by Charl Coetzee. He was a pastor and was acting on behalf of Eric Taylor. Meiring noted in his diary how ‘a meeting was eventually arranged.. ..Mrs Goniwe, a strong critic of the TRC process refused to come, but the rest of the family ..travelled from Cradock to Port Elizabeth for the occasion. The families had many questions....Taylor answered the best he could. At the end of the evening he turned to the Goniwe family, ‘I came to ask you to forgive me, if the Lord can give you the strength to do that ...’ The response of the family was incredibly moving, ‘one after the other, the family members came to the fore to shake Mr Taylor’s hand and to assure him of their willingness to accept his apology, to forgive him for what he had done. ...The son of Matthew Goniwe walked up to the policeman. His right arm was in plaster, but with his left arm he embraced Eric Taylor. ‘It is true’, he said. ‘you murdered our father. But we forgive you’. After the meeting Charl reported what had happened to Piet. He then phoned Desmond Tutu. ‘I heard the news,’ Tutu replied, ‘Mrs Goniwe told me this morning that the next time she would be there’ (Meiring, 2000, 198). It is important to acknowledge that there were high profile cases whereby the relatives of victims gave their consent for their tormentors to be forgiven and accepted

back into the community. It was in response to cases similar to the one that I have outlined above that Mr Tutu claimed that ‘the victims who suffered the most were also the ones who wanted to reached out and to embrace their tormentors with joy’.<sup>55</sup>

In conclusion, the TRC was able to facilitate relations of reconciliation between specific perpetrators and victims through the encouragement of face to face reconciliation. However, it was not clear whether it was appropriate for its commissioners to equate a partial breakthrough at this level with a more complete settlement of damages. The decision of the commission to promote restorative justice did nothing to contribute to its goal of bridging the immense gap between individual and social reconciliation. It also needs to be remembered that the commission’s reliance on the ‘alchemy’ of this approach led to its commissioners agreeing to promote the least costly form of remedy.

### **The revision of identity-forming traditions**

The sixth aspect of the truth-telling process is that it aimed to persuade members of the community at large that it was no longer possible to continue to follow the norms that they had been taught to follow as a result of the way in which they had been socialised. As late as 1989 Ampie Coetzee noted that ‘the philosophy of white superiority is so widespread among Afrikaaners that it has been called *his civic religion*’ (1989, 2). Within the map of the political and social relations that this philosophy permitted a series of norms were central to the reproduction of the ideals of its members. These norms were based on an idealisation of the following principles: ‘legal authority is not to be questioned; whites are superior, blacks are inferior; the Afrikaner has a special relationship with God; South Africa belongs to the Afrikaner; South Africa is a hard land; the Afrikaner is independent; isolated, physically strong and bound to tradition; the Afrikaner is [self-sufficient with regard to] military matters [and] their [way of life] is [continually] threatened’ by the presence of a multiplicity of other groups (1989, 2).

Melissa Steyn has described the conflicts that she experienced as a result of the fact that she had been socialised in a community that demanded her adherence to similar norms.

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<sup>55</sup> His exact words were ‘it never ceases to amaze me the magnanimity of the many victims who suffered the most heinous of violations, who reach out to embrace their tormentors with *joy*, willing to forgive and wanting to reconcile’ (Van Vugt, 2000, 197).

The application of these norms to the 'other' persons with whom her group came into contact with led to some of her group denying the *human* identity of non-members.<sup>56</sup> Moreover, the privileged social identity that she acquired made it relatively easy for her to ignore the implications that followed from the expectation that one set of rules was appropriate for the members of her group and another set of rules was appropriate for all others. These perceptions were reinforced through media images of the time. At the appointed time in the day there 'they' were on one's television screen. Her daily TV diet consisted of stereotypical images of black Africans, 'wielding sticks, burning people alive in interethnic violence, delighting in plots of bloody revolution, acting out grisly crimes on innocent (especially female and frail, old) white bodies' (1999, 272).

Steyn links the presence of the other in 'white' spaces to the need for citizens with a white identity to make real the unreality of the norms that they were expected to follow. The contradiction between the 'imagined reality' that blacks were not like us and the way in which they behaved in a social setting alongside whites could not be resolved. However this tension was resolved insofar as white South Africans imagined that black South Africans ought to be 'happy' in the roles that whites had *created* for them. The effectiveness of these 'projections' could be so strong that white citizens were unable to conceive of 'black' people as persons who sought the same life-chances as themselves. These sentiments could be so powerful and the repression they were linked to so complete that the almost complete absence of public *and* private discourse on these matters could render a change of attitude a prospect beyond the realms of possibility.

Steyn concludes by crediting the TRC with the success of having pierced the amnesia that characterised the attitudes of many white South Africans during the apartheid era. She claims that the ideology of reconciliation created a plausible alternative to the idea that Afrikaners had no choice but to continue to live within an unforgiving universe. The revision of 'white' identity-forming traditions was no longer a one-to-one choice between a (regressive) racialised identity and a (progressive) non-racialised identity.

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<sup>56</sup> Steyn refers to the difficulties she encountered attempting to 'know the truth in a society that legalised the lie' through the way in which it socialised its members (1999, 274). She describes how she was disciplined into a culture of indifference that enabled her to neutralise the troublesome emotions that arose when she witnessed the oppression of others. She also describes how 'well into my adulthood, I experienced confusion about how to live in a society that demanded that to be functional by its norms, a person had to be dysfunctional as a human being'. She describes her choices in a dichotomous way. She could either live with an intangible sense of guilt or to slip back into the psychopathology of her culture.



They could chose alternative conceptions of what it means to be a South African citizen and could they could participate in the co-creation of a new type of political community.

Although the truth-telling process made it possible for identity-forming acts to be questioned and rejected this process of revision tended to focus more on individual acts than the wider political culture within which different types of offences were enacted. Although acts of violence that were previously considered to be a legitimate part of the political struggle were questioned during particular truth-telling hearings the underlying conflicts that led to the occurrence of acts of violence on a widespread scale were not.<sup>57</sup> One of the expectations associated with the truth-telling process was that if the members of a particular organisation could be persuaded to jettison particular *identity-forming traditions* it might also be possible for aspects of a new political culture to emerge. The commission failed to establish this type of breakthrough in some of its constituencies.

In summary, the culture of forgetfulness that the truth-telling process was supposed to prevent was actually extended as a result of the leadership of the TRC failing to adopt a non-negotiable stance in relation to the offences that were committed by some parties. The 'Truth and Reconciliation Commission ....never compelled Buthelezi to testify: in its final report it characterized its failure to do so as 'probably an incorrect decision'. In its defence it noted that the issue had been 'intensely debated within the commission'. However it 'ultimately succumbed to the fears of those who argued that Buthelezi's appearance would give him a platform from which to oppose the Commission and would strike the flames of violence in KwaZulu-Natal, as indeed he himself promised' (Berkeley, 2001, 190). The commission persuaded itself to take no further action.

### **The formation of new bonds of belonging**

The seventh aspect of the truth-telling process is that it sought to establish bonds of belonging between the members of different sections of the communities by applying the same norms to all citizens regardless of who they were and where they came from.

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<sup>57</sup> Krog claims that 'no black person assumed responsibility for the controversial black-on-black violence. Not even the ANC took any responsibility for what happened in Kwa Zulu Natal. The inference is that blacks were ...puppets in the hands of whites who forced them to do all that and that no one *willingly* ever cooperated for personal gain. The amnesty inference is the same: whites were ..*puppets* in the hands of their commanders. The idea of personal responsibility is not part of the TRC ritual' (1998a, 13-14).

One of the benefits of instituting discursive dialogues in the public sphere is that it enabled otherwise anonymous individuals to acquire an awareness that their fate was interdependent insofar as they were all members of the same political community. The commission's truth-telling hearings occurred at the same time that the issue was being debated as to whether the discursive idea of whom a South African citizen was sufficiently strong to penetrate the different social structures throughout the country. As a result, of particular hearings the question arose as to whether it was possible for the participants to favour bonds of belonging that transcended the divisions of the past. Was it possible for the persons who agreed to participate in a hearing to reach out and to place 'you' alongside 'me' and 'me' alongside 'you' even though they may have previously judged each other to be the members of mutually exclusive social groups? Rather than being confined to the condition whereby who *we are* was always contrasted with who *they are* the issue emerged as to whether the participants in a hearing were able to perceive themselves as far more than the sum of their race and/or class relations.

The sources of evidence at my disposal do not provide a clear answer to this question. Antjie Krog who was involved in the TRC from start to finish as a broadcaster does credit the commission with the achievement of having created new bonds of belonging between a range of individuals who were directly involved in the truth-telling process. She has described the change that she that experienced in the following terms: 'If anyone had told me in 1996 that we would have become the kind of group that we have become in 1998 – united, though we differ – I would not have believed it. Because things were always bad ... you came away from the Commission feeling chewed up. I think that overall if we, as diverse as we had been, diverse in gender, faith, race, age – if we could gell as a group then there is great hope for our country' (1998a, 276). She also claims that 'my gaze, my eyes are one with the thousands of others that have looked back over the centuries at Africa. Ours, Mine. *Yes, I would die for this.* ....I realise that it is the Commission alone that has brought me to these fierce moments of belonging. When I am away from these people, I falter, I lose faith' (1998a, 277). She argues that amidst all of the difficulties that it faced the commission was unique. It 'kept alive the idea of a common humanity. Painstakingly it chiselled a way beyond racism and made space for all of our voices'. In the 'cradle of my skull it sings, it ignites my tongue, my inner ear. I realise I am changed. I want to say: forgive me, forgive me' (1998a, 278).

For a privileged few the TRC made it possible for a new awareness to emerge of some of the commonalities that linked or bound the members of different groups together.

In summary, although the commission aimed to establish an awareness of the causes and consequences of some gross human rights violations it would be a mistake to suppose that it was also able to generate a shared sense of purpose afterwards. The sources at my disposal do not unambiguously enable me to judge whether the emergence of the consciousness that particular aspects of history linked the fate of one group to the fate of another was robust enough to create new bonds of belonging on a widespread basis. I am also unable to answer the question as to whether the perpetrators and the victims who agreed to participate in face to face relations of reconciliation were also rationally persuaded of the value of conceiving each other as alike beyond their initial meetings.

### **The legitimization of rituals of remembrance**

Insofar as the spectacle of a series of opinion-forming events led to an awareness of the consequences of some of the crimes that were systematically committed in the past it was also necessary to commemorate the victims through public acts of remembrance. These solidarity-forming rituals of remembrance established reciprocal relations between the living and the dead insofar as it was the role of the relatives of a victim to keep alive a memory of the sacrifices that a victim had made for the benefit of others.

Insofar as the termination of apartheid was dependent on the way in which individuals laid down their lives in order to advance the basis of a specific cause the issue arose as to how their sacrifices should be commemorated by other members of the community. The problem was that in circumstances in which the ideology of reconciliation was assuming an increasingly dominant 'symbolic' position in the country's political culture it was by no means inevitable that the emergence of solidarity-forming rituals of remembrance would promote sentiments that were the same as those of the TRC. The danger with the commission being 'seen' to be giving its formal approval to rituals of remembrance is that its intervention might undermine its claim to be a neutral body. For example, if it agreed that the community should commemorate the sacrifices that were made by the heroes of the country's national liberation movements this judgment could

easily be interpreted by the leadership of the National Party to be a non-neutral act that might lead to the divisive political ideologies of the past being given a new lease of life. The following testimony shows how an act of heroism was noted during a truth-telling hearing but only indirectly and only then as an accompaniment to other narratives.<sup>58</sup>

On the 25<sup>th</sup> of April 1995 Mr Basil Snayer recalled an evening that he spent at home with his family. It was the day before the eleventh birthday of his oldest daughter. His wife had been baking cookies in the kitchen. Suddenly they heard shots being fired outside. His wife fell to the floor. Basil made his way to the telephone. He called a neighbour to find out what was happening. He also called the local police station. They told him that he had nothing to worry about. Outside in the back street and in front of their gate were armed men. After three attempts a caspir [an armoured police vehicle] demolished a wall beside their neighbour's house. It came to a rest opposite outside of the house where Anton was living. A few hours later captain rang the doorbell. He said 'there is a terrorist in the house next door and he needed to come in. I protested I said my family had been terrorized right through the night already and that I didn't think it was a wise thing for them to come and use my house as an advantage point from which to fire heavy artillery ..he said he didn't need my permission ..I was quite helpless and frustrated' (Case 00392, 1995, 16). Four or five policemen followed him with guns at the ready. They took up positions in the kitchen, by the kitchen window and in the bathroom next to the kitchen. Mr Snayer, his wife and his children heard voices shouting 'kom uit jou vark, come out you dog, today is your last day –today you are going to die. I didn't really know why this was happening.' (Case 00392, 1995, 16). There were 30 or 40 policemen against a single man. At around quarter to eight in the

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<sup>58</sup> The sense of inertia that followed from the TRC's position is also evident in the way in which journalists who had established close links with the Commission decided to report specific hearings. Krog's analysis of the Human Rights Violation hearings is called *The Narrative of Betrayal Has to be Reinvented Every Time*. She recalls how Anton Fransch, a member of the ANC underground, was trapped in a residential street. The security forces refused to acknowledge his status as an armed combatant. He was informed that there was no way out. He was subsequently blown to bits by the police officers that had surrounded the house where he was hiding out. The final section of Krog's narrative details the torment that Mr Yassir Henry suffered as a result of this incident. At the age of seventeen he received military training from the ANC. On his return to Cape Town he was arrested. Once the 'sheep was in the pen' his captors told him that unless he cooperated they would kill his mother and nephew (aged four). He agreed to cooperate. As a result the police discovered the whereabouts of Anton and he suffered the fate that I have outlined above. Although Henry was captured as a result of the information supplied by an informer he was left out in the cold following the cold-blooded execution of his comrade. The ANC refused to go near him. This incident reveals the complexities that surrounded the occurrence of specific violations. It was not evident 'whose' casualties should be commemorated and on 'what' basis.

morning there was a loud explosion. Mr Snayer heard a voice, 'You may come out now its all over. Later, Mr Nordieen saw the effect of whatever had been shot into the room ....there were bits of clothing on the floor – the walls and ceiling were blood splattered all – all over. Bits of what I can only describe as hair or some sort and flesh were strewn around ..that ended a – I suppose an episode in our lives ....we will never forget' (Case 00392, 1995, 17). Mr Sayer concluded his testimony with the following declaration, 'I agreed to testify here today not – not simply because the truth must be told. I also agreed because of the impressions created by claims that young cadres like Anton and Ashley Kriel, Robbie Waterwitch, Coline Williams and many others were communists or young people misguided by communists. That myth should be exploded once and for all. I believe a brave soldier died in the service of his country. I also believe I owe it to the family who were not given the chance to say goodbye. I owe it to them to get as close to the truth as we possibly can' (Case 00392, 1995, 17). He'd attempted to do this.

For Habermas, amnestic solidarity presupposes an asymmetrical reciprocity between the dead and the living insofar as the latter are supposed to save the former from the ghostly silence of historical oblivion by establishing the reasons why they were persecuted. One of the problems with his conception of amnestic solidarity is that it is not self-evident how or why the recovery of a single version of the past can be justified or how it can be used to motivate a current (or future) generation to learn from the events of the past. On the one hand, it does make sense to argue that the freedom to communicate is internally related to the democratic ideal insofar as its purpose is to establish a framework of opinion that enables ordinary citizens to address the consequences of the past in the present through the formation of a solidarity-creating ritual of remembrance. On the other hand, the examples that I have outlined imply that it is not obvious how a procedure should be established to enable the members of a specific community to reach an agreement with each other as to what should be commemorated and why.

## **Conclusion**

Overall, then, my conclusion is that the successes and failures of the South African Truth and Reconciliation Commission can be judged against critical standards. The standards that I have outlined in this chapter are controversial. They are unlikely to

secure unanimous approval because they can only be partially derived from the mandate and the codes of conduct that shaped the plans and the conduct of its commissioners. This ambiguity is a product of the fact that the TRC consistently refused to specify each of the normative purposes that its truth-telling hearings were supposed to serve. The published sources of the commission do not document a one-to-one relationship between the goals that were set out in the mandate that its commissioners were told to follow and the codes of conduct that it decided to utilise in order to judge the successes and failures of its action plans and the outcomes that emerged from particular hearings.

At the beginning of this chapter I demonstrated that there was a tension between the explicit and the implicit ends that the TRC used to judge the outcomes of its hearings. As a consequence it was not obvious how one could judge the effectiveness of its truth-telling hearings by using the criteria that were included in its vaguely defined mandate. This chapter has attempted to devise a partial solution to this problem. To that end, I have used the standards that I formulated to judge whether the TRC was able to live up to a series of tests that could be derived from an analysis of its concepts and principles. The analysis that I have carried out has enabled me to arrive at three key conclusions.

My first conclusion is that the achievement of one goal often occurred at the expense of another. Although the TRC was able to establish a partial record of the offences that occurred during the mandate period it was not able to establish comprehensive findings. The decision to promote relations of reconciliation between one party and another led to the confusion whereby some violations were investigated and others were not. The decision to follow through one aspect of the mandate at the expense of another also reinforced the perception that the TRC refused to use all the means at its disposal to address the issue as to who was responsible for the most serious offences of the past. Although the commission agreed to adopt an even-handed approach by deciding to implement the ruling that applicants should be judged in the same way it failed to acknowledge that this method might lead to the actions of different types of perpetrators being judged as if the consequences of their actions mattered more than their causes. The failure to acknowledge that specific offences were the product of entirely different chains of reasoning led to the confusion whereby its commissioners refused to acknowledge that some violations were committed for entirely legitimate reasons.

As a consequence of the commission's decision to minimise the specific historical circumstances that shaped the relation between one set of events and another it was unable to unmask the rational (and the non-rational) origins of specific violations. My second conclusion is that some of the standards that I have used to judge the outcomes of specific hearings were definitely implicit in the practice of the TRC. In contrast, others standards were not formulated as explicit aims that a commissioner was expected to promote but they were implicit in the working practices of the commission.

Insofar as some of the standards that I identified cannot be explicitly derived from the mandate that the TRC commissioners were expected to follow the inability of the TRC to promote their occurrence could be interpreted to be the result of a procedural failure. For instance, it is true in a literal sense that the mandate failed to specify that the TRC should promote a form of justice based on the legitimation of rituals of remembrance. Therefore it may not be appropriate to judge the outcome of particular hearing by referring to a standard that the participants were not explicitly instructed to promote. This objection states that it is one thing to suppose that the commission made the conscious attempt to promote a particular outcome and failed. It is quite another to suppose that it failed to do something that it was not consciously striving to achieve.

In defence of my argument it is important to realise that the participants in particular hearings were only able to create a shared sense of the past in the present by attempting to restore the humanity of a comrade who had been killed during an armed combat. Some of the participants attempted to justify the claim that the soldiers of the liberation movements were not terrorists but legal combatants with the right to resist the state. I would be the first to admit that it was not easy in the aftermath of the negotiated settlement for the TRC to give its formal support to a ritual of remembrance. In spite of these difficulties the official report of the commission does relate its understanding of restorative justice to the goal of restoring the dignity of individuals. It does by using the results that emerged out of its amnesty hearings to refute the claim that specific victims were 'criminals, terrorists or informers' (1, 5, 128, 91). Although the restoration of the humanity of victims could run in parallel with the emergence of rituals of remembrance it remained an open question as to the form that the latter would take after the commission completed its overall schedule of Human Rights Violation hearings.

My second conclusion is that if a precise memory of all past offences is a necessary precondition for addressing the legacy of apartheid as a criminal system of rule then a key characteristic of the legislation that defined the commission's mandate was how it could be used to sidestep a full settlement of damages without appearing to do so. According to Bhargava, the TRC should be evaluated in the light of whether its actions plans contributed to the transformation of a society that has fallen into 'barbarism' into one that was 'minimally decent' for all the individuals who lived within it (2000, 45). In this context, the distinction between strategic and communicative action is a useful analytical tool. It focuses our attention on the normative slippages that may occur when the TRC decided to equate a partial breakthrough at one level of analysis with the achievement of a more extensive consensus between the participants in its hearings.

Although the substitution of a procedural goal for a communicative act can bring immediate benefits the price paid for the exchange of such unequal public goods was far too costly for the immediate victims who were forced to surrender their basic rights. Although the TRC mandate was conceived through an agreement between political leaders it was enforced through the application of a law that extended rights to the members of one group (the alleged perpetrators) at the expense of the rights that were granted to the members of another (the victims or relatives of the victim of an offence). The decision to establish the amnesty clause in exchange for the assistance of the security forces prior to the elections of 1994 led to some of the least advantaged members of the community at large being expected to bear a double burden. On the one hand, they had to forgo the option of their tormentors being brought to justice. On the other hand, they witnessed their experiences of apartheid as a criminal system of rule being minimised through the TRC limiting its investigations to a handful of offences.

My third conclusion is that in circumstances in which the decisive factor that shapes the scope of the truth-telling process is the decision to substitute one strategic goal (reconciliation) for another (the truth), the prospect of a sustainable extension of communicative rationality at all levels of a society's political culture is unlikely. Whenever the logic of the former process is allowed to triumph over the logic of the latter the greatest achievements on paper cannot compensate the passing away of the opportunity for an entire people to settle their accounts with the events of the past. The key problem is that the mandate that the TRC was instructed to follow was restricted to

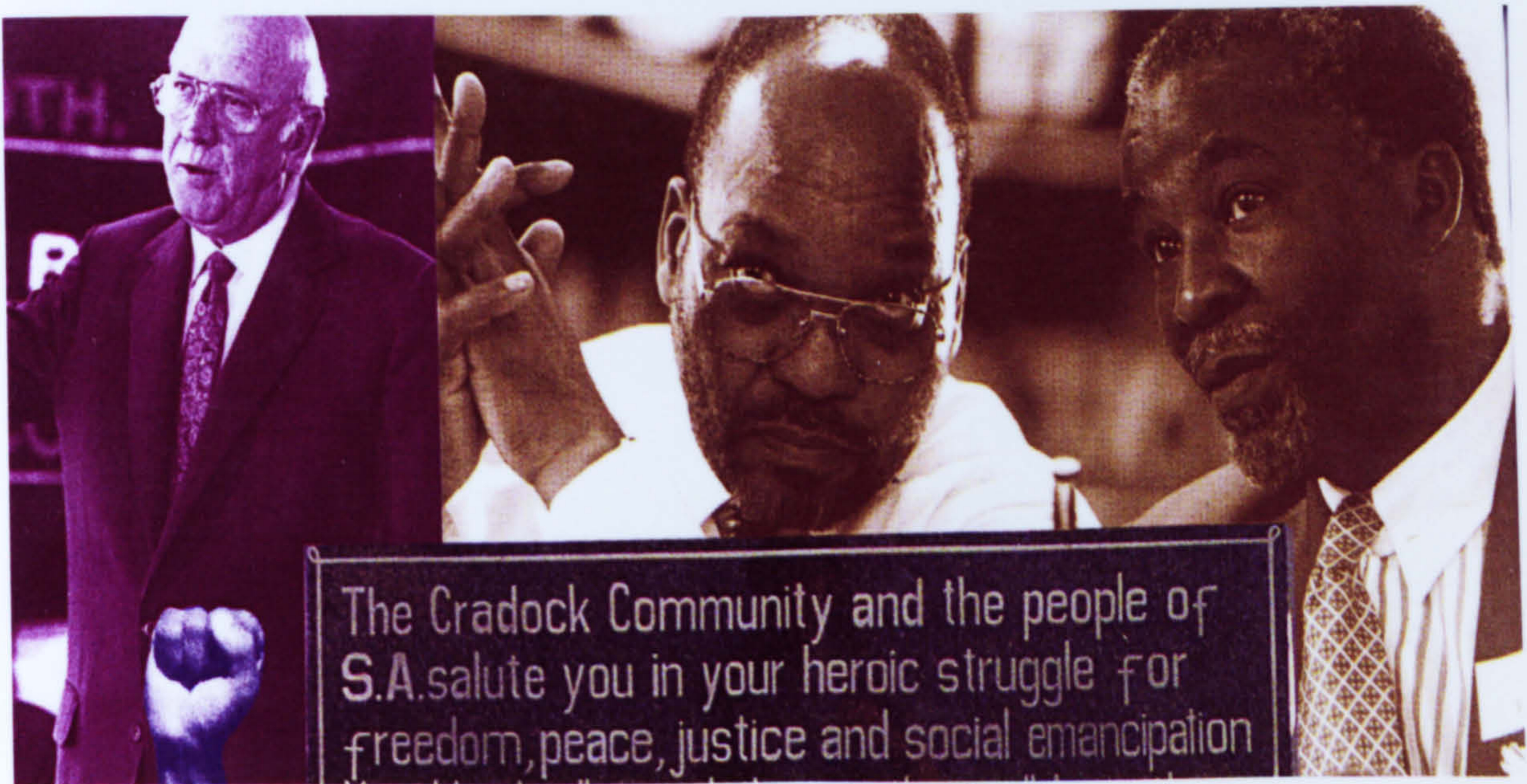


excesses on the one hand and the disclosure of individual acts on the other hand. To the extent that we can talk of a truth-telling process only concrete particulars emerged. The majority of the persons who observed this process failed to acquire an insight into the reasons why the political culture of South Africa permitted criminal acts to occur on a systematic basis in order for one group to enforce its domination over many others. It is important to realise that the displacement of the logic of criminality in favour of the rhetoric of reconciliation is compatible with the argument that TRC made a lasting contribution to 'other' issues with a bearing on the meaning of the past in the present.

It is likely that the critics of the South African Truth and Reconciliation Commission should be able to reach an agreement concerning the impact of its mandate on the action plans that it decided to promote at various stages in its development. The really difficult question is whether analysts who have been influenced by a critical-theoretic approach could reach an agreement as to why the commission's impact was so limited. Although it would be wrong to separate the pressure to compromise from the way in which aspects of the TRC's mandate were translated into specific action plans the precise links between different aspects of this process require further investigation. The next chapter will explore the limited impact of the TRC by considering the Political Party hearings.

## PART 3

### Analysing the proceedings of the Political Party Special hearings



Source : TRC Report – (Volume 1, extract from front cover)

## **Chapter 6 - The political party hearings as a truth-telling spectacle**

### **Introduction**

It is not difficult to see why each new generation imagines that it has found in Jurgen Habermas a trenchant critic who can contribute to a diagnosis of their age. This chapter argues that when they are placed side by side many of his key insights lie in conflict with each other and have been only partially related to each other. One of the difficulties is that Habermas has not attempted to synthesise the insights that are contained in his more systematic works with those that are contained in his occasional political writings. Although it is entirely legitimate to keep them apart so as to avoid confusion there is also a tendency for him to blur the boundaries between related but different writings.

A central focus in Habermas's philosophical and political texts is the question of how it is possible for an entire people to settle accounts with a past that will not go away. Some of his shorter writings also follow an imperative that was devised by Adorno. This is the principle or judgment that all of the members of a given political community should devise the means to reduce the risk of repeating the experiences of the persons who came before them through the inheritance of their predecessor's form of life. In this context, the key question is how a configuration of causes can enable or obstruct the way in which each generation of citizens can settle their account with the causes and the consequences of the events of the past through the promotion of specific remedies. In South Africa, the key issue was whether the country's main political parties could work together to overcome the taboos and the restrictions of a previous form of life without corroding the mechanisms of reproduction that lie at the heart of a given form of life. The constraints that determine the way in which mandate of a truth and reconciliation commission is used to initiate a debate on the future of the traditions of a community are a direct reflection of current and existing problems that cannot be wished away. On the one hand, the elites who were responsible for initiating such a debate on the future of the country's traditions had to avoid the temptation to create an abyss-like situation. For example, although it was necessary for them to reject the normative deficiencies of a particular system of rule they also had to establish something else to put in its place. Moreover, they had to do so through the promotion of an alternative that was capable of

acquiring the acceptance of a community that included perpetrators as well as victims. On the other hand, the country's leaders had to address the following problem. If a perception of criminality has invaded the fabric of a given form of life at different levels and points of application the issue will arise as to whether it is advisable for all of the members of a community to reject the constituents of a prior form of life in its entirety. The problem is that if the decision is made to replace one form of life with another then the current and future members of a particular generation may be objectively and subjectively prevented from being able to nourish the roots of their political identity. It is logically possible that such a sudden change may cause the bearers of a 'discredited' identity such an unbearable level of distress that they respond to the impact of these changes by promoting a series of reactionary challenges to the new political order. In addition, there is also the risk that the negation of a range of previous possibilities may lead to a state of normlessness that stimulates a political and cultural malaise and makes a return to the norms of the past an unthinkable but unquestionably attractive option.

Habermas tends to refer to the term 'a kind of settlement of damages' negatively by using it to refer to the project whereby neo-conservative politicians and their allies attempt to settle their account with a shady past that refuses to go away by paying the least costly premium that it is possible for them to pay in the aftermath of a conflict. In order to prevent the events of the past being forgotten in the present he argued that it was necessary to establish a link between a normatively-derived full 'settlement of damages' and the emergence of a culture of accountability that was robust enough to establish a consensus with the impact to penetrate the consciousness of all its citizens. He linked these aspects of the same process together via the judgment that, 'the less communality a collective life context allowed internally and the more it maintained itself by usurping and destroying the lives of others, the greater the burden of reconciliation loaded onto a ...generation's allocated task of mourning' (1988a, 26/27).

Habermas also interpreted the attempt to use levelling comparisons to minimise the normative transferability of the events of the past to the present as a moment in a larger refusal to work through the implications of a series of events of an unsettling nature. Therefore he argued against the revisionist tendency whereby the leading political and intellectual elites of the community conceived their function to be 'on the one hand, [to mobilise a sense of the past] that can be accepted approvingly, and on the other hand,

[to neutralise all] other pasts that would provoke only criticism' (1988b, 43). There is an additional reason why Habermas was opposed to the making of levelling comparisons. Their acceptance might minimize the transferability of the normative consequences of the past in relation to the present and serve as the basis for the emergence of denials. The problem with Habermas's approach is that he failed to specify what would need to occur in order for a premature return to normality to be avoided in a specific context.

The previous chapter analysed the causes and consequences of some of the truth-telling hearings that were organised by the Human Rights Violation and Amnesty Committees. It proposed an explanation that needed to be supplemented by other kinds of analysis. This chapter focuses on the Political Party hearings. I shall argue that these hearings did not serve as the foundation for the emergence of a defensible consensus of convictions. Although I agree that it is necessary to articulate a series of concepts that can be used to identify the type of truth-telling procedures that would enable a consensus of convictions to be established within a particular political culture the remedies that Habermas has outlined do not fully solve the key issues that he sought to address. To clarify the reasons why the commission was unable to promote a normatively secure outcome we need to consider a series of issues that Habermas has tended to ignore. In particular we need to develop a framework of thought that enables us to pinpoint the contradictions within each truth-telling process and the contradictions that emerged between one hearing and another insofar as they were aspects of a more general process.

I shall argue here that one of the limitations of Habermas's thinking is that it is based on a failure to think through the manner in which the accountability-creating purposes of a truth-telling hearing can be neutralised through the use of strategies of evasion. It is one thing to assert the idea that a normatively defensible 'settlement of damages' could be produced as a result of the leaders of a political party agreeing to utilise their communicative competencies by agreeing to work through the consequences of the past in the present. It is quite another to suppose that it will also be possible for the persons who are responsible for designing a political party hearing to motivate the appointed representatives of a political party to participate with the very fullness of their being.

Habermas uses the term 'a kind of settlement of damages' to refer to the strategic goal of an actor to settle his or her account with the past by paying the lowest possible

premium that it is possible for him or her to pay before, during and after a conflict. In spite of the richness of this specific argument the key weakness of his thinking in relation to specific examples (i.e. the Political Party hearings) is that Habermas has consistently failed to specify what would need to occur in order for a positive (i.e. a full) rather than a negative (i.e. an empty) settlement of damages to be promoted.

This chapter argues that it was far too idealistic to suppose that the leaders of South Africa's main political parties would settle their accounts with the events of the past by agreeing to pay the highest premium that it was conceivable for them to agree to pay. During each of the hearings it was not always possible for the investigators who had been given the task of interrogating a representative of a party to use the *immanent logic* of a witness's past or present testimony to persuade the audience that the representatives who were standing before them should accept responsibility for specific violations. Although the commission's investigators raised 'a claim to power' (Habermas, 1986, 300) the representatives of the party whom they were addressing often refused to yield to the version of the 'truth' that was being offered to them during a particular hearing. The eight sub-sections that follow are an attempt to demonstrate that the means that were made available to the investigators and the commissioners of the commission were far too limited in their scope in order to promote a complete settlement of damages.

### **The structure of the hearings**

The purpose of this chapter is to show how the representatives of the National Party and the African National Congress attempted to create the impression that they were sincerely communicating the fullness of their experiences at the same time that they decided to use a series of techniques of evasion to neutralise the truth-telling process. I shall use framework of analysis that I have devised to question the assumption that the representatives of each party were prepared to promote a full settlement of damages.

In order to clarify the difficulties that the TRC encountered in its attempt to persuade the representatives of each political party to take greater responsibility for the consequences of their actions in the past and the present I distinguish between: (i) the relative sincerity of each truth-teller; (ii) their use of techniques of evasion; (iii) the tendency for each hearing to be staged as a public spectacle; (iv) the cross-examination

of witnesses; (v) the use of documentary sources of evidence; (vi) the role of memory and forgetting in testimony; and (vii) the reasons why representatives were granted the right to neutralise the focus of the questions they were asked during each hearing. Although these moments of the truth-telling process are distinguishable from each other they were inter-related during a specific hearing. In the analysis that follows I argue that they should be read as aspects of a single process rather than as discrete observations.

### **The reliance of the commission on sincere truth-tellers**

The first unique aspect of the hearings is that the process of giving testimony enabled the representatives of each political party to create the impression that they were sincerely communicating the fullness of their experiences to a public audience. The submission of written documents *before* the start of a hearing together with the problems associated with the interpretation of their meaning *during* each session, provide a striking example of how actions *in* history can become entangled with the investigation *of* that history before, during and after the occurrence of each hearing. The contradiction between the need to work through the consequences of the past *in the* present and the tendency for the representatives to deny that their colleagues were responsible for acts of wrongdoing was carried over into the structure of each hearing.

The participants in this process (the TRC's lead investigators) and the persons who formed the audience for each hearing (the journalists who were responsible for covering the hearings and the general public who observed or listened to proceedings) were faced with the difficult task of interpreting the consequences of specific 'factual' disclosures. Was Mr de Klerk telling the truth or was he attempting to use the spectacle of the occasion to attempt to neutralize the accountability-creating purpose of the hearing? Were Mr Mbeki and his delegation of senior ANC representatives coming clean or were they attempting to steer the commission clear of issues of a more damaging nature? It is not self-evident how it is possible to establish an answer to these specific questions.

Following the example of Lynch and Bogen's study of the Iran-Contra hearings<sup>59</sup> I have followed their judgment that it is necessary to avoid the temptation to reduce the

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<sup>59</sup> For an introduction to their very informative text, *The Spectacle of History: Speech, Text and Memory at the Iran-Contra Hearings*, see the review by Macbeth in the journal, *Human Studies* (2000, 423-438).

struggle to promote one version of the truth over another to a ‘clash of ideologies’ between opposing groups whose interests were totally irreconcilable (1996, 23). I begin my analysis by demonstrating how the witnesses who participated in the hearings sought to evade the normative content of the questions that they were expected to answer by the TRC’s investigators by attempting to destabilise the boundary that demarcates the telling of a ‘truth’ from the enactment of a lie. In general terms, the truth-telling process has become inextricably linked to the ideal that it should be possible for one party to alter the interpretations of the other through the force of reason. The TRC investigators who led each of the question and answer session that made up the central spine of the Political Party hearings also shared this assumption. On the one hand, they attempted to establish the reasons why specific violations occurred in the past. On the other hand, they attempted to disclose the reasons why the leaders of a specific party or movement decided to create the structures and the processes that would enable their core constituents to commit offences against the members of other groups.

In formal terms a lie can be interpreted to be the anti-thesis of the truth in two respects. First, through an observer being able to detect a difference between what a witness said was true in speech and the truth of each statement in relation to a verifiable event. This distinction makes it possible for an observer to detect a lie in circumstances in which the content of a witness’s statement does not correspond to the established or known facts. Second, through the judgment being made that a witness knew the facts but chose to conceal or misinterpret their true nature in order to acquire a particular advantage.

A witness may use tactics of evasion to neutralise the accountability-creating purpose of a hearing in a way in which Habermas has neither acknowledged nor theorised.<sup>60</sup> For instance, the representative of a political party may minimize the consequences of the past in relation to the present by framing successive speech acts so that it is practically impossible for an observer to judge whether he or she expressed a specific truth or a lie.

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<sup>60</sup> In his review of Habermas’s collection of essays, ‘*On the Pragmatics of Social Interaction: Preliminary Studies in the Theory of Communicative Action*’ Dr Mackenzie makes the following claim: ‘the last essay on the pathologies of communication should be the first point of call for those critics of Habermas who accuse him of not having a sensitive enough understanding of the harsh realities of everyday language use’ (2001, 105). He goes on to say (citing Fultner) that ‘this essay reveals’, “a clear recognition that empirical circumstances ... diverge significantly from the ideal speech situation” (2001b, 105). The problem with this assessment is that Habermas provides us with no new concepts with which to understand the origins of the ‘pathologies’ that he identifies in this fifty page essay. In addition, his choice of ‘dysfunctional’ families as his unit of analysis is not very inspiring (Habermas, 2001b).



During a Political Party hearing the principle that the representative of a political party should tell the truth and 'nothing but the truth' resulted in the representatives of each party being compelled to display to the audience around them their outward sincerity. The dramaturgical elements of this process were also evident in the way in which the witnesses attempted to compose a symphony of audible utterances that were intended to convey the sincerity of their intentions and the normative rightness of their actions.

During a hearing the testimony of the witnesses presented the TRC's investigators with a series of interpretative problems of the greatest complexity. First, the question arose as to how an investigator could expose an instance of deception in circumstances in which the process of working through the consequences of the past in the present involved far more than simply judging the truth or the falsity of a representative's oral statements. Second, the question arose as to how it was possible for an investigator to challenge the testimony of a witness in circumstances in which the documentary evidence that was needed in order to expose the falsity of a specific denial was absent. Third, it was evident that in some circumstances a witness could simulate the truth so effectively that he or she could also disable the 'conceptual' resources that were needed in order for the to detect or to notice that a witness had used his or her testimony to deceive them.

According to Habermas, the members of an audience who observe a witness giving testimony in a public setting should be able to detect the moment when they are told a lie by comparing what the witness *meant to say* with what he or she *did in fact say* at the moment when he or she was recalling the reasons why a specific event occurred.<sup>61</sup> In order to contextualise this claim it is necessary to understand that Habermas is locating

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<sup>61</sup> According to Habermas 'an interpreter can interpret an action rationally in such a way that he thereby captures elements of deception and self-deception. He can expose the latently strategic character of a *self-presentation* by comparing the manifest content of the utterance, that is, what the actor says, with what the actor means' (1986, 105). He then makes a far stronger claim, 'the interpreter can, furthermore, uncover the systematically distorted character of processes of understanding by showing how the participants express themselves in a subjectively truthful manner and yet objectively say something other than what they (also) mean unbeknownst to themselves'. Unfortunately, Habermas does not link the logical *possibility* of rationally analysing or interpreting dramaturgical action to any concrete examples. Instead, the accompanying footnote refers the reader to Garfinkel's, 'Studies in Ethnomethodology'.

the deception that the witness is intending to achieve in the actual process by which he or she expresses their testimony in speech to an audience who are present at the scene.<sup>62</sup> It is because the process of giving testimony depends on a speaker presenting aspects of his or her experiences to others in an open public space that he or she may not be able to monitor the consequences of successive moments or aspects of his or her testimony. He is also making the acute observation that in the process of saying something that he or she sincerely believes to be true a witness may also end up saying something that differs from what he or she initially intended. It is by detecting the difference between what a witness intended to say and what he or she did say that an observer is able to conclude that the content of one statement was inconsistent with that of another. In other words, in circumstances in which it can be demonstrated that what a witness *meant to say* is at odds with what he or she *did say* it may no longer be possible for that person to sustain the belief that he or she was telling the whole truth and nothing but the truth. The discrepancy between one statement and another leads to a perception of untruth and the witness is forced to concede that he or she made two claims that cannot both be true.

The difficulty for Habermas is that the circumstances may arise in which even the most skilled observer is unable to distinguish: (i) what a witness *meant to say* from (ii) the manifest content of what he or she *did say* when he or she gave their testimony. If a witness is a convincing actor who knows how to communicate false statements in a sincere manner the re-enactment of an event *in* testimony may prevent an observer from being able to distinguish the intended versus the actual meaning of a statement. If an observer is unable to detect an existing gap between what a witness meant to say and what he or she did say then he or she might be unable to separate a falsity from a truth.

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<sup>62</sup> For this insight I am indebted to Lynch and Bogen's analysis of the sincere liar (1996, 47-52). As they rightly argue the Habermasian argument is that the detection of a deception 'depends on an a priori distinction between a surface statement and its intentional meaning' (1996, 48). According to Habermas, 'an interpreter can interpret an action rationally in such a way that he hereby captures elements of deception or self-deception. He can expose the latently strategic character of a self-presentation by comparing the manifest content of the utterance, that is, what the actor says, with what the actor means' (1986, 105). Habermas provides no evidence to support his assumption that actors should be able to detect a deception. It is possible to imagine the circumstances in which a witness is forced to make a false claim. An inexperienced witness may find it difficult to sustain a pattern of lies because sooner or later he or she might be compelled to invent a detail that is inconsistent with a previously corroborated factual event. This example shows that it is not self-evident how one can detect an instance of self-deception by comparing the manifest content of an utterance with a conception of what the witness really meant to say. There are more simple and obvious ways in which an instance of deception can be established. A team of experts may be able to imagine and then to verify new factual possibilities through their investigations.

In summary, in circumstances in which no evident gap exists between the truth and the falsity of a specific statement and a witness does not waver in the face of intense questioning the force of a speaker's conviction that he or she is 'right' and that his or her's utterances are 'true' may disrupt the accountability-creating purpose of a hearing.

Due to the contested nature of the truth-telling process the politics of the truth-telling process was not just *present* in the setting in which the hearing was enacted. The politics of the process was also made *visible* through the utterance-by-utterance process whereby the testimony of a witness became part of the spectacle through which the objectivity of his or her replies was contested in front of two simultaneous audiences. In addition to the audience who were present the proceedings were broadcast by radio. The attempt to destabilise the accountability-creating purpose of the truth-telling process was one of the defining characteristics of the Political Party hearings.

### **The use of tactics of evasion**

The representatives who agreed to answer questions relating to the policies and the practices of the political organisations to which they belonged were permitted to use techniques of evasion to neutralise the accountability-creating purpose of a hearing. The partial promotion of this specific end resulted in the commission being unable to use the results of each hearing to construct its own narrative of the reasons why specific types of gross human rights violations occurred during the mandate period. The ability of particular representatives to neutralise this possibility can be attributed (at least in part) to the tactics that they used to preempt, defer and neutralize the question as to whether they should be held responsible for the human rights violations that occurred in the past.

In addition, the TRC's investigators and commissioners had to address the problem of how they could use incomplete sources of documentary evidence to question the representatives who were defending the record of their party before a public audience. During each hearing this difficulty led to the emergence of the following paradox. The commission's investigative teams attempted to compare and contrast what they suspected had occurred in the past with the sources of evidence of each political party. The TRC's reliance on the submissions that it received from an outside party was a problem. The documentary submissions of the main parties were typically put together

in order to conceal the violations that their members committed rather than to decisively contribute to the uncovering of the reasons why specific violations occurred in the past. The sources that the TRC's investigators could utilize fell into three categories: (i) the testimonial evidence that resulted from amnesty and human rights violations hearings; (ii) documentary sources that its investigative teams had established from various archives; and (iii) the documents that each political party agreed to submit to the TRC.

The basic problem with the TRC's investigators use of the documents that each political party submitted to it is that they were not an accurate reflection of the events of the past. The documentary submissions were written from the point of view of the present. They failed to specify the perspectives of the actors who participated in specific events. In short, the content of these texts was shaped by the decision of a party's leaders to permit only certain facets of a party's past to be openly disclosed before a public hearing.<sup>63</sup> Moreover, when the *content* of these texts was used in a hearing as a source of evidence this led to the circular process whereby the persons who had compiled a written submission were called on to determine what their submission was a record of. The interactive dialogues that followed enabled the representative of a party to contest the incongruency between the intended sense of the original document (including the circumstances in which it was produced) and the meaning that an interrogator was now attempting to 'read' into it during an open public hearing. The TRC's over reliance on the use of documents that had been compiled by the country's main political parties resulted in its investigators surrendering the intellectual terrain of the commission by agreeing to use the terms of their opponents to determine the parameters of the debate.

The acceptance of the principle that the representatives of each party could use a variety of discursive methods during each hearing to contest the validity of the documentary sources that the TRC was permitted to use also acted as a formidable constraint. The raising of procedural objections limited the ability of the commission to use the results of a hearing to establish the reasons why specific violations occurred in the past. The danger also arose that the audience who were listening to a hearing might interpret the inadequacy of the commission's methods of interrogation from the same perspective.

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<sup>63</sup> I have been unable to establish who the intellectual leaders were within the two main political parties and the role that they played in determining the content of each party's documentary submissions.

For example, by perceiving the truth relating to the events of the past as something that was simply *up for grabs* rather than something that was rooted in *an objective* process.

In summary, although the representatives of each political party declared their commitment to the goal of *working through* the reasons why human rights violations occurred in the past the material organisation of the hearings were not well-suited to the goal of putting such a noble objective into practice at the moment of its enactment. A further irony is that the hearings demonstrated that the most astute and well-trained practitioners of evasion were not the ordinary citizens of the South Africa but the representatives who spoke on behalf of the country's two major political parties.<sup>64</sup>

### **The staging of a civic ritual**

The third aspect of the Political Party hearings is that they enacted a civic ritual. This consisted of the appointed representatives of a new constitutional state being permitted to pass judgment on the deeds and misdeeds of the nation's major political parties. The hearings were organised as a staged spectacle. The representatives of a political party were subject to a process of scrutiny and the conduct of their leaders and their constituents was judged in relation to the violations that allegedly occurred in the past. A group of appointed officials were also given the authority to ask the representatives of each party to answer a series of questions that they had formally prepared beforehand. The Deputy President (Mr Thabo Mbeki) highlighted the reversal of normal 'relations of power' by noting in jest that the representatives with whom he was appearing might need to be replaced if the going got tough. Directing his comments at the commission's Chairperson, Mr Desmond Tutu, he also declared that 'there are some other people behind me, that we might depending on how difficult the questions are ..move to the front' (TRC, 1997c, 2). Mr Mbeki also acknowledged the gravity of the occasion by requesting permission for his colleagues to be allowed to remove their jackets. He also ventured the opinion that each of the sessions ahead might also get a little heated.

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<sup>64</sup> Bogen and Lynch make a similar claim in their study of the Iran-Contra hearings. They note that although 'postmodern strategies ... are generally supposed to be congruent with progressive cultural politics ..the most astute practitioners of postmodern politics may well turn out to be affiliated with such groups as the NSC [National Security Council] and the CIA [Central Intelligence Agency]' (1996, 66). In South Africa, the relevant actors were the party leaders and intellectuals who worked behind the scenes. To my knowledge no-one has established whether the persons who formulated the National Party's written submission had formal or informal links to the Broederbond (or fellowship of brothers).

According to Krog he was intending to convey two messages, 'today you are the boss, we will ask your permission to do things; second, we're here to work' (1998, 124).<sup>65</sup>

Although the Political Party hearings were organised along lines that were determined at least in part by the leadership of the commission it would be a grave mistake to ignore the extent to which they were also a product of a behind-the-scene manoeuvre. Similar to other staged spectacles the hearings provided the representatives of each party with a platform on which they could transgress the purpose of the hearing. Just as a condemned man may be able to use the spectacle of a trial to sanctify the rightness of his or her cause, the process of giving testimony in an open public space granted the representative of each party a unique opportunity to refute the allegations of the TRC.

The hearings were similar to a courtroom trial insofar as representatives agreed to testify before a hearing where they were cross-examined by a team of investigators. The journalists who publicized and reported the proceedings also portrayed the National Party hearing as if the ex-president and the party he once led was on trial. In other respects the Political Party hearings were quite unlike a civil hearing or a criminal trial. Although the commission's investigators were permitted to lead the testimony of a representative the rules of a court of law were not used to regulate each specific reply. Representatives were granted privileges that the suspect in a trial does not receive. The questions that each representative was instructed to answer had as their objective the disclosure of information of a general nature rather than the allocation of criminal responsibility for an act of wrongdoing following the occurrence of an offence. The decision to avoid the agony of a prolonged and detailed investigation concerning the acts and the omissions of *all the members* of a particular political party enabled the commission's investigators to zoom in on a limited number of controversies. On the one hand, the foreshortening of the testimony of the National Party to a single day denied the commission's investigators of the opportunity to wear down the resolve of Mr de Klerk. For instance, they were not given the opportunity to return each successive day

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<sup>65</sup> What Antjie Krog fails to mention in her eight-page analysis of the hearings is the extent to which the hearings were a product of a series of, as yet, undisclosed negotiations. Although she describes the political party hearings as a radical departure from 'the Commission's public focus until now: a shift from individual tales to the collective, from victims to the masterminds, from the powerless to those in power' she fails to ground this judgment in a viable political analysis. In her analysis, she mentions the following revelation that she had: 'Jose Zalaquett's comment comes back to me: reconciliation is not possible if the two parties do not have a secret agreement about what they see as mutually important' (1998, 102).

with interrogation techniques based on a close observation of his previous responses. On the other hand, the fact that the ex-president took the oath and agreed to give his own testimony symbolized the strength of his conviction that he would defend the honour of his party with or (as it turned out) without the assistance of his colleagues. By agreeing to abide by this arrangement Mr de Klerk was able to use the spectacle of the occasion to turn the tables on his adversaries by denying or refuting specific allegations.

Although not everyone was happy to observe Mr de Klerk using his legal and political expertise to evade the questions that he was being asked to answer, not even his most ardent critics could deny that he acted as an incredibly resourceful representative. By questioning the credibility of the commission's documentary sources he was able to puncture the watertight case that its investigators had painstakingly built against him. By making a series of procedural objections (some of which were resisted by Mr Desmond Tutu) Mr de Klerk was able to achieve one of his central goals. This was to expand the scope of what he was permitted to say until the moment arrived when he was able to make a series of almost uninterrupted and uncontested speeches. Although the ex-president was constrained by the rules of the hearing to attempt to answer the questions that were put to him by his interrogators he exploited every opportunity that he was given to break the frame of reference of the questions that s asked to answer. As a result, Mr Goosen (the TRC's lead investigator for the day long hearing) and Mr de Klerk (the National Party's only representative) were drawn into a fierce argumentative duel that resulted in each side attempting to impose their priorities on the other party. On the one hand, Mr de Klerk agreed to appear before the commission as the ex-president of a government that was widely suspected of having authorised a series of criminal offences. On the other hand, he was fighting for the survival of the National Party in the inhospitable climate that existed following the elections of April 1994.

In summary, the need to work through the consequences of the past *in relation to* the present was contradicted by the need to stage a state-sponsored civic-political ritual. The agreement to stage manage the hearings as a public spectacle permitted the representatives of each party to raise a series of procedural objections that cast doubt on the validity of the sources of evidence on which the allegations of the TRC were based.

## The use of quasi-legal methods

The fourth aspect of these staged hearings is that the commission's lead investigators were given the authority to cross-examine the representatives of each of the country's political parties in a quasi-judicial manner. It would be an over-statement to describe the inter-subjective dialogues that followed as equal to (or identical with) those that occur in a court of law on a day in and day out basis. And yet the persons who agreed to participate in a hearing as the material representative of a party would readily admit that they were the objects of a machine that operated to rules that were not of their making.<sup>66</sup> The representatives of each party were expected to answer a series of questions that were asked one after the other by an investigator and a panel of witnesses. Neither party could break off from the process until all of the scheduled questions had been answered. Unlike a courtroom hearing there was no judge to sum up the main points at the end of each day and there was no expectation that a judgment of innocence or guilt would emerge at the end of each of the sessions that constituted or made up a single hearing.

In spite of these differences the commission's lead investigators did use a series of interrogation techniques with the express intention of persuading (and/or compelling) a recalcitrant witness to retract the truth of a previous declaration or statement in the light of the sources of evidence that the TRC had established through its own initiatives. The problem was that it was not always possible for an investigator to use the sources at their disposal to persuade a representative to: (i) admit that an act of wrongdoing occurred; or (ii) to link the occurrence of an offence to a documented decision. In addition, it was not always possible for the persons who were interrogating a witness to use the *immanent logic* of a representative's past or present testimony to rationally persuade others that the person (or persons) who were standing before them were complicit in the decision to authorise a plan that led to the occurrence of a crime. Although the commission's investigators frequently raised 'a claim to power' (Habermas, 1986, 300) the individual who was being addressed would often refuse to yield to the version of the 'truth' that was being offered to him or her in testimony.

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<sup>66</sup> For the idea that the truth-telling process depends on the presence of a discursive machine see Bogen and Lynch's analysis of 'The Truth-Finding Engine' (1996, 122-143). They link the 'production of a political spectacle under the rubric of interrogation' to an officially sanctioned discursive machine.



Unlike the infamous witch-hunts at Salem where the accused were denied the means to demonstrate their innocence or guilt the Political Party hearings were rational exercises in which each representative was granted enforceable rights and privileges. There was also a Habermasian element to this process insofar as the hearings were expected to produce a consensus of opinion by calling into question those aspects of a political party's written submission that could no longer be defended in the light of the sources of evidence that the commission had established through its other public hearings.

I have not been able to establish for certain whether the commission published the procedural rules that it used to bind the representatives of each party to the same expectations. However, I have been able to reconstruct some of the rules that *became visible* at the beginning of a hearing and during each of the sessions that followed.<sup>67</sup> Perhaps the most important rule was the prescription that it was the responsibility of the commission's investigators to ask the questions and it was the responsibility of the representative of a party to answer each question by giving the most honest answer. Although this rule can be formulated in simple terms its achievement during each of the sessions that made up a single hearing was neither automatic nor inevitable. One of the problems was that the cross-examination of a representative encompassed a broader range of actions than the articulation in speech of a series of questions that could be used to compel him or her to answer a series of questions in a predetermined order. The questioning process was to a large extent a routine matter 'of going over, for the record' (Lynch and Bogen, 1996, 130) what each representative [already] knew or had already communicated to the commission through the prior submission of a written document. Mr de Klerk (a lawyer before he was a National Party politician) proved to be an exceptionally resourceful representative. He identified a series of loopholes that enabled him to evade the questions that Mr Goosen was permitted to ask him. The ability of the ex-president to find the right words to neutralize a topic of a damaging or a sensitive nature also had much to do with the fact that the interrogation techniques that Mr Goosen was permitted to employ were not robust enough to achieve their purpose.

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<sup>67</sup> The African National Congress and National Party Political Party Special Hearings were organised along similar lines. They were scheduled to occur on consecutive days of the same week.

### The commission's reliance on documentary sources

An additional aspect of the hearings is that the commission's investigators could only interrogate a representative effectively by introducing documentary sources of evidence into a hearing in order to level an accusation at the representatives of a political party. The TRC's investigators also used sources of evidence such as the minutes of a meeting to compare and contrast what these documents implicitly 'implied' had taken place in the past with the written chronologies that each party had submitted to the commission. Although the interrogation of a witness was conducted through the medium of a series of oral utterances it is important to note that the distinction between speech on the one hand and writing on the other hand was frequently subverted during a hearing. This occurred because the commission's investigators were expected to *talk through* the meaning of the *words* that had been recorded onto the *surface* of an official document.

Although the commission used documentary sources of evidence to test the judgment that senior leaders of a political party gave their full authority to the decision for their political opponents to be eliminated its lead investigators were not always effective. This was because the techniques that they decided to use to contextualise the meaning of the words that a leader or committee of representatives used in order to instruct the members of another group to commit an act of wrongdoing were not always persuasive. Individual investigators referred to a variety of documents that had been produced or circulated by senior decision-makers prior to the authorization of an action plan. A reference to an instruction might be noted on the surface of: (i) a note; (ii) a minute; or (iii) an article that was circulated to a group of decision-makers during a meeting. The commission's investigators interpreted these sources as evidence in order to argue that individual politicians at the highest level of the state authorised specific action plans.<sup>68</sup> In other words, the words included in a document were granted a 'certain objective status to the extent that they made reference to' (Lynch and Bogen, 1996, 224) a series of decisions that the TRC's investigators presumed to have been followed through.

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<sup>68</sup> To the extent that it was possible to establish a link between what a document *said* or recorded to have occurred in the past and what the written submission of each political party *omitted to mention* it was also possible for an investigator to test the adequacy of one version of the past in relation to another. Although one might have expected this type of comparison to be present in the political party hearings I have not been able to find any concrete examples that are based on particular this type of comparison. Therefore, it is possible to conclude that the commission's investigators failed to exploit a potentially effective method.

The *order of the words* that were inscribed on a document was not just the means by which an investigator was expected to question the adequacy of a representative's reply. The value of a written source also resided in the fact that that it was a record of the past behaviour of an institution that could be audibly expressed in the form of testimony. A documentary source was a record of the conduct of a configuration of office-holders. It could be cited, read out, shown to the audience and discussed in testimony with reference to the full range of its material and/or literary qualities. The oral disclosure of the content of a text enabled an investigator to specify: (i) the surface qualities of a document (including any headings, indices, and signatures); (ii) the occurrence of a specific act (insofar as it was recorded in a notebook entry or an electronic message); (iii) what the document said; and (iv) and the meaning of the words that had been used.

During each hearing detailed question and answer sequences were structured around the methodological assumption that each *citation of a text* become *part of the method* that was used by an investigators to judge *the adequacy* of representative's testimony. Similar to Garfinkel's 'documentary method of interrogation' the application of this method was based on the presupposition that the words that had been recorded onto the surface of a material text (through the use of a type-writer, a printer or a copier) were a stable reflection of a pattern of behaviour that was carried out by a specific actor.<sup>69</sup>

The commission aimed 'to use written documents as representations of real worldly events' (Bogen and Lynch, 1996, 222) that it presumed to have taken place. In spite of the logical consistency of its approach the TRC's investigators and commissioners were not always able to use the sources at their disposal to persuade a representative that he or she should accept the version of the truth that the TRC was putting to him or her. The problem was that the details that had been written down were not tied to an 'anchoring source' in the 'present intention' (1996, 222) of a specific institution or actor. In other words, the representatives of a political party were able to exploit the ambiguity of the words that were transcribed onto the documents that they were asked to consider by questioning the authorship, intention and multiple meanings of a specific phrase.

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<sup>69</sup> In the paper, 'What is Ethnomethodology?' (1984, 16) Harold Garfinkel remarks that 'not only for all investigators, but on all sides there is the relevance of "What was found out for-all-practical-purposes?" which consists ... ..of how much you can disclose, how much you can gloss and [above all] ...how much you can hold as none of the business of some important persons, [the] investigators included'.

In summary, by questioning the stability of a text Mr de Klerk was able to turn the tables on his interrogator by highlighting the contingent conditions in which it was produced. By exercising this right he was able to negate the accountability-creating purpose of the hearing by denying that a decision was followed through in action or denying that the meaning of the words that his colleagues decided to use were the same as those that were being implied or imputed by each of the commission's investigators.

### **The recall of events from the vantage point of the present**

The sixth aspect of the Political Party hearings is that each representative was permitted to recall matters of fact from the point of view of the present rather than from the point of view of his or her response to the occurrence of an event as it actually happened. In this context, it is important to realize that the events that a representative recalled in the process of giving testimony were not confined to the process whereby he or she was expected to communicate to an investigator everything that he or she could remember. For example, it was not as if the commission was asking the ex-president to recall what he decided to do on such and such a day following a particular crisis-creating event.

If an interrogator's line of questioning was heading in the right direction a political party representative was permitted to raise an objection that neither affirmed nor denied the idea that an event *similar to* the one that had been mentioned may have occurred. Although an investigator could suggest that a representative's inability to accept or to reject a statement should count against his or her credibility this was not always so. The fact of the matter is that the majority of the persons who observed this spectacle had no knowledge of the immediate factors that shaped a representative's past behaviour. The decision to neither affirm nor deny the occurrence of an incident could work to the advantage of a representative. The fact that he or she could not specify whether an act or an omission followed a specific incident was not always a cause for concern. The audience lacked the documentary means or sources of evidence to judge whether the failure of a representative to remember 'everything' was an act of insincerity or an act of honesty in relation to a specific event that may or may not have actually occurred.

A further tension is that the accuracy of the details that a representative could remember in part or had forgotten in part was not settled by a TRC investigator comparing what a

witness *had said* with an independent record of each of the historical events in question. Typically, a representative would link what he or she remembered with a disclosure of the type of actions that should have occurred in response to the occurrence of a crisis. Representative were permitted to disclose their side of the 'story'. They did so by making speeches that were only partially related to the focus of a specific question. Through the use of this method the testimony of a representative included suppositions of a conditional nature that were designed to bring about a 'pseudo-confirmation' (Habermas, 2001, 167). The objective of these speech acts was to disqualify or to neutralize an accusation that was being addressed to a specific body or organisation. The representatives of each political party used their testimony to neutralize the possibility that they should take full responsibility for the consequences of the past *in relation to the present* at the same time that the sincerity of their conduct served to 'keep up the appearance' that they were fully cooperating with the commission.

In summary, during a hearing a witness was permitted to conflate what he or she did do with what he or she could reasonably expected to do given the emergence of a crisis. Through a reading of the past from the point of view of the present a witness was able to *tell a story* that removed the need for him or her to fully answer a specific allegation. Each representative was permitted to conflate what he or she decided *to do* with the argument that this was all that he or she could reasonably be expected *to do*. The use of this tactic of evasion served as the means by which a representative could sidestep the implications of an accusation of wrongdoing without appearing to do so. Although each representative was given the full opportunity to take responsibility for the consequences of the past in the present they were also permitted to use a variety of techniques to evade or to refuse to address the consequences of their party's actions.

### **The raising of procedural objections**

The final characteristic of the Political Party hearings is that the representatives of each party were permitted to interrupt the questions they had been instructed to answer by raising a series of objections relating to procedures that they were expected to follow. The first issue related to the admissibility of a leader individualizing the 'working through process' by agreeing to act as the sole representative of his or her party. The second issue concerned the propriety of a representative being permitted to reverse the

focus of the previous strategy by making a series of ungrounded generalizations. When it suited their purpose a representative would conflate their personal declarations of regret concerning the consequences of specific policy choices with the actions of all of its constituents who were responsible for the occurrence of additional excesses. The third issue concerned the question of whether a representative should be permitted to obstruct the flow of a sequence of questions by raising a series of well-rehearsed objections to the questions that he or she was being asked to answer by an investigator. The representative of a specific party decided to follow this course of conduct in order to prevent an investigator from being able to penetrate his or her's façade of sincerity. The fourth issue related to the leeway that representatives were given to go beyond the immediate focus of a question by articulating their current perspectives on an issue. The TRC permitted individual representatives to: (i) disrupt the flow of the hearing by making speeches; (ii) read from documents that their support staff had brought along to the hearing; and (iii) to engage in protracted discussions of minor issues; and (iv) to give reasons why it was not appropriate for them to answer a specific question. Moreover, they managed to do this at the same time that they claimed that they were simply 'answering' the 'questions' that were put to them by a panel of investigators. In summary, the representatives of each party were able to impose constraints on the scope and focus of the truth-telling process by raising a series of procedural objections.

### **Conclusion**

This chapter has argued that the problems that the commission's investigators encountered when they attempted to implement durable accountability-creating mechanisms cannot be adequately explained with reference to the standards of truth-telling that Habermas has set out in detail in his theory of communicative action. The representatives of each party minimised the consequences of the past in relation to the present by situating their speech acts beyond the possibility whereby a statement could be judged to be an unambiguous expression of a specific truth or a falsity. The judgment that the hearings should serve as the basis for the emergence of a normatively secure consensus of convictions tends to miss the point as to what they were actually about.

This chapter has also demonstrated that it is not at all obvious how one can use the consensus theory of truth to think through the way in which the accountability-creating

purpose of a series of truth-telling hearings could be neutralised through the representatives of a party being permitted to utilise specific techniques of evasion. A unique dimension of this process was that the accuracy of a representative's testimony was rarely settled by an investigator being permitted to compare what a representative disclosed in testimony with an independent record of a specific event.<sup>70</sup> The representatives who gave testimony during a hearing were permitted to tell stories that extended far beyond the circumstances surrounding the occurrence of an event. As a result the testimony of a representative would often include normative suppositions of a conditional nature that were designed to bring about a 'pseudo-confirmation'. They were intentionally framed in testimony in order to neutralize the possibility that a witness should take full responsibility for the consequences of the past *in the present* at the same time that they used the spectacle of the occasion to refute specific allegations. It is one thing to assert the idea that a normatively defensible 'settlement of damages' could originate in principle from the capacity of leading political party representatives to agree to draw on their existing communicative competencies in order to work through the implications of the past in the present in an open and accessible public setting. It is quite another to suppose that it was also possible for the representatives of a party to be persuaded to participate in an open public hearing with the very fullness of their being.

My analysis of these hearings has shown that one of the weaknesses of Habermas's model of communicative action is that it is based on a series of assumptions relating to the motives of the immediate participants that he is unable to demonstrate to be true. The problem with Habermas's conception of the truth-telling process is that his argument presupposes exactly what he should be attempting to demonstrate. When Habermas claims 'that the anticipation of undistorted communication and the reciprocal redemption of normative validity claims' is 'renewed with every act of unconstrained understanding, with every moment of living together in solidarity, of successful individuation, and of saving emancipation', he is arguably making the claim that 'he is

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<sup>70</sup> The objection can be raised that conformity to the facts does not count for Habermas. His theory of truth is not logically dependent on a correspondence between the disclosure of factual statements on the one hand and their confirmation or falsification in relation to independent sources of evidence on the other hand. The problem with the logic of this argument is that Habermas does attribute a specific role to pure fact-finding. In Chapter 4 I argued that in relation to the truth of a statement the concept of validity does depend on whether a proposition is consistent with the current state of knowledge of the participants. Insofar as factuality is one of the three dimensions of validity this argument is compatible with the idea that one should compare the statement of a witness with an independent assessment of its truth or falsity.

not projecting some ideal that is divorced from practice' (Bernstein, 1983, 226). The problem with this argument is that 'the coming into being of a type of public life that can strengthen solidarity, public freedom, a willingness to talk and to listen, mutual debate and a commitment to rational forms of persuasion presupposes the incipient forms of such communal life' (Bernstein, 1983, 226) before they have been created.

It needs to be added that the coming into being of a heightened sense of community presupposes a developed sense of moral responsibility between the leaders and/or representatives who agreed to testify on behalf of their colleagues at a public hearing. In this context, there are a number of problems with Habermas's initial presuppositions. Why would the representatives of a political party agree that it is in their interest to refuse to disrupt the accountability-creating purpose of a hearing by using their communicative competences to cancel the benefits of a full 'working through' process? On what basis can it be reasonably claimed that the representatives of a party will act responsibly by agreeing to take responsibility for the past in relation to the present? Why is it reasonable to suppose that the leaders who authorised specific action plans of an illegal nature would be motivated to admit their involvement in specific violations? Is it not more reasonable to suppose that a gain in understanding is more likely to be reversed through the attempt to negate the accountability-creating purpose of a hearing? This chapter argues that it was far more likely that the representative of the country's two major parties would use a hearing to justify the emergence of a process of revision. They did so by: (i) articulating outright denials as new complexities were revealed for the first time; (ii) responding to the unsettling issues that were put before them by attempting to neutralise the focus of the questions that they were asked to answer; and (iii) recycling modes of thought that had been deeply learnt in the past in order to excuse themselves and their followers from the need to answer specific allegations. Chapter 7 argues that the commission was unable to promote the outcome whereby the leaders of the National Party were persuaded that they should use the spectacle of the occasion to confirm that they were responsible for the occurrence of specific offences. In this context, one of the key issues that emerged during the hearing was whether the single delegate who acted on behalf of the National Party (the ex-President, Mr de Klerk) would be permitted to selectively use the tactics of evasion that I have outlined above in order to neutralise the accountability-creating purpose of the hearing. Chapter 8 extends this focus one step further. It does so by addressing the issue as to whether the



leaders who represented the African National Congress also refused to settle their accounts with the events of the past by attempting to refute the allegation that they should be held to account for the occurrence of a far smaller number of offences. The two hearings occurred after the Human Rights Violation Committee had completed its sessions but before the stage when the commission was expected to use the sources at its disposal to establish an official body of truths for the entire mandate period.

They were designed to enable one of the TRC's lead investigators and a panel of commissioners to interrogate a panel of delegates from each party. The investigators who led the hearings had to face 'an enormous challenge. While they were virtually unknown outside [of the TRC and] arrayed against them were representatives' who were sharing power in the Government of National Unity (Alexander, 1990, 202). On the one hand, the National Party was a key member of the current government. Mr de Klerk had been appointed to the position of Deputy-President in the aftermath of the 1994 elections. Six of his colleagues also served alongside him at a ministerial level. This power sharing arrangement came to an end on the 9<sup>th</sup> of May 1996. This was the day when the National Party decided to implement its decision for its party members who were participating in the government at a ministerial level to officially resign. Their departure from the day-to-day administration of the government was symbolically timed to coincide with the coming into force of the country's newest constitution. On the other hand, the delegation of African National Congress representatives included the Deputy President, the Minister of Foreign Affairs, the First Minister of Defence, the Deputy Minister of Defence, the Minister of Transport, the Premier of the province of Mpumalanga, the ex-President of the ANC's Women's League and the Deputy General Secretary of the party throughout the country at large (Mr Jacob Zuma). To offset the imbalance in status between the commission's appointed officials and the delegates of a party a ritual was introduced at the beginning of a hearing. All party representatives were expected to swear an oath to tell the truth and nothing but the truth. This ritual 'functioned as a form of moral degradation. It reduced the famous, powerful people involved to the status of "Everyman". It placed them in subordinate positions *vis-a-vis* the overwhelming and universalistic law of the land' (Alexander, 1990, 204).

For Durkheim, the legitimation of a moral order is not simply a matter of ritual persuasion. It is also the product of an attempt to restore the cohesion of a community.

Seen from this perspective, the hearings were intentionally designed as a civic ritual. They were an attempt to symbolise the fact that it was only through the participation in a specific hearing that the leaders of the country's two major political parties could demonstrate their commitment to the values on which the TRC's mandate was based. During a transitional period the divisions of a nation can be lessened through its leaders using a civic ritual to confirm their commitment to a series of newly-constituted values. In the absence of ritual practices that symbolise the commitment of its members to shared values the collective identity of the community would rest on a precarious basis. Although the decision to invoke particular rituals may be based on the intended goal of restoring relations of solidarity between one party and another, 'reintegration and symbolic renewal are far from being automatic processes' (1990, 195). Symbolic agreement at one level may also coexist with perpetual disagreement at another level. The dilemma that the commission had to address is that 'while solidarity is always the concomitant of ritual, it may be expanded or contracted, depending on the specific case' (1990, 192). There were absolutely no guarantee that the representatives of the National Party nor the African National Congress would agree to participate in each hearings. Nor was it inevitable that the representatives of each party would settle their debts (or accounts) with specific events by agreeing to pay the very highest normative and material premium that their organisations could possibly agree to pay each victim.

## **Chapter 7 - The National Party (NP) hearing**

### **Introduction**

The purpose of this chapter is to analyse how the South African Truth and Reconciliation Commission assessed the record of the National Party during a one day hearing. I shall analyse the difficulties that the TRC's investigator, Mr Glenn Goosen, encountered as he attempted to hold the ex-president to account for the offences that occurred when the leadership of the National Party occupied the highest offices of state. Mr de Klerk used the spectacle of the occasion to undermine the accountability-creating purpose of the hearing and to refute any allegations of the criminal conduct of his party. In doing so his testimony contributed to the emergence of a neo-revisionist offensive.

### **The record of the National Party (NP)**

During the first session the record of the National Party was assessed in relation to the judgment that it was 'not prepared to accept responsibility for the criminal actions of a handful of operatives of the security forces of which the Party was not aware and which it would never have condoned' (TRC, 1997d, 5). This statement was derived from the second set of documents that the National Party had submitted to the commission. This took place approximately six weeks before the hearing was finally scheduled to begin.

The tone of the session was set by Mr Goosen employing a technique of interrogation that sought to demonstrate the incoherence of the categories that the National Party used in its written submission to explain the reasons why its leaders should not be held responsible for a series of human rights violations that alleged occurred during the past. Immediately after Mr Goosen began to question Mr de Klerk it became apparent that he had conceded the intellectual high ground to a terrain of his opponent's choice. He did so by using the categories that the National Party had devised as the medium through which gross human rights violations were analysed in terms of their causes. The commission could have set out its own unique framework of thought in order to judge the actions of National Party members within a series of related command structures. Mr Goosen's methodology was based on the attempt to establish whether the categories

of causation that the National Party proposed in its documentary submissions were consistent with the sources of evidence that the commission had been able to establish.

By tacitly accepting that the events of the past could be perceived through the prism of the categories that the National Party decided to devise it became difficult for Mr Goosen to establish the reasons why gross human rights violations occurred in the past. What was also lost from the equation was the political-cultural context that made it possible for different offences to be carried out by the state in a systematic manner. Instead of accepting the normative assumptions of the National Party's written submission the commission should have been bolder in setting out its own perspective. This would have involved the attempt being made to demonstrate that two classes of action made it possible for party and/or state officials to commit specific violations. On the one hand, offences were committed as result of the subjective intentions of specific office-holders who decided to authorise others to carry out a specific plan of action. On the other hand, an offence was the result of the acts of omission of other office-holders who directly or indirectly made it possible for violation to occur on a regular basis.

In order to clarify the causes and the consequences of party or state-based violations the TRC should have attempted to demonstrate a link between each of these processes. First, through an attempt being made to explain how the emergence of a specific political culture made it possible for acts and omissions to become an unquestioned aspect of the political and/or administrative functioning of a specific state apparatus. Second, through an attempt being made to explain how the diffusion of particular norms made it possible for the persons who were responsible for commissioning and/or carrying out specific offences to follow through the results of their action plans. The categories that the National Party decided to utilize were inventive precisely because they plausibly obscured the political and cultural conditions that made it possible for criminal action plans to be carried out on a systematic basis during the mandate period.

In order to establish the most minimal standards of a normatively adequate account the commission should have related acts of omission to acts of commission by situating each category of action within the political culture within which they were enacted.

This focus was surrendered. Mr de Klerk was asked to explain how the typology of 'motivating' causes that he and his colleagues had devised could be used to explain how a series of 'excesses' were committed by a handful of maverick perpetrators.

A further problem is that Mr Goosen became so immersed in the logic of his opponent's argument that he was unable to reach the point at which he was able to communicate the reasons why it was a mistake for the argument to be accepted that the crimes that the National Party committed were reducible to the actions of a handful of mavericks.

Before I consider specific examples I shall outline the 'categories' that was used by the National Party in order to defend the conduct of its leaders during the mandate period.

In its written submission it proposed a well-crafted explanation of the reasons why specific offences occurred during the period when its leaders ruled the country.<sup>71</sup>

First, the submission claimed that some gross human rights violations were committed by perpetrators as a result of a 'bona fide ...interpretation of [the] orders and strategies' (TRC, 1997d, 5) that they had been instructed to follow by their superiors. The National Party admitted that members of the security forces committed offences. Although specific security officers made the mistake of interpreting the orders of their political masters in an incorrect manner they were acting in good faith at all times. This explanation tacitly accepts that the leadership of the National party routinely 'ordered' the security forces to use unconventional strategies against their opponents. It also acknowledges that they routinely instructed the security forces to use unconventional means to undermine the actions of their political opponents. What this explanation does not do is to imply that there was ever a moment in time when the leadership of the National Party leaders instructed the security forces to break the law. In circumstances in which the persons who were publicly employed to serve the ends of their elected leaders contravened the framework of legality that had been established by successive administrations the occurrence of a 'deviation' was explained in three stages. First, the

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<sup>71</sup> The typology of causes that the National Party devised was referred to at the beginning of Mr Goosen's interrogation of Mr de Klerk. In its second submission to the Commission (dated the 23<sup>rd</sup> of March 1997) the National Party proposed that the perpetrators of gross human rights violations were motivated to commit specific offences on the basis of the following distinguishable causes: (i) a perpetrator acted in good faith but did so by misinterpreting the order that he or she had been instructed to follow; (ii) a perpetrator committed an offence because he or she carried out a legitimate order in an over-zealous way; and (iii) a perpetrator decided to commit an offence because they were motivated by their 'bad faith'. Mr Goosen described the first case as the "misinterpretation" category, the second case as the "overzealous" category and the third as the "bad faith" category (TRC, 1997b, 5). I clarify the use of these terms above.

individuals who committed a 'violation' were motivated to do so because they believed that they were acting with the full authority of the government of the day. Second, the individuals who committed a 'crime' believed that the order that he or she had been instructed to follow gave them the authority to use unconventional means. Third, the reason why an individual committed an unauthorized act is because he or she interpreted the order that he or she had been given in a subjectively mistaken manner. Only by making these assumptions could the National Party claim that specific perpetrators were acting in good faith at the moment when they committed an offence.

Second, the National Party proposed that in other circumstances the office-holders who were suspected of having carried out a gross human rights violation may have initially acted in good faith but ended up carrying out an order in an overzealous manner. This category is similar to the previous one insofar as it assumes that the National Party gave its full authority to the decision for the security forces to use unconventional strategies to deal with the threat that their political opponents posed to the security of the state. It then goes on to suppose that the involvement of the security forces in unauthorized acts was a consequence of the way in which specific individuals interpreted the legitimate orders of their political leaders in either an over-zealous or a negligent manner. The good faith of the individual who agreed to participate in an operation was clouded' by the overzealous way in which he or she decided to carry out a specific order. In other words, the office-holders who were given the authority and the means to defend the interests of the state went too far when they decided to implement a specific order. The implication of this explanation is that it was not the leadership of the National Party who should be held responsible for the occurrence of gross human rights violations. It was the individual office-holders who decided to act by following their own initiative.

Third, the National Party proposed that other office-holders committed crimes as a result of their 'bad faith'. They misused the resources that had been allocated to them to carry out legitimate acts and ended up committing gross human rights violations. This explanation led to the explicit rejection of the judgment that the strategies that specific office-holders decided to follow in order to undermine their opponents were either authorised by their superiors or carried out with their prior knowledge. The written submission declared that the leadership of the National Party could not be held

responsible for: (i) abuses; (ii) examples of malpractice; or (iii) violations that were the product of an individual committing an offence as a result of an act of 'bad' faith.

In summary, the submission put forward by the National Party was janus-faced. On the one hand, its leaders acknowledged the suffering that resulted from the occurrence of gross human rights violations during the mandate period. On the other hand, its elected leaders were not prepared to take any political or moral responsibility for the action of any office-holders who committed an offence without their consent or their authority. Mr Goosen decided to ask Mr de Klerk to explain how a particular offence should be located within the conceptual framework that the National Party had devised. The following extract is taken from the opening session. It demonstrates that the decision to accept the logic of the National Party's submission at face value was a big mistake:

Goosen: 'A number of amnesty applications from senior officers in the Eastern Cape now confirm the fact that Mr Goniwe and his three colleagues were indeed murdered by members of the security Forces.

In your view Sir, was this an example of them misinterpreting their mandate, being overzealous, or was it [a] mala fide action which led to abuses [occurring]?'

de Klerk: Mr Chairman it has never been the policy of the Government, the National Party ...that people should be murdered, should be assassinated. I have said that clearly. Such instruction is in conflict with the policy as it has been at all times within my knowledge.

Goosen: .. where would you place that action on the part of the Security Forces?

de Klerk: It would definitely fall outside, to my mind, the first two categories.

Goosen: It would therefore be a mala fide action, in essence, leading to abuses.

de Klerk: Ja ... anyone believing that we would have ordered [that], right from the top .. would be wrong in believing that that would be possible.

What is possible? You see you are dealing with a chain of people .. the lower down you go the more I have sympathy for a person receiving an instruction from a senior officer *if that superior officer* creates the impression that .. this is a very far-reaching order that you're getting ...' (TRC, 1997d, 6).

Mr de Klerk claimed that the murder of the four civilian activists was an unauthorized action that was carried out in bad faith. However, this admission did not prevent him from attempting to lessen the normative responsibility of the 'alleged' perpetrators. He argued that it was possible for the content of a specific order to be 'altered' or 'changed' when it was passed 'down' or 'along' a specific chain of command. He claimed that it was conceivable that an office-holder at or near to the end of the chain of command may have perceived that the unauthorized act that he or she had been instructed to follow as if it was a fully authorised policy. How was it possible for this outcome to occur? On the one hand, he claimed that it was unreasonable to believe that 'we' (the elected leaders of the National Party) gave an order for civilian activists to be targeted. On the other hand, it was entirely reasonable to suppose that an office-holder with a lesser position in the chain of command could have altered the terms of reference of an instruction in order to pursue an end or a goal that his superiors had not authorised. As a result, the perpetrator who carried out an illegal action may have been entirely justified to believe that the decision to use lethal force against the enemy had been *authorised*.

In response to this reply, Mr Goosen asked Mr de Klerk whether it made sense for a series of carefully orchestrated security operations to be characterized as if they were the product of the actions of a handful of mavericks. He referred to: (i) the decision to train a resistance movement; (ii) the instruction from Mr P. W. Botha to the former police commissioner to plant a bomb at the Khosa House building; and (iii) the decision to blow up cinemas that were showing the film 'Cry Freedom' (TRC, 1997d, 4/8). In relation to these cases his purpose was to establish where the responsibility for these actions should lie given the categories of causation that the National Party had devised.

Each time that he was asked to express his opinion regarding a specific incident Mr de Klerk denied that the perpetrators were acting 'within the framework [of] anything which comes near a reasonable interpretation of the policies of the government' (TRC, 1997d, 8). According to the ex-president, it was reasonable for the state to instruct the security forces to use covert means to destabilise the activities of its opponents. These decisions were justified because 'there was a fight to be fought against these activities which in themselves were part of the revolutionary onslaught aimed at making South Africa ungovernable' (TRC, 1997d, 9). He denied that the administrations that he had served agreed to kill their political opponents. To 'promote black on black violence, to



get people to kill other people, to get people to commit murder was not part of the policy and anyone doing that or ordering that would be *mala fides*' (TRC, 1997b, 9). According to Mr de Klerk, the accusation with which he was being charged by the TRC was not a reasonable interpretation of the policies that his colleagues agreed to follow.

When Mr Goosen was able to demonstrate that lethal levels of force were used against civilians Mr de Klerk decided to attribute the occurrence of these incidents to the actions of mavericks who decided to act without the knowledge of their superiors. In relation to the killings that were carried out by the Vlakplaas police unit the ex-president did not deny that this unit was authorised to carry out unconventional actions. However, he had been *led to believe* that its function was to persuade suspects to change sides. The ex-president then made the following claim, 'I have asked four generals who were at various stages with regard to Vlakplaas and who were because ... of the duties they held, *in the best possible position*, if you look at the top decision-makers, to know what was happening there. All four of them assured me that they did not know' (TRC, 1997d, 11). He added, 'I believe them'. He also referred to the fact that the paperwork of the unit was in good order. He had also been assured by one of the generals whom he had spoken to that 'the reports they got with regard to Vlakplaas could meet the eyes of the auditor general' (TRC, 1997d, 11). He concluded by attributing the offences that this unit committed to 'somebody with [their] own agenda and .....[their] own goals'.

According to Mr de Klerk, there were three reasons why office-holders who were linked to the security of the state might have been motivated to commit unauthorised' actions. First, the leaders of successive administrations gave their full authority to the decision for the security forces to be permitted to organise covert actions against their opponents. It was common knowledge that the army and police had to 'to fight an onslaught where there were no rules. They had to fight a revolutionary onslaught which had as its end [the] goal to make South Africa look like Zaire is looking today' (TRC, 1997d, 11). Second, he explained the persistence of deviations from civilized standards of conduct in terms of the refusal of his political opponents to abide by the 'queensbury rules'. Third, the failure of the state to enforce its own legal and civil codes was a product of the fact that periods of unrest were followed by the introduction of a state of emergency. According to Mr de Klerk, 'where you have detention without trial and the like, once again it creates circumstances and opportunities for aberrations to occur' (TRC, 1997d,

11). He concluded this section of his testimony by making the bold declaration that 'murder and assassination cannot be justified and anybody who within this framework *went as far as that* did something which was totally unacceptable' (TRC, 1997d, 11).

The ex-president was asked to explain why it was that state officials and security officers were able to misinterpret the orders of their leaders with such regularity? Instead of answering this question he decided to sketch out some of the initiatives that he decided to follow in order to remedy the situation that he had inherited. Following the departure of his predecessor, Mr P. W. Botha, he instructed the most senior police officers in the country to appear before him. He instructed them that, 'this is the end of the government asking you in *any way whatsoever* to be politically involved or to advance any political cause or to obstruct any other political cause' (TRC, 1997d, 12). He denied that the security forces were at fault before, during or after the negotiation era. It was the intelligence officers who were 'pushing us civilians' by telling us that the problems that we were facing could only be resolved through 'a political solution' (TRC, 1997b, 13). He attributed the success of the negotiated settlement to the statesman-like ability of the leaders on his side to put an 'end [to] the revolutionary onslaught' (TRC, 1997b, 11) that his opponents were responsible for promoting. It was his political party that created the 'situation where all these restrictions could be lifted'.

### **The persistence of anomalies**

Faced with such a clever adversary Mr Goosen attempted to demonstrate that it was not possible to place specific violations that were committed during the mandate period into the typology of causes that the National Party decided to utilize during the hearing. Mr de Klerk was presented with a series of acts of wrongdoing that were associated with, or linked to, the incidence of grave breaches of international humanitarian law. The first incident was the election of Craig Williamson to the President's Council after his participation in the plan that led to the murder of Ruth First in Maputo, Mozambique. The second incident was the decoration of a team of security officers who were responsible for the detonation of a bomb at the London offices of the ANC. In circumstances in which it could be demonstrated beyond reasonable doubt that the alleged perpetrators did carry out a gross human rights violation Mr de Klerk acknowledged that the culprits should be called to account for their actions. In relation

to the accusation that the leadership of the National Party was co-responsible for these offences Mr de Klerk would only concede that his colleagues might have been responsible for the creation of an environment within which excesses could occur. At the same time he also rejected any suggestion that his party should be held responsible for specific excesses that occurred during its period in high office. He acknowledged the precariousness of the posture that he had adopted by declaring that 'I am not running away from that aspect which I dealt with in my opening remarks this morning' (TRC, 1997d, 4). During the first session he had made the 'principled' declaration that, 'I accept full responsibility for our policies ... and we stand by our security forces who implemented such policies and all reasonable interpretations thereof' (TRC, 1997d, 3).

To his credit, Mr Goosen replied by setting out an incident that took place on the 27<sup>th</sup> of June 1986. The, then, Chief of Staff of the South African Defence Force (SADF) gave his authority for an operation to take place. The objective of the mission was to capture a group of men who agreed to leave their township in order to receive military training. The young men were placed inside a vehicle after their capture. They were blown to pieces in a controlled explosion. Asked to comment, Mr de Klerk replied by saying that for him this was 'just [as] shocking a revelation as to anyone else' (TRC, 1997b, 15). After a brief adjournment the second session began with a series of commissioners other than Mr Goosen being permitted to ask Mr de Klerk a series of follow up questions. These concerned the plausibility of his comments relating to the activities of Vlakplaas.

### **The plausibility of Mr de Klerk's denials**

Mr Potgieter asked Mr de Klerk whether the generals whom he had taken the time to speak to should have known what the officers acting under their command were doing? The ex-president did not believe that his intention had been to imply that the generals should have known. All he was saying was that *if anyone* was in a position to know it was these generals. It was they 'who dealt with [their] .... finances' (TRC, 1997d, 22). From his discussions with the two generals Mr de Klerk had reached the conclusion that they were not aware of what their officers were doing, 'they had a different impression of what was going on than what was actually going on' (TRC, 1997d, 23). Mr Potgieter decided to query the plausibility of this explanation. Was it really possible for officers, at a second tier level, to torture and kill so many detainees and prisoners? Could the

culprits commit each of these atrocities without the assistance of others? Mr de Klerk refused to answer these questions. However he did raise doubts concerning the validity of the testimony that the commission had received from its key informants. For instance, he claimed that Eugene de Cock and others had been caught in the act. As a result, they were attempting to pass the buck. They were saying that it was all down to their superiors. He then played to the gallery by implying that it was only natural for someone who had been caught in the act to shift the blame onto another person. He concluded this section of his testimony by claiming that, 'it happens from the smallest of sins as the Archbishop will know to the gravest of crimes' (TRC, 1997d, 23).

Once again, Mr Potgieter asked Mr de Klerk whether his explanation was reasonable. Could lowly officers carry out these acts without the assistance of their superiors? Mr de Klerk answered this question by drawing a levelling comparison. He equated the internal dynamics of the 'apartheid' state with the alleged disorganization of the commission itself by stating that although, 'it's not the policy of the Commission that constantly information should be leaked to the press, but it happens. It happens. It's a very serious issue I believe for you to have confidentiality maintained' (TRC, 1997d, 23). Having turned the tables on his interrogator he spelt out the implication of this comparison, 'although in one case we are dealing with something fairly innocuous in comparison with the other, at what level does it take place in the Commission? Should the Commission know? Should the executive head, on the side of the officials know? And likewise here, things happened, inasmuch as it happened in the period after 1990' (TRC, 1997d, 23). In one fell swoop he reduced the entire record of the Vlakplaas hit squad to the action of a Chief Executive officer who failed to use the means at his or her disposal to prevent a less senior colleague from engaging in a spot of mischief-making.

Mr de Klerk was asked why anyone would go to so much trouble. He ventured the following explanation, 'De Kock said about me, that there was in his heart and amongst some of his colleagues, a feeling that I was selling out the country ... I recall reading that they said to each other at a certain stage, well let's do this last thing now just to prove our point ...there's no reasonable explanation for that' (TRC, 1997d, 23).

### **The motives of the perpetrators**

Mr de Klerk was asked whether it was possible for a Vlakplaas commander to use the resources of the state to commit a crime and to keep their action plans a secret? He replied in the affirmative. Yes, it was possible, 'it happens every day with theft, where for months on end in the bank system *with all the precautionary methods, with all the double-checking*, where nonetheless people working for banks or for attorneys find it possible to embezzle vast amounts of money without being found out' (TRC, 1997d, 24). Mr Potgieter decided to ask Mr de Klerk why a person in the Vlakplaas situation would be motivated to go to so much trouble? According to Mr de Klerk this was 'a clear example of the mala fide category' (TRC, 1997b, 26)<sup>72</sup>. He also referred to some of the extenuating circumstances that may have motivated the security forces to carry out these actions. The need to counter the revolutionary forces generated the 'belief that the threat was such that they had to do it' (TRC, 1997d, 24). Some acts of violence could be justified if they contributed to the removal of the enemy from one's midst. Second, the perpetrators may have perceived their actions as a means of self-defence. Mr de Klerk referred to the sixteenth page of his written submission where he claimed that 'members of the security forces watched with increasing frustration while [the] revolutionary movements organised, mobilized and intimidated or killed their opponents seemingly at will' (TRC, 1997d, 25).<sup>73</sup> He claimed that whilst 'the security forces were expected to play by the rules ...their opponents could and did use any methods they liked' against his people (TRC, 1997d, 25). In these circumstances, the motive of vengeance may have played a role. Although, he admitted that he was 'not an expert witness on .. what motivates people' he was aware that his colleagues in the police force were infuriated by the discrepancies that emerged. Many of them 'had been killed' (TRC, 1997d, 25) and 'being police and having been on the receiving end of violence' they decided to hit back at the persons whom they suspected were the culprits.

### **The responsibility of the ex-president**

Mr de Klerk conceded that 'aberrations' occurred 'at high levels' (TRC, 1997d, 27) of the state but he defended his own innocence by stating that 'the blame should rest where

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<sup>72</sup> A mala fide category was an act that was carried out by perpetrators in bad faith. It was the third category of causation that was included in the typology that the National Party submitted to the TRC.

<sup>73</sup> Mr de Klerk failed to mention who these movements were or how many of his side were targeted.

the aberration or the crime originated'. He then went on to say that 'whether you are a general or whether you are a minister or .. whoever you are, if you were involved and .. that crime .. falls within the law, .. [you should] apply for amnesty' (TRC, 1997d, 27). The problem with this reply is that he failed to clarify what a crime was within the remit of the commission's mandate. Some office-holders were able to commit specific offences because it was unlikely that their superiors would agree to take action them. This was because the country's leaders did not perceive it to be in their interest to be seen to be acting against individual members of the security forces. The commissioning of specific crimes was as much a result of acts of omission as it was a result of the subjective intentions of the office-holders who were given the order to carry them out.

Dr Alex Boraine asked Mr de Klerk why he had refused to apply for amnesty. Mr De Klerk denied that he had been involved 'in anything which can be – which can constitute any credible charge – that I have been guilty of any crime' (TRC, 1997d, 28). He concluded by suggesting that the most appropriate place 'to express your sorrow .. your responsibility for things *which are not crimes* [was before] .. a hearing like this'. Dr Mapule Ramashala (of the Reparation and Rehabilitation Committee) attempted to expose the contradictory logic that characterized much of Mr de Klerk's thinking. She did so by questioning whether he was as 'in charge' of events as he appeared to imply. 'Surely', she stated, 'no cabinet minister can claim to have been unaware of gross human rights violations on the part of the security forces? If the perpetrators were not authorised specifically, what did the state do? What steps did it take to protect all citizens? Where does your argument leave the person who applied for amnesty or even those who have been granted amnesty for that matter? What are you taking moral and political responsibility for?' (TRC, 1997d, 31). Mr de Klerk replied by outlining a series of reforms that he introduced when he occupied the highest public office in the land. They included: (i) the termination of all secret operations; (ii) the reduced use of the State Security Council; and (iii) the appointment of Mr Goldstone to a commission to investigate the causes of public violence. This was his response to the many things that 'were not authorised, not intended ..of which we were not aware' (TRC, 1997d, 31).

The afternoon session began with Mr Goosen returning to some of the issues that he had touched on at the end of the first session when Mr de Klerk conceded that it was possible that some senior politicians may have authorised a series of illegal action plans.

## **The authorisation of illegal acts**

The ex-president was asked 'how it was possible for such high office-holders to believe it was right and acceptable to issue illegal instructions'? (TRC, 1997d, 32). Mr de Klerk refused to answer this question directly. He excused himself from the need to do so by stating, 'it is really not for me to try and interpret why individuals take a certain decision, ... on [the] basis of a general assumption' (TRC, 1997d, 32). He then decided to outline the factors that may have motivated an officer to hatch a plan of their own making. The motivation for some was the 'determination to defend what they saw as their historic right to self-determination' (TRC, 1997d, 33). For others it was because they wanted to use the means at their disposal to prevent the ANC and its allies from acquiring the political power to be able to put their political manifestos into practice. This was a priority for Mr de Klerk this too. Reflecting on the events of the past he declared that it was not some 'sort of McCarthyite paranoia. It was a fact that there was this strategy that ... would establish here in South Africa ... a communist foothold and [a] communist dominated government' (TRC, 1997d, 33). He added that he was not alone in this belief. Even, 'good church-going people' were motivated 'by the fact that they were fighting against forces that wanted to overthrow the state' (TRC, 1997d, 33). He refused to acknowledge that the liberation forces were fighting a just war. The security forces 'were fighting against revolutionary forces' who were 'applying no rules whatsoever' (TRC, 1997d, 33) to the political campaigns that they decided to follow. He claimed that the minds of some of the participants 'worked in such a way' that they were prepared to kill 'policemen just because they were policemen' (TRC, 1997d, 33). As a result, 'this war became an ugly war .. where the rules are blurred and where individuals get into situations where ... hatred .... makes people do things' (TRC, 1997d, 33). He admitted that atrocities occurred but only mentioned those that were carried out by his opponents. He referred to the fact that 'you've been listening for two days to the admissions of the ANC in that regard. They had to admit that ... in some instances ...[it was] ...their official policy' (TRC, 1997d, 33) to kill police officers. He concluded his speech by making a solemn declaration, 'I think it would have pleased everybody if I said it was our official policy ... I can't speak an untruth to satisfy the call for blood which there is ... I can only speak the truth as I know it and the truth is ... I never participated in such a policy, I was never involved in it. And I was never aware of such a policy' (TRC, 1997d, 33). Mr de Klerk was then asked whether he supported

the police and the armed forces? Did he support their participation in this 'ugly' war? His reply was that the policy was 'to go out and act firmly ...that is where the concept of reasonable interpretation comes [to the fore]' in this debate' (TRC, 1997d, 33).

### **The role of the State Security Council (SSC)**

Following De Klerk's denial that the National Party was responsible for acts of wrongdoing Mr Goosen decided to refer to some new sources of evidence. The commission had acquired possession of the minutes of some committee meetings. Mr Goosen decided to use them to pursue the allegation that specific leaders of the National Party authorised illegal actions that resulted in the security forces of the state being authorised by their political masters to use lethal levels of force against civilians. The persons who were targeted had allegedly undermined the government's policies. The key document was a minute that recorded a decision of the State Security Council. It was a record of a meeting that was held by the National Party on the 12<sup>th</sup> of May 1986.

By revealing the meaning of the words that were contained in this document Mr Goosen attempted to establish the truth of the argument that National Party leaders at the highest level of the state agreed to instruct or to authorise the members of other apparatuses of the state to use lethal levels of force to terminate the lives of their political opponents. The document declared that 'a well-trained capacity to *wipe out terrorists* must be provided by the SADF and SAP. It must be feared without damaging the image of the SAP. It must stand under very strong authority' (TRC, 1997d, 41). The commission assumed that the minute was a true reflection of the intentions of the decision-makers who attended the meeting and agreed to establish a counter-insurgency unit with the operational capacity to target and kill citizens who opposed the government's policies.

A second document included a series of terms that appeared to indicate the action plan that should follow from the decision that was contained in the previous document. It said that it was necessary for 'the security forces to [work together] to bring about a Third Force .. so that the underminers are dealt with using their own methods' (TRC, 1997d, 41). The value of this citation is that when the 'decision' of the State Security Council was recorded its authors had no reason to believe that they would not be able to use the means at their disposal to achieve the intended purpose of this 'policy' choice.



On this basis the argument was put to Mr de Klerk that senior members of his party gave their authority to the decision to use lethal levels of force against their opponents. As a result of decisions 'similar' to the one that he outlined above Mr Goosen claimed that the most senior political leaders of the National Party authorised the following action when they were in office, 'assassinations, bombings directed at civilian targets, targeted operations to maim and kill, to sow distrust and fear among communities, long range cross border raids and indiscriminate attacks on civilians' (TRC, 1997d, 42).

Although he admitted attending that meeting Mr de Klerk rejected the allegation. He had no experience of there being 'at any stage an acceptance that a policy had been accepted to achieve what Advocate Goosen is suggesting' (TRC, 1997d, 42). He also cast doubt on the substance of the charge that was being addressed against him. The TRC had no evidence to suggest that the documented decision was carried out in the manner that Mr Goosen was implying. Moreover, he was unable to recall 'any reference ... in any way whatsoever of ... [his side] using terrorist methods' (TRC, 1997d, 42) to eliminate their opponents. He admitted that his colleagues agreed to authorise the use of the following methods: 'yes, firm action, yes, using and applying extraordinary measures, yes, going underground, yes, spying, yes, having covert actions, having a state of emergency, putting people into camps' (TRC, 1997d, 42). However, they never agreed a policy that led to their opponents being targeted and then killed in cold blood.

According to Mr Goosen, the commission knew from the documents in its possession and the testimony of senior Cabinet Ministers that the National Party advocated, 'the strongest possible action against revolutionaries' (TRC, 1997d, 42). He claimed that the orders that emerged from the meetings of the State Security Council indicated that Mr de Klerk and his colleagues gave their authority to the decision to 'wipe out terrorists'. The following extract indicates the problems that Mr Goosen encountered when he attempted to use the sources of evidence at his disposal to persuade Mr de Klerk that it was in his best interest to admit that acts of wrongdoing occurred as a result of the decisions that were made by National Party leaders during their period in high office:

Goosen: In your initial submission Mr de Klerk you state that accountability should be attributed to the State Security Council for all [the] decisions you took and the instructions that it issued including *authorised* actions and operations executed in terms of the *reasonable interpretation* of such

instructions ...now we know from some of the documents of the State Security Council, and certainly from statements by senior Cabinet Ministers, Cabinet Members and Members of the National Party, that the strongest possible action against revolutionaries was advocated....how would a direction from the State Security Council or the Party [containing] phrases like 'wipe out terrorists' [by] 'using their own methods' be interpreted by the Security Forces to whom it was directed?'

De Klerk: The phrase 'using their own methods', 'I've never perceived it, I've never experienced that to be a policy ...you are referring to one clause, I haven't studied the document, I haven't studied the next weeks or the next fortnight's document to see whether there was any reference again, I'm not questioning the fact that there is such a document'. (TRC, 1997d, 42).

Although, Mr de Klerk granted the document an objective status his reply reveals that the source that Mr Goosen was quoting did not speak for itself. The text was neither exhaustive nor complete. The words that were typed onto the surface of the document failed to provide the commission with a watertight case against the National Party. By utilizing the right to explain the contingent circumstances in which a document had been produced Mr de Klerk opened up each citation to an entirely different reading.

Mr Goosen decided to return to his initial focus by asking the following question, 'how would you expect a member of the security forces, who had been told by the highest decision-making body to use the strongest possible means against one's opponents, to ..... respond [to] the directives of the Council?' (TRC, 1997d, 43). Mr de Klerk refused to concede that the security forces were likely to interpret the words contained in such an order as a green light that gave them the right to target and kill someone. However, he did admit that the persistence of these allegations was sufficiently damaging to persuade him that it was necessary to introduce new guidelines. Their purpose was to prevent any misunderstanding in the future. He also claimed the initiative for the removal of the measure that indemnified all security officers from the possibility of a criminal trial in circumstances in which it could be demonstrated that they had committed an offence that fell outside the existing framework of legality. His conclusion was that 'inasmuch as there was a risk of misinterpretation, I went out of my way to ... institute clearer guidelines in order to avoid just that' (TRC, 1997d, 43). In order to reinforce his point he then decided to go on the offensive. First, he asked the Chairperson to acknowledge that the laws and customs of war differ from those that are

present in a 'normal' and 'peaceful' society. Second, he declared that atrocities did not take place 'in a void ..they happened in a war situation' (TRC, 1997d, 44). Third, he used a levelling comparison to deny the allegation that the forces that were lined up on his side were responsible for the conflicts that emerged during the past. He also claimed that the violations that were committed by his opponents were comparable, if not worse, than those that were committed by the state and its security forces.

According to Mr de Klerk, atrocities occurred 'where innocent civilians were being killed by bombs .... where people gathered for their pleasure and relaxation ...where people could no longer travel on a country road without the fear of being blown up by a limpet mine ...and in a situation where if you are a police officer ...whether you're black or white, whether you are doing a marvelous duty in protecting people ... you're a target, you can be shot and you can be killed' (TRC, 1997d, 44). He concluded his speech by making the claim that the 'deeper task of the Commission is to get to that understanding .....so ..we can bring understanding to all the people of the country'.

### **The failure to take preventative action**

The final session of the afternoon permitted members of the TRC other than Mr Goosen to challenge the normative and factual adequacy of Mr de Klerk's testimony. Ms Yasmin Sooka decided to raise the question as to whether the ex-president could credibly claim to have been in control of his own government in the period after 1990. She stated that National Party leaders who were appointed as a minister of state had admitted that they were personally responsible for the occurrence of specific violations. Mr de Klerk's suggestion that he was in control of events was contradicted by the testimony of his colleagues in government who admitted that they were responsible for the occurrence of events that resulted in the violation of the rights of ordinary citizens. Ms Sooka asked him to explain it was that he decided to sit on the sidelines and observe each of his colleagues carry out these dastardly acts during his period in high office?

In relation to the allegation that members of his administration committed crimes in spite of his instructions for them not to do so Mr De Klerk decided it was time for him to turn the focus of these accusations back against the persons who were his accusers. He followed the prescription that to attack is the best means of defence by arguing that the problems with which he had to grapple were not so different than those that

President Mandela had encountered following the public violence in KwaZulu-Natal. He then broke new ground by claiming that there were three benchmarks against which the conduct of the political leader of a country should be judged in a transitional period. The first test was whether a leader put reasonable 'rules, regulations and control measures' into place. Mr de Klerk assured Ms Sooka that he 'had them in place all the time' (TRC, 1997d, 51). Therefore, he could not be faulted. The second test was whether the leader at the top acknowledged that wrongdoing had (or was) occurring. In this respect Mr de Klerk's conscience was clear. He agreed to take steps to prevent his colleagues from removing the sources of evidence that would prevent an investigator from being able to follow the traces of a crime back to its source of origin. He did everything that he could be expected to do to establish the identities of the culprits.<sup>74</sup> The third test was whether the president agreed to take action against a perpetrator. He claimed that 'on that my track record is clear' (TRC, 1997d, 51). He concluded by stating that, 'I took numerous steps to ensure that the situation that was very volatile was kept under control and continuously brought more and more under control'.

Mr Potgieter asked him whether the acts that were committed in defence of apartheid could be equated with the acts of those who opposed the continuation of this system. According to Mr De Klerk, it was a mistake for the commission to place acts committed on one side on a different plane than violations that were committed on the other side. His questioner was making the mistake of assuming that the only reason why the National Party took action against its opponents was because its leaders arrived at the conclusion that it was necessary to defend this system of rule against attack. This was not the case. The National Party decided to take firm action against its opponents because the ideology that they espoused was based on a revolutionary programme. It was a fallacy for the commission to assume that the most important objective of the movements that formed part of the opposition was to secure the demise of apartheid. This was not the case. The political manifestos of the National Party's opponents encompassed far more than the creation of an alternative system of political rule.

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<sup>74</sup> Presumably, Mr de Klerk included in the category of 'preventative' actions his decision to talk to the four Generals who had been assigned the responsibility to manage the activities of the Vlakplaas police unit. According to Mr de Klerk they had assured him that they had no knowledge of the involvement of any of the officers under their command in any plan to capture, torture and kill unarmed civilians.

Mr de Klerk implied that history had vindicated the vision of his party. Its leaders were entirely justified to use all the means at their disposal to prevent the spectre of communism from becoming an everyday reality within the country. He reinforced this judgment by claiming that millions of black South Africans had also been correct to reject the principle that the 'end' does justify the use of any or all means. Many of the country's new citizens had no problem whatsoever in combining an anti-apartheid ethic with their resolute opposition to the promotion of all pro-communist alternatives. According to Mr de Klerk, it made little sense for the commission to continue to characterize the events of the past in terms of the dichotomous contrast between those leaders who argued for apartheid versus those who sought to promote its demise. The content of this distinction had been superseded by a series of irreversible events. He then reasserted his belief that the National Party had been correct to take firm action. The liberation movements were composed of people who aimed to make the country ungovernable and to 'grasp all the power'. They were prepared to 'demonise black South Africans' because 'they preferred the peaceful route' to change (TRC, 1997d, 54). It made no sense to argue that 'a black policeman who was going about his duty protecting the lives and property of his neighbours' (TRC, 1997d, 54) had a lesser right to determine the kind of community that he lived in than 'the activists who burned him and many like him to death by tying a tyre to his neck with barbed wire, filling it with petrol and setting him on fire' (TRC, 1997b, 54). He then reversed the focus of this argument. The members of the opposition who were 'demonstrating peacefully in support of their rights undoubtedly did have a more moral cause than .. the security forces who committed brutal crimes to suppress them' (TRC, 1997d, 54). He concluded this speech by stating that 'we would not have voted for the Bill [that] instituted the Commission if Minister Omar did not step down from his original insistence that double norms be written into this' legislation (TRC, 1997d, 54). The leaders of the National Party deserved to be applauded for the results that followed. It was 'not by chance that, in my interpretation, the Commission is, with all due respect Mr Chairman, charged with applying one norm and not in any way double standards' (TRC, 1997d, 54).

Ms Glenda Wildschut was the only panel member to raise the issue of the responsibility of the National Party for the acts of aggression that it committed against other states. She asked Mr de Klerk what responsibility he felt, on behalf of his Party, for the devastation that followed the decision to authorise specific acts of aggression? He

denied that the problems of his neighbours could 'be traced to the subject matter' of the question that he had been asked to answer (TRC, 1997d, 57). He argued that the problems of his neighbours could be 'traced to [the] ill-conceived policies [that they] followed' that resulted in high levels of 'unemployment' amongst their people. Only in that context, would he admit that the National Party took steps that 'must have also had a negative effect there' (TRC, 1997d, 57). Following the decision to allow South Africa to become a full member of the international community he supported the goal of stimulating development with his neighbours within a framework of affordability.

## Conclusion

The tactical strategies that Mr de Klerk employed at the National Party Special hearing demonstrate that it is an error to suppose that the presence of rational accountability-creating mechanisms can serve as the foundation for the emergence of a consensus.

The documents that the National Party submitted to the commission before the hearing was scheduled made it clear that its leaders were not going to settle their account with the events of the past by paying the highest premium that they could possibly pay.

The procedures that the commission decide to use to facilitate the truth-telling process permitted Mr de Klerk to selectively utilise a range of communicative competencies. In the first instance, he decided to use specific truth-telling tactics to evade or to neutralise the questions that might lead to unsettling criticisms of the conduct of his colleagues. In the second instance, he decided to affirm the actions of his party in order to mobilise a sense of the past in the present that could be uncritically approved by his supporters.<sup>75</sup>

On the one hand, he decided to recall particular aspects of the past in their *entirety* if they cast the actions of himself and his colleagues in a positive light. The TRC failed to use the sources of evidence at its disposal to demonstrate that the National Party established a series of command structures that made it possible for other office-holders to implement criminal policies on a systematic basis throughout the mandate period.

The absence of reliable sources also contributed to the outcome whereby Mr de Klerk was able to promote a neo-revisionist offensive by: (i) neutralizing the accountability-

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<sup>75</sup> This argument is indebted to Habermas's argument that revisionism involves opinion formers (and the persons whom they serve) conceiving of their purpose to be '[to mobilise a sense of the past] that can be accepted approvingly, [and to neutralise all] other pasts that would provoke only criticism' (1988b, 43).

creating purpose of a question; (ii) denying that his colleagues acted in bad faith; and (iii) claiming the initiative for having cleaned up the conduct of the security forces.

On the other hand, Mr de Klerk was more than content when more troublesome aspects of the conduct of his party was discursively forgotten or discretely removed from view. Through his testimony he attempted to sustain the impression that a series of events of an unsettling nature simply did not occur or take place during his period in office. The commission was naïve to believe that it would be able to use the sources at its disposal to place the head of Mr de Klerk and each of his colleagues on the chopping block. This outcome failed to materialise out of the one-day hearing that it was allowed to organise.

Although Mr de Klerk was unable to prevent an investigator from asking questions of a deeply unsettling nature he was able to neutralize the force of particular accusations. He was also able to mobilize the support of his supporters and allies by encouraging them to judge the appropriateness of the questions that he was asked to answer from his point of view rather than from the point of view of the persons who were the victims of a criminal act or the non-beneficiaries of the policies that his party introduced in the past. The tactics that he employed were effective insofar as he was able to replace a now discredited sense of the past with a version of its more recent achievements. He refused to pay the debt that his party owed to the persons whom it decided to persecute in the past. The methods that he used to lower the threshold of the debt that he and his colleagues owed the victims of his party's policy choices frequently hit their target.

In conclusion, the tactics of evasion that Mr de Klerk employed during the hearing cannot be easily separated from the political culture out of which they originated. One of the useful services that Mr de Klerk performed during the hearing was to set his allies and supporters a challenge for the future. By comparing the achievements of the commission with the negative consequences of Mr de Klerk's tactics of evasions it became possible for all South African citizens to acquire an understanding of the obstacles that needed to be removed in order for the leaders of his party to free themselves from the shackles that continued to tie them to a false past and present. It is 'one thing to offer certain meanings and values and ask people to consider and if possible accept them' (Williams, 1961, 353) within a given political culture. It is quite another to suppose that a people will accept the arguments that have been put to them.

This chapter has demonstrated that it is not possible to use the consensus theory of truth to think through the general processes that led to the accountability-creating purpose of the National Party hearing being neutralised through Mr de Klerk's tactics of evasion. It has also shown that it is possible to use an additional strand of Habermas's thinking to understand the reasons why Mr de Klerk used the spectacle of a single truth-telling occasion to agree to pay the least costly payment that he could possibly agree to pay.



## Chapter 8 -

### The African National Congress (ANC) hearing

#### Introduction

This chapter examines the record of the African National Congress as it was disclosed at a public hearing that took place on the 12<sup>th</sup> and 13<sup>th</sup> of May 1997. It differed from the National Party hearing in the following respects. First, the hearing occurred over two days. Second, the process of questioning was less adversarial. Third, the ANC delegation drew on a wider range of expertise in order to answer a series of questions. Fourth, fewer procedural objections were raised by the delegation of ANC leaders. Fifth, they displayed a greater readiness to accept that mistakes were made in the past. The ANC fielded a delegation of speakers headed by Mr Thabo Mbeki. He appeared at the hearings as the Deputy President of the Government of National Unity. Three features of the African National Congress delegation deserve a special mention. The first is the level of seniority of the figures who were selected to represent the party. The delegation included five ministers of state, the General Secretary of the ANC, the ex-President of the ANC's Women's League and a very well-known provincial leader.<sup>76</sup> Second, with the exception of Matthews Phosa (and possibly Mac Maharaj and Ronnie Kasrils) the delegation was composed of officials who had spent the greatest part of their adult lives in exile. It was only after Mr F. W. de Klerk's landmark speech in February 1990 that the majority of the representatives who composed the ANC delegation were granted the legal right to return to their homeland of South Africa. The final aspect is that the choice of *these individuals* to represent the interests of the ANC seems to have been taken in order to address the issues to be discussed at the hearing. It was as if the ANC delegation had been hand-picked to answer specific questions.<sup>77</sup>

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<sup>76</sup> The delegation of officials representing the African National Congress included; (i) Mr Thabo Mbeki (the Deputy President); (ii) Mr Mac Maharaj (First Minister of Transport from 1994); (iii) Mr Ronnie Kasrils (Deputy Minister of Defence from 1994); (iv) Mr Joe Modise (First Minister of Defence from 1994); (v) Mr Nhlanhla (Deputy Minister of Intelligence from 1994); (vi) Mr Alfred Nxso (Minister of Foreign Affairs from 1994); (vii) Ms Gertrude Shope (President of the ANC Women's League, 1991); (viii) Mr Matthews Phosa (Premier of the Mpumalanga Province) and (ix) Mr Jacob Zuma (Deputy General Secretary of the African National Congress). This was a formidable panel of representatives.

<sup>77</sup> This is my impression. I do not have documentary proof to confirm this claim. After receiving the ANC's documentary submission the TRC requested further clarification of a number of issues. They included: (i) the policies of the ANC in exile; (ii) the accountability-creating mechanisms that its leaders instituted inside different aspects of the organisation; and (iii) the methods that its leaders deployed in order to ensure that its policies and values were adhered to by its cadres and allies (TRC, 1997a, 1-3). A

## The admission that mistakes were made

A readiness to accept that mistakes were made during the course of the political struggles of the past coexisted in an uneasy relation with other aspects of the testimony of the ANC delegation. The replies of individual delegates to the questions that they were asked during the hearing revealed that the perspective of the delegation was composed of a complex mix of 'backward' and 'forward' looking elements. The emergence of divergent answers between the delegates was also a reflection of the differences in approach that characterised the decisions of the ANC in exile. The enactment in testimony of these differences was also a product of the fact that the ANC's delegation of representatives attempted to mobilise a sense of the past that revealed the successes as against the failures of the policy choices of its leaders. The refusal to acknowledge that mistakes were made existed in an uneasy relationship with the need to admit that there were times when the reputation of the ANC was tarnished because *they and their leaders* failed to intervene to correct a mistaken approach.

Towards the end of the hearing Mr Mbeki took issue with the charge that his colleagues were resorting to self-defeating denials in circumstances in which it had become apparent that a particular 'line' or 'position' could no longer be rationally defended. On the hand, he agreed that 'that was an important remark to make' (TRC, 1997c, 8). On the other hand, he claimed that it was only natural for a person who had been accused of an act or omission to say 'I am not as guilty as you think I am, I'm justified to this extent'. It was 'natural thing' (TRC, 1997c, 81) for a party to refute an allegation.<sup>78</sup>

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request was also made a request for additional information relating to the following topics: (iv) the actions taken against the ANC by the former regime; (v) the military activities of Umkhonto we Sizwe (the Spear of the Nation); and (vi) its ongoing relations with members of the Inkatha Freedom Party. The ANC responded to some of these queries but it refused to answer all of the commission's questions.

<sup>78</sup> An outright denial of responsibility is not the correct response in circumstances in which the well-being of a 'comrade' is still at risk because he or she had been coerced to hide behind a wall of silence in order to prevent his or her voice from being openly expressed in the aftermath of a serious crisis. According to the Southscan news digest, the Montsuenyane Report included the revelation that 'a number of ANC members had been guilty of murder and torture in detention camps outside of South Africa. It called for disciplinary action, penalties in terms of the ANC's code of conduct, a claims settlement and an apology against all those affected' (December 1997, 360). The report went on to say that the leadership of the ANC had reached the agreement that it was not going to take any further action against the culprits. The ANC 'said that it would not act against the offenders, saying that unlike the former government, it had no systematic policy of murder and torture' (1997, 360). The digest noted at the end of its report that,

The ANC delegation implicitly acknowledged that there were events that its leaders: (i) failed to anticipate; (ii) anticipated but were unable to control; (iii) anticipated but were unable to influence; and (iv) anticipated but were unable to influence in a direct manner.

The leadership of the ANC remained committed to the belief that they were entirely justified to participate in a struggle whose purpose was to end minority rule. The problem was that it was not always evident on what basis the struggle should be conducted. It was one thing to argue that a movement of national liberation possessed the *right to resist* a state that systematically removed the basic rights of the mass of people. It was quite another for the ANC to conduct a just war in circumstances in which its opponents were able to use the means at their disposal to prevent its leaders from establishing an organic relationship with the mass movement inside South Africa.

It became apparent during the hearing that the leaders of the ANC were *forced* by the pressure of circumstances *to make a series of choices* relating to the impact of one evil relative to another following the occurrence of events that lay outside of their control.<sup>79</sup> The tension was particularly acute in circumstances in which the commitment of the ANC to the upholding of a particular norm resulted in its office-holders agreeing to follow a policy that ran contrary to the immediate interests of an oppressed majority. Although the leadership of the ANC attempted to sustain the high moral ground on which the justness of its cause was based they also found it difficult to find a way to offset their overall military weakness with other mechanisms of influence. As a consequence, a dialectical process was built into the ANC's decision-making processes. On the one hand, its senior leaders were committed to the idea that their cause was just. On the other hand, they had to acknowledge that they might lose the support of their allies by conducting a war that was entirely 'just' but also operationally ineffective. The crux of the problem was the need for its leaders to bridge the gap between its pre-war commitment to fight a just war and the in-war emergencies that they had to adapt to. Although the ANC formulated statements (and policies) that documented the justness of the cause that they were attempting to further senior members of the movement also

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'subsequently there were warnings that if it did not act to prevent those who had been culpable from achieving high office [the ANC] would be revisited by the spectre for years to come' (1997, 360).

<sup>79</sup> A central controversy that I later refer to concerns the constellation of issues that surrounded the use of the necklace as a technique that was used to kill individuals who were suspected of being informers.

broke the terms of the 'holy writ' that they had committed their entire movement to. This gave rise to one side of the polarity whereby ANC delegation claimed that it was necessary for the commission to acknowledge that there were times when the pursuit and the achievement of a higher political goal (such as the ability of the ANC to compel its opponents to negotiate with its leaders) depended on an intensification of the ANC's military campaigns and the deployment of its military units to its enemy's heartlands. It also gave rise to the other side of the polarity whereby the TRC claimed that the ANC committed itself to a series of decisions that its leaders were unable to rationally justify. For instance, it was a matter of intense controversy when the allegation was made that specific ANC leaders agreed to follow the wrong course of action when they failed to discourage their allies from killing individuals who were allegedly collaborators.<sup>80</sup>

Mr Mbeki was correct to ask the commission to refrain from the goal of attempting 'to impose conditionalities on the ... struggle' (TRC, 1997c, 7). There was a danger that it might interpret events of the past might be judged from the vantage point of the present. He was also correct to claim that in circumstances in which an escalation of the conflict was unavoidable it made little sense for the TRC to judge the results of the strategies of the ANC in terms of the 'non-lethal consequences of a peaceful non-violent struggle' (TRC, 1997c, 7). The implication was that its investigators were mistaken when they attempted to read 'ethical choices' into the past that were not attainable at the moment when a series of changes strategy were being enacted during the 1980s and 1990s. For instance, in order for the leaders of the ANC to achieve their goal of compelling their political opponents to enter into negotiations with them it was necessary for them to publicly support the intensification of the political struggle both abroad and at home. The basis of this controversy deepened when Mr Mbeki decided to make the claim that the achievements of MK (Umkhonto we Sizwe) were dependent on whether the military operations that it decided to carry out were capable of winning the allegiance (the heart) and the support (the minds) of the people in whose name it claimed the right to act.

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<sup>80</sup> A case can be made that the leadership of the ANC refused to object to the decisions of others to carry out particular acts of retribution because it did not want to run the risk of losing the support of its allies. A case can also be made that the ANC was correct to make this strategic decision insofar as it was a greater good for the country to be made ungovernable than it was for the ANC to lose the support of its allies. It seems to me that by choosing one end in preference to another the leadership of the ANC contributed to the creation of a *climate of opinion* that that made it more likely that specific violations might occur. At the same time the decision to intensify the focus of the armed struggle during the middle of the 1980s undoubtedly contributed to the outcome whereby National Party decided to enter into negotiations.

Paradoxically, the stakes were raised even higher when he claimed ‘that we were engaged in a just war, and [conducted our campaigns] in a manner consistent with humanitarian principles governing the conduct of that war’ (TRC, 1997c, 7). The danger emerged that Mr Mbeki might use this doctrine as a smokescreen to divert attention away from the more objectionable consequences of the conduct of his colleagues. This was an ever-present danger and it could only be resisted through intense vigilance.

### **Identity-affirming versus identity-negating truths**

Having set out the key debates that shaped the context within which Mr Vally was permitted to question the delegation of ANC representatives is now necessary to specify how its members decided to respond to allegations or criticisms of an unsettling nature. There was always the danger that the ANC delegation would use the communicative means at their disposal to persuade their supporters and allies to uncritically accept the legitimacy of all of the strategies that their leaders decided to follow in the past. One of the key issues that emerged during the hearing was the question as to whether it was correct for the commission to permit the ANC delegation to persuade a mass audience of citizens that it was right and just for them to accept a series of historical revisions. On the one hand, the process of affirmation involved particular aspects of the ANC’s past being recalled *in their entirety* and unreservedly accepted by the delegation to be a part of *the past* as well as *the present* identity of their movement or party as a whole. In other words, collective aspects of a movement’s past were confirmed if they led to the political-cultural identity of the ANC being affirmed in a positive manner. On the other hand, the process of negating troublesome aspects of the movements past occurred through the more negative aspects of its actions being omitted from the discussion. The purpose of these acts of omission was to generate the false impression that a series of events of an unsettling nature did not occur (and should not be subject to the scrutiny of the commission) even though independent sources of evidence suggested that they did.

Throughout this chapter I shall follow Habermas by attempting to demonstrate how the ANC delegation attempted to ‘[mobilise a sense of the past] that [could] be accepted approvingly’ at the same time that they attempted [to neutralise] ‘other pasts that would provoke only criticism’ from the persons who suffered as a consequence of the actions that its leaders decided to follow during the political struggles of the past (1988b, 43).

Demonstrating the evasiveness of the ANC delegation is not a straightforward matter. The commission was also complicit in this process insofar as it failed to fully explore a range of incidents of an unsettling nature. It would appear that the TRC softened its approach in order to secure the support of the ANC in a limited 'truth-telling' process. An instance of this occurred at the beginning of the first session. The commission's lead investigator, Mr Hanif Vally, began his investigation by declaring that the ANC consciously decided to execute twenty-two of its own cadres during its period in exile. The question that he should really have been asking Mr Mbeki and his colleagues was why a movement that set itself the goal of liberating all the members of a nation ended up ordering the public execution of twenty-two of its 'brothers' and 'sisters' in arms.

The ANC's code of conduct declares that it is a grave offence for any cadre: (i) to sabotage or destroy the fighting capacity of a movement of liberation; (ii) to engage in espionage on behalf of a movement's enemies; (iii) to participate in a revolt or a rebellion that contravenes the orders of the unit's high command; and (iv) to violate military discipline by taking drugs or drinking excessively. The Motsuenyane Commission confirmed that these acts were grave crimes (ANC, 1993, 18-20). In circumstance in which military discipline breaks down and the members of a unit participate in a mutiny it is not unreasonable for its leaders: (i) to use a mixture of persuasion and force to restore order; (ii) to establish the reasons why a mutiny took place; and (iii) to institute proceedings against individual combatants who were suspected of having committed a grave breach of a movement's code of conduct.

The commission should have discriminated between the circumstances in which it is valid for a national liberation movement to use lethal levels of force against its members and the circumstances in which it is not valid for its leaders or officers to agree to do so. Through a clarification of these differences it would have been possible for the TRC to specify the precise contexts in which the ANC failed to discharge (or to uphold) its humanitarian responsibilities to its own soldiers and their living relatives back home. The problem is that the TRC failed to specify (or to agree) the precise circumstances in which the killing of an individual could be justified and defended to be a legitimate act. For instance, if an individual had been convicted of a grave breach of the code of conduct of an army the use of violence as *an instrument of last resort* need not be condemned in and of itself as an action that violated the human rights of that person.

By failing to acknowledge that a case could be made to justify a decision the commission may have created the impression that the ANC was responsible for the authorisation of a series of 'killings' that its senior leaders could have avoided. It is not possible to judge whether a decision was justifiable in one set of circumstances unless one is prepared to admit the possibility that there may be other circumstances in which it was not possible at that particular moment in time for the leaders of a movement to authorise a different course of action. The commission's failure to propose a nuanced approach to this particular issue undermined the case that it was attempting to make.

Mr Vally could have used the codes of conduct that were included in the Motsuenyane Commission Report to investigate the reasons why 'alleged' suspects were not permitted to exercise specific rights that the ANC claimed were inalienable. The first guarantee of the two codes of conduct that were agreed at the Kabwe Conference (in 1985) was 'the right to be free from torture' (ANC, 1993, 17). Additional clauses included: (i) the right not to be subject to ill treatment; (ii) the prompt handling of all prosecutions; and (iii) the right for each and every detainee to be guaranteed a fair trial. The TRC could have used these standards to establish the reasons why the ANC failed to put its own 'standards' into practice at the moment when their use mattered the most. In fact, it decided that it was inappropriate for its investigators to address the conduct of the ANC's intelligence and security organisations in such a forceful manner. In the discussion that followed no reference was made to the fact that cadres (who allegedly stepped out of line) were tortured at the 'Morris Seabelo Rehabilitation Camp'. No mention was made of the fact that the inmates at this camp were tortured. No mention was made of the fact that 'young' cadres were instructed to pour 'boiling water on men's heads until they burst and to drip burning plastic on their backs' (Smith, 1998).

Mr Hanif Vally failed to use the documents at his disposal to work through the reasons why action was not taken to prevent the occurrence of gross human rights violations. Had the ANC's security and intelligence units adhered to the ANC's code of conduct at all times it may have been possible for these specific violations to be avoided. An acknowledgement that members of the ANC's security organisation (Mbokodo) committed inflicted severe physical and mental harm on the detainees in their charge could have led to serious charges being levelled at members of the ANC delegation. Rather than working through the normative consequences of these unsettling issues the

decision was taken at some ‘unspecified’ level for the commission to steer clear of these issues and to treat each of the ANC delegates with kid gloves during the hearing.<sup>81</sup>

### **The military operations of the African National Congress (ANC)**

A central foundation of the ANC’s political strategy was based on the idea that it conducted a just war and refused to use the same tactics as those of its opponents. Its leaders were also able to accrue the benefits that followed from the fact that the ANC was the first movement of national liberation to become an official signatory to Protocol 1 Additional to the Geneva Convention. This protocol states that it is the duty of the signatory to ‘secure the implementation of this protocol’ (Article 5.1, Roberts, 1999, 424) in all the operations that it decided to carry out. The failure of the ANC to consistently uphold this principle was one of the key issues during the two-day hearing.

There were two strands to the commission’s approach to this specific problem. First, Mr Vally attempted to demonstrate that the decision of the ANC to intensify the armed struggle led to a blurring of the distinction between combatants and civilians. Second, he attempted to show that the decisions of its leaders resulted in its armed cadres being permitted to carry out military operations that led to grave breaches of the laws of war. I shall use the rest of this chapter to specify the precise manner in which the occurrence of specific ‘military’ actions led to the occurrence of grave breaches of the laws of war.

There are several reasons why it is necessary to formulate these preparatory arguments. On the one hand, there was a tendency for the commission to equate different types of allegations together even though they were the product of different circumstances. On the other hand, Mr Vally and his colleagues failed to relate the focus of their questions to two empirically related but analytically distinct types of violations. First, there were operations that fell inside the remit of the Geneva Conventions. These operations could be described in testimony as the direct or immediate consequence of the decision to

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<sup>81</sup> At the beginning of the hearing Mr Vally set out his case by asking the panel of ANC representatives to answer a series of loosely related ‘procedural’ questions. His schedule of questions avoided any direct reference to the allegation that senior officers of the ANC were responsible for the decision to execute individuals following their refusal to follow specific orders. During the hearing, Mr Vally avoided this issue by asking the ANC delegation the following questions: (i) on what basis was a suspect accused of having committed an offence? (ii) were tribunals established to judge the innocence or guilt of an offender? (iii) who was appointed to a tribunal? (iv) what rights were suspects permitted to exercise?



deploy a movement's military units in order to inflict casualties on their enemy's forces. Second, there were decisions that contributed in an indirect manner to the occurrence of violations that were not included in or covered by the Geneva Conventions. The second category was allegedly the by-product of the acts and the omissions of the ANC leadership following the occurrence of violations during the late 1980s and early 1990s. The commission made the implicit allegation that the political strategies of the ANC contributed to the perpetration of a climate of opinion in which it was more likely that their cadres or allies would commit gross violations against their political opponents. The TRC was raising the allegation that although the allies of the ANC committed specific offences the leaders of the ANC contributed some of the enabling conditions.

During the middle of the 1980s the leadership of the ANC agreed a new strategy. It was based on the idea that its cadres and their allies should intensify a 'people's war'. One of the consequences of this change of policy was that its units were permitted to physically attack members of the security forces when they were not 'strictly' on duty. According to the commission, the decision of the ANC to broaden the scope of its military operations inside the territories that were subject to the control of the South African state led to the disappearance of contrast between a 'hard' and a 'soft' target. Second, the ANC agreed to permit its units to attack security-related personnel who were present in civilian areas in an operational and a non-operational capacity. Units inside of South Africa were authorised to seek out their military opponents in civilian locations and to attack them in locations even if they were not actively 'on' duty. As a result, soldiers and policemen who were present in a place of rest were attacked.<sup>82</sup> Third, units were permitted to use methods of combat that could only be imperfectly directed at a location where it was suspected that enemy forces were congregated. Although a cadre could not be absolutely certain that the detonation of a bomb in a public place would result in the death or injury of the intended victims the decision was taken to use a method of combat that was not always discriminate in its consequences.

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<sup>82</sup> Ronnie Kasrils gives an interesting example of this process in his memoir 'Armed and Dangerous'. On Saturday the 2<sup>nd</sup> of June 1984, two ANC operatives and a young swazi women were killed by a hit squad in the Northern Transvaal. Days later he ran into three men. They were unaware of his identity. The three men, he describes them as Magnum, the Ulsterman, and the Peruvian were sitting ducks. Instead of making the most of this opportunity, Mr Kasrils and his colleagues decided to gather more intelligence. When they finally returned to the motel room of the suspected assassins 'they had vanished' (1993, 239). Although Mr Kasrils says 'we should have acted' he admits that somehow we failed to do so. He had been taught that the armed struggle was a defensive measure and this was not a kill or be killed situation.

Fourth, senior leaders of the ANC decided to limit the number of cadres who were captured as they crossed the border areas that connected South Africa to the territory of its neighbours. They did so by deciding to employ a method of combat that could not be specifically limited to military as opposed to civilian targets. The problem that emerged was that the ANC decided to use 'land mines' in isolated border areas that were frequented by SADF border patrols and the movement of farmers and their labourers.

In addition, to these breaches it was suspected that the ANC was complicit through its direct acts (i.e. the decision to promote the people's war strategy) and its indirect omissions (i.e. its silences concerning the slaying of its enemies) in the perpetuation of a climate of opinion that made it more likely that additional violations might occur. These incidents were allegedly the result of specific acts and omissions that created a category of offences that could not be subsumed within the scope of the Geneva Conventions.

First, it was claimed that the need to resist the counter-mobilisation strategy of the National Party was followed by the security forces (and their allies) being ascribed with the designation that they were 'enemies of the people' and should be treated as such. In this context, the question arose as to whether it was 'official' or 'unofficial' policy for the ANC's cadres and allies to target or to attack civilian members of the population.

Second, it was suspected that the ANC's preoccupation with the need to retain its hegemonic position as the 'leading' political movement of the oppressed majority served as the basis whereby its leaders turned a blind eye to the gross human rights violations that were committed by its allies and supporters in the mass movement. As a consequence, the claim was made that its leaders refused to speak out or to denounce the acts of terror that were carried out by members of the mass movement against individual citizens who were allegedly working for the enemy as collaborators. In this context, the question also arose as to why it took so long for senior ANC leaders to publicly condone the use of the necklacing technique against specific sub-groups.

Having completed my overview of the issues and problems at stake during the hearing I shall now specify how the acts and the omissions of the ANC contributed to either the occurrence of grave *breaches* of the Geneva laws or to the occurrence of *excesses*.

Insofar as it is possible to do so I shall relate the offences that I introduced above to each of the 'breaches' or 'excesses' that were discussed during the hearing. Due to limitations of space I will concentrate solely on issues relating to the just war theme.

At a press conference that followed the Kabwe Conference Mr Vally claimed that President Oliver Tambo declared that, 'the distinction between hard and soft targets is going to disappear in an intensified confrontation in an escalating conflict' (TRC, 1997c, 33). This statement was made despite the fact that the ANC decided to enter into an agreement in 1980 to abide by the provisions of Protocol 1 Additional to the Geneva Convention. According to Article 51.2 of the treaty, 'the civilian population as such, shall not be the objects of attack' (Roberts, 1999, 448). Therefore, it was illegal for any unit that was commanded by the ANC to target a person who was not a combatant in an existing armed conflict between two or more parties. Mr Vally decided to ask the ANC delegation whether the 'decision' of its leaders to intensify the armed conflict led to its cadres being authorised to contravene the laws of war? Why did its leaders permit their soldiers to attack security-related personnel who were present in civilian locations?

To the extent that a blurring of lines did occur Mr Maharaj denied that the leadership of the ANC authorised its units to target or to attack civilian targets. Ronnie Kasrils made the same point a little later. Although the bombs were planted in civilian locations that were frequented by members of the security forces the ANC refused to authorise indiscriminate attacks against civilians in the manner implied by the Convention. He claimed that MK cadres were forced to take risks that sometimes went horribly wrong. Although he and his colleagues accepted that specific operations might lead to civilian casualties he denied that the attacks that occurred were indiscriminate in their focus. According to Kasrils, the refusal to attack 'soft' targets and its observance of the laws of war was 'a real commitment ..one we constantly strove to live up to' (TRC, 1997c 34). Matthews Phosa added that very few 'outrages' occurred during the armed struggle. In spite of the problem of uncertain lines of command and control the movement's cadres complied with the ANC's declared goal of carrying out its operations in a humane way. He also cited the decision to use land mines rather than their anti-personnel equivalents. As a consequence, ANC units were not permitted to lay explosives that could be set off by the movement of a horse or the footsteps of a woman or child as they passed by.

According to Protocol 1 Additional to the Geneva Convention any attack that is 'not directed at a military objective' is legally impermissible during an armed conflict. The ANC decided to ignore this clause in order to improve the effectiveness of the military operations that they decided to launch or to direct at members of the security forces. Its

leaders did so by allowing its units to target security personnel in civilian locations. In its submission to the commission the ANC admitted that the car bomb explosions 'at the Magoo Bar and the Why Not Bar on June the 14<sup>th</sup> 1986 [resulted in] 3 civilians killed and 69 injured' (TRC, 1997c, 36). During the hearing, Mr Vally asked the delegation how the ANC could reconcile its commitment to observe the Geneva Conventions with the decisions that its office-holders subsequent made to carry out these operations? According to Mr Maharaj, 'in this particular case ..[we] had intelligence that the security forces ... congregated at that venue' (TRC, 1997c, 36) The unit carried out its orders effectively by: (i) locating the forces of the enemy; (ii) using a bomb to reduce the operational effectiveness of the enemy, and (iii) inflicting serious casualties. In relation to the Church Street bombing he admitted that although the area had been 'carefully reconnoitred' the bomb 'went off prematurely' killing innocent civilians.

The decision to employ a method of combat that could only be directed at the enemy in an indiscriminate manner was certainly a grave breach of the laws of war.<sup>83</sup> Dr Alex Boraine, noted that 'in terms of the Geneva Conventions ... provision is made for movements whose cause is just to engage the oppressor' (TRC, 1997c, 37) in an armed combat. Then he made his point in his typically droll way, 'it then goes on to say, and it's a convention that the ANC has signed ... where human rights violations take place, which includes the killing of innocent people, civilians, the movement has to accept moral and political responsibility for those actions' (TRC, 1997c, 5). The first aspect of this process was to 'acknowledge that in the pursuit of that [goal] mistakes and tragedies did occur' (TRC, 1997c, 37). The commission was concerned that 'there is an acceptance of responsibility .... [and] that there is accountability' (TRC, 1997c, 37). Therefore, if 'the ANC is saying yes, we accept responsibility for that ... we could make some progress'. The delegation refused to 'unconditionally' accept the allegation that their leaders were responsible for the occurrence of grave breaches of the laws of war. Mr Maharaj decided to reply to the allegations of the commission by offering his

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<sup>83</sup> Article 15(1) of the United Nation's Draft Articles on State Responsibility also declares that any act 'of an insurrectionary movement which becomes the new government shall be considered as an act ... for which the state shall incur responsibility' after an armed conflict (Spinedi and Simma, 1987, 328).

unreserved apology 'to all civilians who lost their lives, whether in crossfire or any other circumstances' as a consequence of the actions of the ANC (TRC, 1997c, 37).<sup>84</sup>

Article 51, sub-section 4C of the protocol states that it is illegal for any party to an armed conflict 'to employ a method [of combat] the effects of which cannot be limited' in the manner 'that this protocol requires' (Roberts, 1999, 449). This sub-section also prohibits the use of anti-personnel land mines. It does so for a simple reason. The personnel who are responsible for the decision to use a weapon of this type cannot be sure that a mine will be detonated by a combatant after it has been primed to go off. In contradiction to the claim that it fought the war in a humane way the ANC decided to lay mines in rural areas that were frequented by farm workers and unarmed civilians. Mr Vally asked the delegation how they could 'justify the usage of land mines on public roads in view of it having signed the Geneva Protocol?' (TRC, 1997c, 41). According to Mr Joe Modise, land mines were used in areas that were extensively patrolled by the South African Defence Force (SADF) 'area protection units'. The purpose of the ANC's policy was to reduce the frequency of these patrols. He recalled that after the incidents 'where civilians were caught the President called us in and asked us to put a stop to this method of operation' (TRC, 1997c, 41). Mr Maharaj added that 'the farmers in the border areas ... had been encouraged .. to become part of the defence force line' (TRC, 1997c, 42). In terms of 'the *Promotion of Density of Population in Designated Areas Act of 1979* these farms were managed according to SADF directives. As a result, 'all white farmers had to undergo military training'. They 'had to ... carry out reconnaissance and intelligence tasks whenever they were called to do so' (TRC, 1997c, 42). They were also 'linked to the command system and the ..radio network known as Marnet'. After an agonising debate 'we came to the conclusion that they were members of the Security Forces'. After, 'we saw that the bulk of the casualties were civilian casualties' it was decided that we should 'examine the problem' once more. There were two sides to this issue. On the one hand, 'MK never used a single anti-personnel mine .. [that] can be triggered, as we all know by ordinary human weight. We used anti-tank land mines'. On the other hand, 'we found ...[that] the cause of the casualties is that ... the farmers transported many of their labourers on these vehicles ... the vehicles had the

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<sup>84</sup> I have reproduced this section of Mr Maharaj's testimony exactly as it is recorded in the transcript. Of course it is not possible for the ANC to apologise to civilians who have already lost their lives as a result of the techniques of combat that the ANC decided to use. The deceased are no longer with the living.

request weight and the casualties were ordinary people' (TRC, 1997c, 42). Following the discovery that the victims were landless labourers a reversal of policy took place.

According to the commission, the conduct of a just war encompassed two elements. First, the outcome of the struggle had to be just. It should contribute to the liberation of a people from a system of relations that led to the majority of the people being expected to administer their own form of enslavement over each other. Second, the means that were used to promote the achievement of this end should be just. The problem that the ANC attempted to address but was unable to resolve was simple. The ability of its leaders to demonstrate their commitment to the 'holiest of all causes' was damaged in circumstances in which they failed to condemn the use of 'unholy means' by their allies. Two key issues were at stake. First, did the ANC allow a series of 'in-war emergencies' to take precedence over its 'pre-war commitment' to conduct its struggle in a just way? Second, did senior ANC leaders contribute to the perpetuation of the climate within which additional violations were likely to occur through their decision to refuse to speak out in public by opposing the leaders and activists who decided to use unjust means?

Mr Ronnie Kasrils acknowledged the interdependency of these aspects of the problem. First, a war could be legitimised in terms of the justness of a movement's cause insofar as it was necessary to end a system of rule by taking up of arms against one's adversary. During the armed struggle the ANC decided to define the justness of its cause in terms of the benefits that were expected to follow from the demise of a system of minority rule. Second, a just war referred to justice *in* relation to specific wartime conditions. Although the doctrine of a just cause made it possible for the leaders of a movement to claim that their cause was just the application of this principle to combat conditions did not entail that the means that a movement used to conduct its struggle with its enemies could be justified by reference to a norm independent of their context of application. The ANC was not reckless. Its leaders agreed to relate its 'in-war' decisions to follow legitimate courses of actions to its 'pre-war' commitment to promote a just outcome. In relation to this criterion the ANC's record was honourable (TRC, 1997c, 47). Mr Kasrils used three sources of evidence in support of this specific argument. First, the ANC decided that it would not use specific instruments of violence when it became apparent that its cadres were unable to control their end use in specific conditions. Second, although the ANC refused to target non-combatants it had given its formal

apologies to the civilians who suffered harm as a result of the actions of its units. In spite of these breakthroughs it needs to be remembered that the ANC was only accepting a limited liability for the mistakes (or excesses) of its military units. The delegation refused to accept any liability for any of the violations that were not the direct result of the actions of one of its units. They also refused to accept any liability in relation to the allegation that the purpose of the attacks that its units carried out was to create indiscriminate terror amongst the civilian members of a state's population. The conduct of the ANC was not being judged in relation to the standard that it resorted to 'terror bombing' by attacking citizens who were unable to defend themselves. Third, Mr Kasrils declared that MK units were not permitted to target or to attack 'soft' targets. This is because the ANC refused to subscribe to the doctrine that the end justified the use of all (or any of) the means that were in its possession during a specific conflict. Its leaders were adamant in their refusal to allow their cadres to use the means at their possession (i.e. guns, ammunition, and mines) to serve an indiscriminate purpose. He concluded by stating that although 'we've seen a lot of that happening in this poor old world of ours today and in the past', the ANC neither agreed with, legitimised, nor supported 'necklaces, terrorism, indiscriminate slaughter and so on' (TRC, 1997c, 47).

Mr Kasrils was on less secure terrain when he failed to mention the acts and the omissions of his colleagues in relation to the conduct of the ANC's allies back home. Although the ANC refused to subscribe to the policy whereby it encouraged its allies to engage the security forces in a series of armed uprisings it allegedly failed to discourage its political allies from using indiscriminate methods against their declared enemies. In other words, there were additional circumstances (that Mr Kasrils failed to mention) when the ANC leadership did allow in-war emergencies to take primacy over its pre-war commitment to fight a just war regardless of the consequences that might follow. This slippage in perspective was apparent in relation to the well-documented failure of the ANC leadership to declare its immediate opposition to the necklacing technique. This was the method that some members of the mass movement decided to use to defend themselves against saboteurs who had been able to infiltrate their ranks. The janus-faced perspective of the ANC was reflected in some of the supporting statements that Mr Alfred Nxso made to Mr Vally during the hearing. According to Mr Nxso, the issue of necklacing emerged in a spontaneous fashion. The problem was that 'the people' who were 'facing the apartheid regime at that time' suddenly discovered

that that regime was employing hundreds of informers' (TRC, 1997c, 48).<sup>85</sup> Faced with the presence of 'imminent' and 'mounting' dangers the decision was taken by local leaders to combat the dangers that they were facing by devising their own solutions. Some members of the mass movement decided to take matters into their own hands by killing individuals whom they believed were working on behalf of their enemies. Although 'attempts were made ... to see to it that they understand how wrong this is ... you don't stand up from the very beginning' (TRC, 1997, 48) and actually say so. Why was this line taken? According to Mr Nxso, the leadership decided that it should not speak out immediately because their criticism might reduce the morale of the people. A premature intervention by the ANC's leaders may also have had the consequence of arresting the ability of 'the people' to devise their own solutions to the issues with which they were confronted at the height of a series of ongoing political struggles.

Mr Nzo minimised *the impact* of the ANC's *acts of omission*. He did so by implying that the need to prevent enemies of the people from infiltrating the mass movement was more important than the need to take corrective action against the cadres who decided to use unjust means to prevent alleged collaborators from causing further loss of life.<sup>86</sup> He decided to explain this tension away by insisting that the perpetrators 'were doing this in response to a situation that was very difficult on them' (TRC, 1997c, 49). Into an already volatile situation the combustible fuel of an ideology without limits was added. Mr Nzo's reply was to state that some of the perpetrators of the necklace murders were being persecuted at the same time that they were attempting to root out the persons whom they decided should be held responsible for the source of their own suffering. In other words, they decided to force the victims of their actions to submit to the roughest form of justice that it is possible for a non-participating observer to contemplate.<sup>87</sup> Mr

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<sup>85</sup> Mr Nxso made no mention of the reasons why someone might decide to work for the enemy.

<sup>86</sup> Mr Nzo did not extend the focus of his argument to the next issue by arguing that the cadres who decided to use unjust means to defend themselves were doing so in order to pursue a just end.

<sup>87</sup> In the foreword to the book, *The Bang-Bang Club*, Mr Tutu describes Greg Marinovich and Joao Silva as 'two outstanding artists' (2000, xi) who took enormous risks to document the 'hidden wars' in the townships. In the second chapter, 'Ah, a Pondo – He Deserved To Die' Marinovich describes the death of a township resident in terms that prefigure the use of the necklacing method in the same decade. He described the unbearable horror of this man's death in the following terms, 'after just a few steps he went down, but I did not see why or how. The attackers were instantly around him in a tight, voiceless circle, stabbing, slashing, hitting. My ears picked out the slithering, whispery sound of steel entering flesh, the solid thud of the heavy fighting sticks crushing the bone of his skull. These were sounds I had never heard before, but they made sickening sense, as if this were exactly the noise a roughly sharpened, rusty iron



Nzo conclusion was that, 'we couldn't by the very next day ... say no, no, no you are wrong, especially when they were targeting the enemies of the struggle, that were assisting the apartheid state' (TRC, 1997c, 49) and its security forces. Almost immediately Mr Maharaj decided to qualify the testimony of his colleague. He added that 'necklacing' was 'a form that we did not like' (TRC, 1997c, 46). It originated as 'something ... the masses had taken up' after they were subject to 'conditions of extreme brutalisation and repression'. He then argued along the same lines as Mr Nxo. At the height of the campaign to render the townships ungovernable, he claimed that, it would have been foolhardy for any ANC leader 'to have stood up and said this is wrong, out with it. I know some people had the courage, but we had to balance the need for that understanding with a proper appreciation of what was happening on the ground' (TRC, 1997, 47). He then added that, 'if some people say our condemnation was made too late we can say in all honesty that yes it is possible to make that judgment from hindsight .. but it is not a judgment [that can be] too lightly made' (TRC, 1997c, 47). Perhaps an additional reason why the ANC delayed its condemnation of the use of unjust means was because it lacked the means to promote a feasible alternative. It also needs to be acknowledged that a range of additional parties to the conflict also contributed conditions that made it more likely that additional violations might occur. For instance, National Party leaders decided to continue to implement a law that banned the ANC by using the threat of imprisonment to prevent its leaders from establishing the structures that would enable them to organise a mass movement inside South Africa. The decision to ban legitimate political activity in order to uphold the security of the state and to continue to use covert means to destabilise the action plans of their political opponents were arguably just as important as the ANC's 'alleged' acts of omission. It is noticeable that the commission failed to mention a range of other 'contributory' factors that were not the product of the decisions that the ANC made whilst it was still in exile.

What was possibly more damaging to the ANC was the allegation that its leaders refused to take action because they were unwilling to run the risk of losing the support of specific constituencies who were at the forefront of the political struggle. It would appear that there was never a right time for its leaders to openly object to the way in

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should make when pushed deep into a human torso. The victim's body quivered each time he was hit and jerked spasmodically when a jagged spear blade was tugged from his resisting flesh. ...I was horrified, screaming inside my head that this could not be happening' (2000, 15/16).

which their allies used specific techniques of violence to liberate (or to cleanse) their communities of the 'culprits' who were allegedly working on behalf of the enemy. The statements of Mr Maharaj and Mr Nzo appear to imply that the ANC had no choice but to commit itself to a policy of omission at least in the initial stages of the struggle. The ANC's silence implies that it decided to favour one end in preference to another. It was far more important for the country to be made ungovernable than it was for the leadership of the ANC to intervene and to call a halt to the actions of its allies. By choosing the first over the second value the ANC's acts of omissions may have contributed at least in part to the perpetuation of a political climate in which the enactment of further offences were likely to occur within the townships of South Africa. The acts of omission of the ANC may have also contributed to the outcome whereby the escalation of the conflict forced the National Party to agree to enter into negotiations.

The Chairperson, Archbishop Mr Desmond Tutu, concluded the hearing in a thoughtful manner. The process of reconciliation was 'ultimately' was not about 'legalities ... it hasn't to do with that side of thing ...it has to do with the creation of an atmosphere in this land where people are ready ... to say that they made mistakes, that they are sorry for what they may have done' (TRC, 1997c, 83/84). He then offered his heartfelt thanks to the ANC delegation 'for what has taken place here since yesterday until now'.

## **Conclusion**

As part of this analysis of one aspect of the ANC Political Party hearing I have explored the question of whether the decision to implement the 'people's war' strategy was consistent with the judgment that the ANC conducted a just war at all times. Mr Mbeki argued that the success of MK was dependent on whether it was able to carry out its military operations in order to win the hearts and the minds of the South African people. The truth and falsity of this statement was revealed when the ANC's pre-war commitment to fight a just war was contradicted by the tendency of some of its leaders to respond to in-war emergencies by authorising its units to breach the laws of war. Senior members of the ANC committed gross human rights violations against their colleagues and enemies in a variety of contexts outside as well as inside South Africa. The documentation of a series of negative cases contradicted the truth of the claim that Mr Mbeki made at the beginning of the hearing in his opening presentation to the TRC.

I make this point in order to signal the difficulties that arise when one attempts to arrive at a conclusion as to whether the representatives of the ANC agreed that they would settle the accounts of their movement in relation to specific human rights violations by agreeing to work through the full consequences of their leader's acts and omissions.

Habermas knows that there can be no truth-telling process - rather no accountability-creating outcome - other than through the agency of the persons who participated in this process. To the extent that the representatives of the ANC agreed to fully settle their accounts with the events of the past it was necessary for them to pay a series of normative and material costs that were borne inside the effects of their actions and non-existent to the extent that this was a principle that they tacitly refused to acknowledge.<sup>88</sup> The commission knew that the promotion of a durable accountability-creating outcome was dependent on whether its investigators could use the sources of evidence at their disposal to persuade the ANC that it was in its interests for their representatives to admit they made mistakes at particular moments during the political struggles of the past. If we follow through the logic of this argument then Habermas's conception of a full (i.e. a positive) or an empty (i.e. an incomplete) settlement damages can be utilised as our initial starting point in order to judge whether the representatives of the ANC agreed to take full responsibility for the actions of their colleagues during the special hearing.

My verdict is that although some ANC representatives acknowledged that they did not always react in the best possible manner to particular crisis-creating events they also refused to acknowledge that specific office-holders within the higher echelons of their party should be held to be personally liable for occurrence of specific violations.

Although some ANC cadres committed grave breaches to the laws of war their political representatives refused to accept that the leaders of their movement were unconditionally responsible for the military operations that its cadres carried out. The ANC delegation refused to accept that the ANC was 'unconditionally' responsible for the suffering that followed from the occurrence of grave breaches to the laws of war.

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<sup>88</sup> I have derived the formulation of this insight from Althusser's reconstruction of the political thought of Machiavelli in his posthumously published collection, 'Machiavelli and Us'. In the second chapter, 'Theory and Political Practice', Althusser argues that 'there is no truth - or rather, nothing is true - other than what is actual, that is to say borne in its effects, nonexistent outside them; and that the effectivity of the truth is always merged with the activity of men; and that politically speaking, it exists only in the confrontation between forces, the struggle between parties' (1999, 22). This formulation corrects the tendency for Habermas to restrict the truth-telling process to an overwhelmingly idealistic basis.

The most that occurred during the hearing was that Mr Maharaj (and to a lesser extent Mr Kasrils) agreed to offer their unreserved apologies 'to all civilians who lost their lives, whether in crossfire or any other circumstances' as a result of an ANC action. It is difficult to avoid the conclusion that the delegation used the means at their disposal to persuade the country at large that they should uncritically accept the explanations that its delegates offered in relation to a series of damaging and unsettling accusations. In a manner, that runs in parallel with the way in which Habermas has theorised this issue the process of acknowledgement involved a self-affirmation being recalled *in its entirety* if it led to the actions of the ANC being presented in the best possible light. The purpose of these self-justifications was to affirm the positive consequences of the movement's actions and to defuse the normative implications of its less illustrious acts. The assertion of the Deputy President that the ANC fought a just war at all times was an indication of how the ANC sought to use an identity-affirming conception of its successes to paper over or to excuse the identity-negating mistakes that it committed.

At the same time, the process of forgetfulness involved more troublesome aspects of an organisation's past being wished away before, during and after the hearing. The purpose of these act or omissions was to sustain the impression that a series of events of an unsettling nature did not occur even though existing sources suggested that they did.<sup>89</sup> There was also the risk that specific incidents were forgotten so that one party (the commission) could reconcile itself with the forgetfulness of the other (the ANC). An instance of this process occurred at the beginning of the first session when the commission's lead investigator decided to steer clear of the reasons why senior ANC leaders made the decision to authorise the execution of their internal critics. Neither party worked through the normative consequences of these deeply unsettling issues from the point of view of the victims of these acts of political oppression. In other words, the ANC was let off the hook so that a return to some other kind of 'normality' could be enacted within the country after the special hearings had been completed.

For the persons who should have died in the Angolan camps but somehow managed to cling to life and to survive in the midst of the direst of circumstances one is left

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<sup>89</sup> Trehwela has addressed the range of factors that may have played a part in decision to execute and to imprison and torture 'mutineers' and 'dissenters' in his paper 'Inside Quadro: End of an Era' (2004).

wondering what they would have made of this omission at the start of the hearing. Perhaps the survivors would, as Adorno implies, be plagued by the recurring dream that they were no longer living though their senses implied that they had in fact survived. Was their continued existence the product of an overactive imagination? If so, what kind of life could these individuals possibly follow in the aftermath of specific events? According to Adorno, if 'perennial suffering has as much right to expression as a tortured man has to a scream', there is the danger that 'mere survival calls for the coldness, the basic principle of bourgeois subjectivity, without which there could have been no Auschwitz' (1990, 363). This is an insight that should not be forgotten. The simultaneous presence of these conditions at the same moment in time can lock the victim of successive acts of political persecution into a hideously closed circularity. On the one hand, Adorno is claiming that if a prisoner in a prison (or an institute of correction) attempts to claim ordinary 'human' entitlements during a period of captivity then he or she may be less likely to survive than an inmate who declined to do so. For instance, he or she may decide on the basis of personal observation that it is futile to claim this right in a social situation in which the right to possess any rights was no longer recognised as a right that someone like him or her could legitimately claim. On the other hand, he is also arguing that if an inmate is able to survive the ordeal of their period in captivity it is likely that he or she could only do so by losing aspects of her or his humanity in order to survive the inhumane conditions that she or he was subject to. I am not implying that the conditions that were present in the ANC's makeshift prison camps were as desperate as those that were present in the death camps during the 1940s. However I am arguing that the camps that the ANC decided to establish created an upside down world in which some detainees were subject to serious mistreatment. Only an insane person would suppose that a person who has suffered as a consequence of repeated acts of torture could live a life afterwards that was no different to the one that she or he might have lived before she or he was subject to inhumane conditions of life.<sup>90</sup>

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<sup>90</sup>According to J. M. Bernstein (2001, 398) 'living on certainly manifests the depth of the drive to self-preservation, and even more the shape that drive now takes, instrumental reasoning. While that will do for unavoidable complicity, something more specific is at issue: not only guilt at living off others, but guilt at having one's fundamental resource for both living and thinking the coldness that is the fundamental principle, *des Grundprinzips*, of bourgeois subjectivity'. I do not see why the aspiration to survive a system of persecution that denies both life and culture should be conceived only in this way. Some survivors of the genocide strove to survive in order to bear witness to the horror of Auschwitz. One of them, the Italian chemist Primo Levi, was told by one of his persecutors that no-one would believe his testimony or his revelations of the actions that took place in this place. This was difficult for him to bear.

Judged against this standard South Africa remains a very cold place for those persons whose suffering was not formally and explicitly acknowledged during the hearing.

One of the functions that the commission's investigators performed during the hearing was to challenge the leaders, officials and supporters of the ANC to reflect on the reasons why they refused to settle their accounts with the past in the fullest manner. Paraphrasing Adorno, it is arguably the case that 'inwardly, everyone knew, whether they admitted it or not, that things could have been' other than how they had been.<sup>91</sup> A more complete working through process would have enabled the ANC's representatives to live with the satisfaction that they answered the questions that the commission had asked them in the fullest and the most honest possible manner. Judged against this standard the conduct of the delegation was found to be wanting. For the leadership of the ANC the prospect of a full 'working through process was unthinkable because it might upset the secret pacts and the formal agreements that they agreed to sign with the leadership of the National Party before, during and after the negotiated settlement.

The next chapter will show how the commission attempted to revive the prospect of a more complete working through process by publishing its own 'perpetrator' findings. The decision to include these results alongside its formal 'findings' and 'conclusions' confirmed the operational independence of the commission from the ANC. However, it also made it more difficult for the TRC to ground the findings and the conclusions that it had been able to produce in a series of irrefutable sources of 'fact'. We shall now move onto the third and final stage of the truth-telling process. It involved the decision of the TRC to use the sources at its disposal to construct an official body of truths.

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<sup>91</sup> It was during a debate in the mid-sixties on the topic of utopia that Adorno made the following judgment, 'Inwardly, everyone knows, whether they admit it or not, that things could be otherwise. People could live ...without hunger and probably without fear ...as free human beings' (Anderson, 2004, 75). This quotation is derived from the chapter 'Something's Missing: A Discussion between Ernst Bloch and Theodor W. Adorno on the Contradictions of Utopian Longing' (Bloch, 1988, 4). The wording of Anderson's translation is slightly different than the translation of Jack Zipes and Frank Mecklenburg.

## **PART 4**

### **Analysing the reported findings and conclusions of the South African Truth and Reconciliation Commission**



Source: TRC Report – (Volume 1, Chapter 12, cover sheet)

## Chapter 9 – The construction of an official body of truths

### Introduction

Many close observers of the South African Truth and Reconciliation Commission were surprised to discover that there was far more to the truth-telling process than the decision to schedule the occurrence of a programme of victim and perpetrator hearings. The ‘methodology and process’ chapter of the first volume of its report relates the functions of the TRC to three distinguishable but overlapping stages of its development. The first stage consisted of the scheduling of victim hearings. Some of the victims who agreed to make a statement ‘were given the opportunity to testify in public’ (1, 6, 145, 33). Towards the end of the Human Rights Violation hearings the commission’s priorities shifted to the next aspect of the mandate that it was expected to implement. Stage two was shaped by the need to ‘establish the political and moral accountability of individuals, organisations and institutions’ (1, 4, 58, 35). This phase included ‘public submissions by, and [the] questioning of political parties, and a range of institutional, structural and special hearings’ (1, 4, 58, 35). Stage three involved the corroboration of the statements that victims submitted to each of the regional offices of the commission. The Amnesty Committee was also encouraged to conclude a greater number of its cases. Somewhere between the second and third stages the decision was taken by the TRC for its commissioners and support staff to consolidate the sources that it had established. This process enabled the TRC to write up its overall findings and conclusions in a five volume report that was presented to President Mandela on the 29th of October 1998.

The introduction to this chapter signals that we have entered the fourth and final section of the thesis as a whole. We have now left the Political Party hearings behind. This chapter shows that the achievements of the commission were undermined by the methods that it used to present its findings in the form of an official report. It also demonstrates that the commission set itself on a collision course with the African National Congress and the National Party by deciding to add a series of perpetrator findings to the body of truths that it decided to report in its official report. The publication of perpetrator findings undermined the relationship between the commission and its sponsors who included the leaders of the Government of National Unity. The



decision to disclose some of the key findings and conclusions of the commission as perpetrator findings was a unique action. It set the first precedent of its kind. The decision to follow this course of action made it difficult for the commission to refute the allegation of its opponents that it was equating the violations that were committed by the members of different parties as if they were more or less equal to each other. The inability of the TRC to demonstrate that it was not guilty of the charge of artificial even-handedness contributed to the outcome whereby it was unable to establish a consensus of convictions relating to the causes and the consequences of the gravest human rights violations of the past. The decision to publish perpetrator findings opened up the commission to a series of politically motivated critiques and also threatened to eclipse the other breakthroughs that it was undeniably responsible for promoting in the past.

### **The impact of the mandate on the report writing process**

The first axis that shaped the findings that the TRC's report writers were able to include in its 1998 report as official truths was the tension between truth and reconciliation. The authors of the TRC report used a series of mechanistic methods to present its findings and conclusions to the peoples of South Africa in the October 1998 Report. The commissioners tended to swing the truth-telling pendulum in one direction (towards a conception of factual truth) and then in another (towards the end of reconciliation). As a result, each swing of the commission's truth-telling pendulum tended to knock any conceptions that did not fit into its predetermined perspective far out into space.

In the first instance, the commission decided to 'push' its truth-telling pendulum in a predetermined direction by conceptualising the 'truth' in terms of the human rights violations that were carried out by the members of different 'political' organisations. This resulted in the authors of the report interpreting one facet of its mandate in terms of the decision to document the gross human rights violations that were committed by perpetrators who were aligned with or the members of a particular party or movement. The commission's ability to disclose this type of finding was limited by the failure of its Amnesty Committee to clear its backlog of cases before the final report was written. This led to the circularity whereby the commission was only able to disclose the offences that were committed by the National Party and its allies to the extent that the members of these organisations had voluntarily agreed to admit their guilt. In the

circumstances, in which the leaders and the supporters of this party decided to ignore the commission the sources of evidence on which the TRC was able to base its conclusions became narrower in scope and sparser in terms of their temporal coverage. In addition to this problem, Cherry et al, claim that the following factors also played a role in determining 'the content and the structure of the report' (2002, 27). First, the 'writing of the report ... was sidetracked by a number of events'. These included 'the trial of P. W. Botha in May ... the hearing on the chemical and biological warfare programme ... the in camera appearance by a senior officer of the Civic Cooperation Bureau ... and the United Democratic Front Submission' (2002, 26). Second, the commission's report writers were 'denied access to the potentially useful information [that] the outstanding Amnesty 'hearings were expected to generate (and subsequently did)' (2002, 26). Third, the 'the tortuous legal process of attempting to serve prior-warning notices on persons named to their detriment in the report' (2002, 26) reduced the amount of time that was available to the commission's report writers to integrate the findings that the Amnesty Committee had been able to produce into its official report. Fourth, the chapters that were included in the report were drafted in fundamentally different ways. Some of the 'chapters' were 'submitted by diverse authors at the eleventh hour ... were rushed straight into editing and layout, which were often done simultaneously' (2002, 28). Other sections were completed 'by outsiders brought in at the last minute to edit work with which they were not familiar' (2002, 28). No attempt was made 'to conduct an integrated analysis of various chapters, such as the regional reports'. As a result, the report emerged as a 'disconnected compilation of discrete chunks of information' (2002, 28). Cherry et al, offer no defence for the strategies that they were forced to adopt as a response to the orders that they were instructed to follow. They conclude their analysis by claiming that the compilation of the commission's findings were 'premature in almost every respect ... the analysis was far from finished; indeed, some would argue that in late 1998 it was only just beginning' (2002, 28).

The authors of the report were also expected to push the truth-telling focus of the report in the opposite direction by conceptualising 'reconciliation' in terms of the changing relationship between a series of 'supposedly' exclusive racial and/or ethnic groups. The reification of race as a central and/or all-encompassing principle of political division became the second axis around which the TRC attempted to place the issue of national and/or racial reconciliation at the forefront of the attention of the South African people.

The attempt to link the theme of reconciliation to a discourse of race was ambiguous. First, the authors of the report tended to equate the *prospect of reconciliation* with the emergence of a series of remedies (and recommendations) that were supposed to contribute to the *healing* of the relationships between different racial or ethnic groups. Second, the tendency to conceptualise 'reconciliation' in terms of 'race' enabled the commission to downgrade the significance of other political and social divisions. There were few references in the report to class and gender or to other divisions in the report.

According to Alexander, it was after the first free elections of April 1994 that a 'multiracial discourse' became 'hegemonic in South Africa'. The 'social categories, 'African (black), 'White', 'Coloured' and 'Indian' (or Asian) [were] .. taken as given'. From this moment on 'all theoretical, strategic and practical work [was] based on the social (and often on the assumed biological reality) of the four races' (2002, 36). The purpose of the commission was seen to consist in the need to establish multiracial harmony between the 'peoples' who resided within the borders of South Africa. The TRC uncritically adopted a similar conception by placing the need for 'unity' between black and white South Africans at the heart of its discourse of reconciliation. The authors of the report also made their own contribution to this one dimensional discourse by adopting the unargued assumption that 'reconciliation' should be primarily orientated to the goal of 'repairing' or 'healing' the relationships between the members of different racial groups as if these divisions were the major issue facing the country. The chairperson, Archbishop Tutu, outlined in his preface to the five volume report the one-sidedness of this truth-telling orientation by using essentially the same terminology:

'I want to make a heartfelt plea to my *white* fellow South Africans. On the whole we have been exhilarated by the magnanimity of those who should be by rights be consumed by bitterness and a lust for revenge; who instead have time after time shown an astonishing magnanimity and willingness to forgive. It is not easy to forgive, but we have seen it happen. And some of those who have done so are *white* victims. Nevertheless the bulk of victims have been black and I have been saddened by what has appeared to be mean-spiritedness in the *white* community' (1, 1, 17, 18)

The third axis that shaped the findings of the commission was the limited ability of its members to reconcile two antithetical conceptions of its purpose. On the one hand, the commission attempted to use the mandate that it was instructed to follow as the means by which its commissioners would be able to establish their legal-rational credentials with the parties and the movements with whom they had to establish contact. On the other hand, they had to change the mandate that they had inherited by deciding how they would investigate the reasons why violations occurred in an even-handed way. The latter emphasis gave rise to the idea that the commission should establish the reasons why gross human rights violations occurred and the means that could be used to establish the constitutional safeguards that could prevent their occurrence in the future.

It was not obvious how the commission could achieve a balance between these conceptions. Its Amnesty Committee was legally obliged to grant amnesty to all of the perpetrators of a gross human rights violation even though the motives of individual applicants were often based on entirely different chains of reasoning. The problem was that the logic of the commission's mandate set its commissioners on a collision course with the African National Congress and its most ministers in government. Mr Dullah Omar (the Minister of Justice in the Government of National Unity) warned that 'in putting the past behind us, let us not through morality out' (Du Toit, 1993, 3). His ministerial colleague, Mr Kader Asmal, also declared that things could go horribly wrong if the appointed representatives of the commission adopted 'the perverse doctrine of moral indifferentism' (Asmal et al, 1993, 3). This was the principle that 'the Act binds the commission to set aside their basic faculties of moral judgement' by making 'no distinction between apartheid and its opposite' (Asmal et al, 1993, 3). The spectre of moral indifferentism could only be overcome via the implementation of a dual strategy. On the one hand, the commission should decriminalise the conduct of the persons who laid down their lives in the fight against apartheid. On the other hand, it should also agree to pass judgement on the persons who were responsible for the worst offences. One can only assume that these categories were intended to be mutually exclusive.

In response to the force of these arguments the TRC decided to modify its approach. It claimed that although the ends of the national liberation movements were just it did not follow that the actions of all of its leaders, supporters and allies were also just. There was far more standing between the 'people and its goal of a more just and happier

condition' (Geras, 1990, 36) than the violence of the state and the National Party. The actions of the country's liberation movement also had a significant 'secondary' effect:

'During 1985 and 1986, years of a great wave of black resistance and struggle, ..bombs were placed in or near police stations, in the offices of the South African Defence Forces, in one case in a shopping centre; the explosions caused death and injury' (1990, 36).

Asmal was correct to argue that there was a qualitative difference between the 'moral abomination of apartheid' and the violations that were committed by ANC members. However, he was wrong to rule out the possibility that the commission should initiate 'a comparative investigation of gross violations on both sides of the conflict' (Du Toit, 1999, 4). The commission's ability *to be seen* to have achieved some degree of balance between these competing conceptions of its purpose as a truth-telling agency was continually disrupted by the inability of its commissioners to agree with each other. The idea that it should restore the dignity of all victims of a gross human rights violation implied that all perpetrators should be judged according to the same standard. At the same time the idea that violations were committed as a result of different chains of reasoning implied that perpetrators should not be judged in exactly the same way. The presence of a contradictory conception of the purposes that the commission was expected to promote was compounded by the fact that its leading commissioners were unable to reach a consensus as to how they should interpret the mandate impartially.

The fourth axis that shaped the truth-telling process was a product of the fact that the appointed commissioners of the commission were unable to agree with each other as to how 'complete' their investigations of the human rights violations of the past should be. At the beginning, the 'people saw the TRC as an opportunity to piece together a comprehensive and detailed account of turbulent and decisive episodes in their history' (1999, 7). The problem was that the pressure to promote greater 'reconciliation' worked against this grain by validating the decision for fewer investigations to be carried out. During the later stages in the commission's development its commissioners supported the movement away from a more complete programme of investigations by arguing that

the disclosure of the truths should be linked to the investigation of 'window cases'.<sup>92</sup> The difference between these opposing readings of the commission's mandate resulted in the emergence of a tension that it was never able to resolve within its working life. On the one hand, the commission continued to follow the instructions of its political masters by agreeing to disclose the reasons why specific type of violations occurred. On the other hand, its commissioners realised that if they extended the scope of their investigations to deeper and more sensitive areas of the country's political culture they might lose the support of the political parties who were responsible for its creation. In other words, its investigations might produce such a high degree of discomfort inside and outside of government that the commission's sponsors implicitly agreed to change sides by deciding to oppose the underlying logic of the TRC's even-handed approach. This is exactly what happened. The leadership of the African National Congress ended placing itself in the same camp as their ideological opponents in the National Party. Few politicians could ignore this controversy after the commission published its 1998 report. President Mandela argued that the commission was responsible for 'an *artificial even-handedness* that seemed to place those fighting a just war alongside those who they opposed and who defended an inhuman system' (italics added, Du Toit, 1999, 1). The emergence of these open public disputes may have strengthened the credibility of the TRC in the short-term but only at the expense of weakening its long-term impact. It is difficult to avoid the conclusion that the strategies that the commission decided to use to disclose its results and conclusions in the form of a report were poorly managed. The disputes between the TRC and the leaders of the country's major political parties – at the moment when its findings and conclusions were published- had the consequence of locking catastrophe into the hour of what should have been the TRC's greatest triumph.

The fifth axis that shaped the kind of results that the commission established was the product of the fact that its mandate was based on a series of contradictory conceptions. The mandate of the commission was based on the premise that it should work through the consequences of the past in the present by limiting the focus of its investigations. As a result, its commissioners were not permitted to initiate their own investigations into the reasons why a system of white minority rule led to the basic rights of the majority of

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<sup>92</sup> For instance, Mary Burton claimed that the Commission should limit its focus to 'a relatively small number of carefully selected individual cases which exemplified collective truths' (Posel, 1999, 8).

its citizens being systematically denied within and between successive generations. The problem was that the mandate was based on the judgment that its commissioners should reach a firm conclusion as to how it might be possible for a series of measures to be devised in order to prevent gross human rights violations from occurring in the future. This focus generated the expectation that the TRC would analyse 'apartheid' and the structures of power that permitted different groups to carry out specific violations. Therefore the question arose as to how the commission could formulate a series of recommendations that were designed to prevent violations from occurring in the future in the circumstances in which it commissioners were not permitted to analyse the systems of rule that shaped the way in which different violations were organised?

The commission was unable to bridge the gap between these readings of its mandate. On the one hand, the principle that the TRC was only permitted to investigate gross violations resulted in a system of rule that was the principal source of their occurrence being pushed so far into the background that its report writers were deprived of the means to explain the reasons why basic human rights violations occurred in the past. On the other hand, the principle that the TRC should establish the reasons why perpetrators were able to commit specific offences resulted in the systems of rule that emerged before, during and after the 'apartheid' era being pushed back into the foreground. The contradictory emphasis of these dimensions of the commission's mandate placed its appointed commissioners in a difficult and ultimately irresolvable position. They were expected to ignore the way in which the routine operation of a system of minority rule served the interests of a range of beneficiaries at the same time that it also undermined the quality and condition of life of the vast majority of the country's black population. They were also expected to place at the heart of their report an analysis of the reasons why the office-holders who agreed to defend the interests of a white minority were willing and able to commit far more offences than the members of other organisations.

In summary, the antithetical relationship between these competing conceptions of the commission's purpose could not be resolved without one aspect being achieved at the expense of the other. The commission was unable to resolve this issue. On the one hand, the political culture that emerged out of the decision to create and defend a system of white minority rule was central to the findings of the commission. On the other hand, this dimension of the problem was excluded from the intellectual apparatus that the

commission was permitted to use in order to explain the reasons why the majority of violations were more likely to be committed by some organisations rather than others.

Having outlined some of the background factors that shaped the kind of truths that the TRC's report writers were permitted to include as findings in its official report it is now necessary to change my focus and to introduce a new emphasis into my analysis. I shall do so by showing how a series of factors that were only partially related to the mandate of the commission shaped the kind of findings that the commission was able to produce. The weakness of the report was a product of the decisions that were made: (i) to use specific methodologies to report its findings and conclusions; and (ii) to use the limited range of sources at its disposal to articulate accountability-creating arguments. It is to these decisions and methodologies that we shall turn to in the next section.

### **The methods that the TRC used to report its findings and conclusions**

The decision to divide the mandate into disconnected operational plans made it difficult for the commission to report its findings and conclusions in a persuasive form. The inability of the commission's report writers to escape the ice-cold logic of a positivist methodology was reflected in their inability to link multiple forms of representation together. The search for a useable past was gradually limited in scope. On the one hand, the commission's report writers confined the focus of their analysis to the repetitive use of quantitative methods in order to present the main findings of the commission. On the other hand, the methods that they decided to use to narrate the reasons why specific violations occurred were organised in such a way that they prevented the reader from being able to make a connection between one source of evidence and another.

The events of the past were recorded as if a memory of their occurrence could be fully understood through the prism of a series of unrelated window cases. This approach resulted in the causes and the consequences of specific violations being obscured. The decision to disclose window cases in a parallel sequence led to the violations that were committed by one political organisation being 'seamlessly' followed by the violations that were allegedly committed by the members of another political organisation. The presentation of the commission's results in this form created the misleading impression that the violations that were committed by the National Party and its allies were



unrelated to the violations that were committed by the ANC and its allies. The use of this blunt but two-pronged approach resulted in the links between the violence of the state and the counter-violence of the liberation movements being cancelled out. It therefore comes as quite a surprise for the commission to claim that there was an affinity between the 'objective' knowledge (1, 6, 101, 10) that its mandate required and the methods that it decided to utilise in order to establish its own sources of evidence.

The sixth axis that shaped the TRC report was the result of the fact that its commissioners decided to relate the underlying purpose of their investigations to the methodological imperative to arrive at a rationally defensible estimate of the number of gross human rights violations that occurred during the mandate period. In order to facilitate this outcome its researcher were instructed to formulate 'ideal types'. The purpose of the types that the TRC 'supposedly' constructed was to demarcate the qualitative differences that emerged between one type of violation and another. The report claims that its researchers established the incidence of various violations by applying 'controlled and unambiguous conceptions' to the protocol statements that it received from each of the applicants who submitted a protocol to each of its offices. It also extends this focus by claiming that its researchers arrived at an understanding of the reasons why specific incidents occurred by documenting the impact of social networks on the meanings that the perpetrators attached to their own actions. Through the use of the method of *verstehen* the commission's researchers were able to interpret the motives of the individuals who committed specific violations and to do so through the application of a methodology that was also adequate at the level of meaning.<sup>93</sup>

The commission decided to relate a Weberian conception of methodology to the sources of evidence that it was able to establish for a very simple reason. It was attempting to cover its tracks in order to obscure the positivist methods that it decided to use in order

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<sup>93</sup> The report states that, 'The Act demands methodological pluralism ...it required that the Commission gather information and analyse it rigorously. Beyond rigour even, it requires an analysis of "systematic patterns" and of "conduct, motives and perspectives which led to such violations" (49a), sections (i) and (ii)). The first implies a quantitative treatment, and the second necessitates historical or ethnographic reflection. In short, the Act echoes classical sociologist Max Weber's definition of the sociological method, whereby "historical and social uniqueness results from specific combinations of general factors, which when isolated are quantifiable" .....Weber recommends that analysts identify general factors in the universe by applying ideal types – "controlled and unambiguous conceptions" – which illuminate particular phenomena of study ....this definition of a set of 'ideal types' is then applied to a universe of narrative (or semi-structured) statements taken in interviews with deponents' (1, 6, 162, 12-13).

to establish a database of the number of persons who were the victim of a violation. It sought to cover its tracks by attempting to establish ‘a neat and efficient match’ (Posel, 1999, 17) between the qualitative and the quantitative data that it was able to collect and the ‘authority and respectability’ of the methods that it used to establish its own sources. Although the report claims that the commission was able to use a series of ‘ideal types’ to distinguish one type of violation from another it actually conflated a method of classification with a very different methodological orientation in the human sciences. The commission’s report writers related their interpretation of the TRC’s mandate to the respectability of a Weberian conception of the sociological method for a simple reason. They aimed to persuade their audience of readers that the sources of evidence that the TRC produced were the product of their decision to utilise a reputable ‘methodology’. Although the attempt to invoke ‘Max Weber might lend an air of methodological rigour and authority to the proceedings, the parallels are ultimately spurious’ (Posel, 1999, 17)

According to Weber, ‘the meaning of history as a science of reality can only be one that treats particular elements of reality ... as the subject of knowledge and particular causal connections not as premises of knowledge but as *real* causal forces’ (Eldridge, 1971, 20). In order to arrive at a valid conclusion it was necessary for the sociologist to link a causal analysis of the behaviour of specific groups to a comprehensive interpretation of the meaning that each member of a group attached to the causes of their own actions. Moreover, in order for a historian to ‘go beyond the bare establishment of a ‘concrete relationship and to determine the *cultural* significance of even the simplest event in order to characterise it, [he or she] *must* use [also formulate] concepts which are precisely and unambiguously definable in the form of ideal types’ (1971, 24). Having formulated these methodological rules Weber set himself the task of explaining how the meaning that social actors attached to their thoughts and actions was shaped by impersonal constraints within the context of a specific form of political, economic and/or social organisation. The commission made no attempt to follow this approach. It was precisely the impact of different chains of reasoning (logical and non-logical) on the conduct of different groups of perpetrators that the commission decided to exclude from its analysis when it decided to report the basis of its findings and conclusions.<sup>94</sup>

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<sup>94</sup> Posel is simply wrong when she concludes that ‘the report’s pseudo-Weberian method is responsible, then, for the unwieldy structure of the five volumes’ (1999, 18). However, I agree with her judgment that the commission’s analysis of ‘the motives and perspectives of victims and perpetrators’ is limited to ‘a

The report does not link the actions of specific perpetrators to the wider *political culture* within which they were enacted. Neither does it demonstrate how a configuration of political and cultural determinants shaped the actions of individual perpetrators by making them more likely to follow one course of action in preference to another.

The final axis that shaped the structure of the TRC report was the tentative validity of the sources of evidence that the commission produced as a consequence of its investigations into the reasons why specific violations occurred in the mandate period. We do not know why the decision was made to restrict the scope of the TRC's investigations to one set of priorities rather than another at different moments in time. One of the commission's report writers (and two of her colleagues) have revealed that the structure of the commission's report was systematically distorted by a series of weighty omissions that could have been corrected at the report writing stage. Why was this the case? Cherry et al, claim that in assessing the faulty structure of the report:

‘one needs to ask whether it was the result of an organisation problem, for instance, a *lack of capacity* among staff; or whether it arose from *methodological* concerns, for instance an *ethical debate* or the perception of a potentially serious *legal difficulty*. Was the acknowledged lack of coherence in the Report a result of the *conflicting methodologies* employed, or of the difficult and *contested conclusions* reached by the various contributors, or of *hasty editing* within the strict constraints of time and space? Or was it some *combination* of these factors?’ (2002, 17-18)

It is tempting to conclude that these factors must have played some role in shaping the validity of the findings and conclusions that the TRC decided to include in its report. However, there is a limitation to the perspective that Cherry et al, have proposed. Their analysis fails to clarify how the methodological techniques that the TRC decided to employ *before* the report was written limited the *validity* of the commission's findings. This omission is a surprise given that the methodological starting point of the Research Department was the ‘Act’s stipulation that the Commission prepare as comprehensive

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general disembodied discussion’ (Posel, 1999, 18). The only section of the report that focuses its full focus to the motives and the perspectives of the ‘perpetrators’ is a forty four-page chapter. It is included in the final volume of the report but is disconnected from the report’s main findings and conclusions.

an account as possible' of the 'causes, nature and extent of gross human rights violations' including 'the motives of the persons responsible' for 'their occurrence' (2002, 19). This focus implied 'the production of a new history since 1960, a . . . text reflecting the views and experiences of the victims' (2002, 19). The 'envisaged volumes could have embodied' a 'genuine passion for the unrepresented' (Wood, 1994, 47) by including the experiences of the victims whose voices were silenced in the past.

The content of the report could have contributed to two crucial breakthroughs. On the one hand, it could have documented the fate of the victims who were unable to represent themselves. On the other hand, it could have raised the stakes by constructing a new type of narrative that articulated its message from the perspective of the dispossessed. This narrative could have transcended the need for the TRC to *speak for* the marginalized peoples of the country by enabling the readers of the report to visibly *hear their silence*. The reason why the disclosure of specific truths (such as the criminality of apartheid as a system of rule) mattered was because the victims of a multitude of gross human rights violations were unable to represent the specificity of their experiences. The emergence of negative perceptions concerning their fate was a consequence of the fact that the National Party and its allies used the means at their disposal to criminalise and to dehumanise the actions of the fallen cadres of the national liberation movements. It was a frequent occurrence during the era of grand apartheid for the leaders of the ANC and the PAC to be 'represented' as: (i) terrorists rather than as freedom fighters; (ii) as the supporters of a communist-inspired uprising rather than as the members of a national liberation movement; or (iii) as ethnic 'Africans' who were responsible for the perpetration of black-on-black violence against their enemies throughout the country.

Similar to the 'chess-playing puppet' that 'Walter Benjamin evokes at the start of his "Theses on the Philosophy of History" a monstrous imitation stood 'in [the] place of the [truth]' (Wood, 1994, 47). The presence of this 'imitation' prevented the immense contributions of numerous fallen 'comrades' from being fully acknowledged in terms of the contributions that they made to the liberation of the country from apartheid. Cherry et al, acknowledge that the TRC failed to write an emancipatory narrative (2003, 19):

'About six months into the process, however, [towards the end of 1996] 'the dream of producing a radical new history began

to falter in the face of a consensus that was developing inside the Commission ...largely, as a result of the many legal requirements built into the Act regarding evidence, prior-warning notices, the making of findings and the granting of amnesty, the TRC came to assume the position that it was essentially a state-directed investigative commission, rather than an exercise in writing or rewriting history. For the researchers, the 'historical analysis' approach began to give way to a more empirical one, to the notion that 'the facts' should be reported, and readers left to draw their own conclusions'.

Cherry et al, fail to specify the reasons why the decision was made to change the way in which the commission's report writers were permitted to present the findings and the conclusions of the TRC in its report via the use of such an indiscriminate method. Instead, they limit their focus to the issue as to why the coverage of the commission's investigations was so selective in comparison with the focus of the TRC's mandate. The key factor that 'hindered the Commission's reportage of violation outside of South Africa' was the absence of resources to send investigators into the region' (2002, 33).<sup>95</sup> The problem was that 'most, if not all governments ...did not want investigators ferreting around for information in their backyards' (2002, 33). The commission was unable to 'gain access to a CCB member imprisoned in Zimbabwe', even though he applied for amnesty 'for an operation against the ANC in which a Zimbabwean citizen was killed' (2002, 33). The commission was denied the right to speak to this applicant and 'an important source of information' (2002, 33) was lost. For the commissioners and support staff of the commission who attempted to keep the door to the past open the actions of high-ranking leaders and officials (inside and also outside of South Africa) made it difficult (if not impossible) for them to establish their own sources of evidence.

I am unable to specify the reasons why the commission decided to jettison its initial goal of writing a non-positivist narrative of the conflicts of the past. However, I am able to specify how other omissions raise doubts as the quality of its reporting mechanisms. First, the report does not specify how the TRC established its own sources of evidence.

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<sup>95</sup> By the 'region' Cherry et al, presumably mean the post-colonial states of Southern Africa such as Angola, Namibia, Botswana, Zimbabwe, Mozambique, Malawi and Tanzania.

The problem is that what the commission *said* it did do in order to establish its own sources and what it *did do* were not always consistently brought together in the report. The emergence of this tension was a product of the fact that it failed to document the 'non-positivist' methods that it did use to persuade a variety of target groups: (i) to complete a protocol statement; (ii) to appear at a Human Rights Violation hearing, (iii) to apply for amnesty on an individual basis; (iv) to appear before an Amnesty hearing.

The sources of evidence that the commission attempted to collect were the product of a complex series of interventions at a national and a local level. The report fails to mention their basis or their impact in the methodological sections of its report. This section of its report is limited to the disclosure of a series of schematic appendices that document the methods that the TRC used to *process* different sources of information. As a result, the report creates the entirely misleading impression that the processing or management of decontextualised sources of information was the single most important aspect of the methodologies that its staff utilised in order to establish valid sources. Through their silence the commission's report writers reinstated the same logic. A positivist conception of knowledge was given primacy in the report. The methods that were used to persuade a perpetrator, a victims or a bystander to attend a hearing or submit an application were omitted from the methodological sections of its report.

Despite these omissions it has to be acknowledged that the commission's commitment to the 'selective' disclosure of 'factual' or 'forensic' truths was a grand undertaking. The reporting of violations was relentless in its focus as it was indiscriminate in terms of the 'normative' consequences that were expected to follow from their publication. In an ideal world, the disclosure of factual findings should have been one of the liberating moments in the commission's arc of truth-telling activities over a three-year period. For instance, by breaching the taboos that surrounded the occurrence of the gross human rights violations of the past the disclosure of the commission's main findings and conclusions could have paved the way for a far-reaching public debate. In reality, it was not to be. The cumulative achievements of the commission were undermined by the methods that it decided to use to publicise the findings and conclusions that it had been able to establish as a result of an extensive programme of hearings and investigations.

The TRC was unable to achieve its objective of telling the truth to the extent that it failed to acknowledge the inadequacy of the means at its disposal to bear witness to the way in which the perpetrators and victims interpreted specific events in different ways. The argument that the commission's findings spoke 'for' themselves resulted in its report writers being permitted to excuse themselves from the intellectual responsibility whereby they were expected to disclose the full meaning of a variety of violations. The injunction that the facts 'spoke' for themselves was an eloquent admission of the fact that when the commission decided to present its findings in such an arbitrary way the consequences that followed were different than those that it had initially intended. The selective disclosure of a range of arbitrary 'facts' created a short circuit in the truth-telling process by making it impossible for the reader to link one finding to another. It is arguably the case that the real emphasis of the report lay in its ability to publicise the involvement of a range of different types of perpetrators in a wide variety of incidents. Paradoxically, many of these violations failed to convey (or to communicate) the reason why specific violations occurred at different moments in the country's development. In summary, the methods that the commission used to disclose its main findings and conclusions were too crude to enable the reader to make sense of the reasons why different types of gross human rights violations occurred during the mandate period.

The purpose of the commission's 'regional surveys' was to document the gross human rights violations that occurred in the following provinces during the mandate period: (i) the Cape Province; (ii) Natal; (iii) the Orange Free State; and (iv) the Transvaal.<sup>96</sup> The introduction to this section of the report states that the TRC selected the following periods as the time-containers within which specific violations should be understood: 1960-1975, 1976-1982, 1983-1989, 1990-1994' (3, 1, 1, 4).<sup>97</sup> The report fails to specify the criterion that the commission used to decide which 'cases' were included and which were set to one side even though they were available to it at the report writing stage.

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<sup>96</sup> The Third Volume of the report contains two discrepancies. The volume does not contain a separate chapter on the Transkei. In addition, the volume divides the 'Cape Province' into two separate chapters.

<sup>97</sup> A further complication is that the summary statistics that are referred to at the beginning of each chapter do not always follow the same pattern. This makes it difficult for the reader to compare and contrast the total number of violations that occurred in different provinces during the same period.

Due to the limited range of sources at its disposal the commission's report writers also acknowledged the need to make 'use of secondary source materials' (3, 1, 1, 3). These included the 'reports and publications of research institutes and monitoring bodies, both at home and abroad' (3, 1, 1, 3), the 'published monographs, press reports' and the 'unrest reports' of the South African Police' (3, 1, 1, 3). The introduction to this section of the report fails to clarify the quality of the sources that the TRC had established. The authors of this section of the report also failed to clarify the value of one source in relation to another even though they were often placed side by side in the text. Perhaps the authors of the regional profiles believed that the 'objectivity' of their findings might be subject to challenge if their origin in a non-positivistic method was acknowledged. According to Posel, the appropriation of the research of other agencies and bodies was 'atheoretical' (1999, 25). It was for contributory 'information' only. These sources were not intended to disclose 'facts' in the same sense as the commission's forensic 'facts'. In spite of these caveats the profiles do place dissimilar sources of 'side-by-side' without clarifying the status and the relationship between one source and another. In addition, it was never entirely clear whether the authors of these sections of the report were using their sources to illustrate the occurrence of a violation or whether they were using the sources at their disposal to condemn the actions of specific perpetrators. The authors of the profiles tended to move backwards and forwards between one type of finding and another without clarifying the reasons why it was appropriate to do so.

In spite of these weaknesses the regional profiles do disclose to the reader a catalogue of brutalities that occurred from the beginning until the end of the mandate period. For instance, under the heading 'banishment' we are introduced to two ANC activists. They were residents of the Cradock area at, or near to, the beginning of the mandate period. Mr Vara and Mr Sizila were arrested in 1963, 'for furthering the aims of the ANC' (3, 2, 44, 49). Mr Vara was released from prison three years later. He 'was mentally disturbed due to [a] beating with a hammer whilst serving on Robben Island' (3, 2, 44, 49). Following his release he was banished with his family to Ilinge. This was a small settlement near Queenstown in the Eastern Cape. His health deteriorated and he was admitted to hospital. He died three months later. Mr Sizila was also assaulted whilst he was in prison. After his release he was placed under house arrest. He was then subject to a banishment order. Three months after his wife gave birth their child died. The family could not afford a burial. They had no choice but to dig a hole, placed the corpse of their



child in a cardboard box and bury their infant in the ground beneath their feet. Mr Sizila's wife recalled these events with the following words, 'our neighbours could not do anything to help us. We had no food. It is my mother who travelled from Cradock to Queenstown and gave us food' (3, 2, 45, 50). Through the sheer accumulation of incidents such as these the commission documented its case that gross human rights violations occurred in all the provinces of the country during the mandate period.

The problem with the methods that the commission used to support this conclusion is that it made no attempt to link one aspect of its findings with a parallel aspect. The report does not specify the reasons why the National Party decided to use the method of 'banishment' to persecute the lives of black African subjects and their families. Nor does the report reveal to its readers the fact that this method was systematically used against one racial group but not against another. Clearly, there was a racial basis to formulation of this policy. The same method was not used to persecute white citizens who were courageous enough to step out of line by defying their political leaders.<sup>98</sup> A further aspect of the problem is that the report makes no attempt to specify the identities of the persons who were responsible for the perpetration of these gross human rights offences. The relationship between the causes and the consequences of these acts of persecution was still born. Many of the findings of the commission were incomplete.

Posel notes that in relation to the 'cases that [were] selected for the report .... the descriptive recounting of what, when and how things happened [was also] subject to other strategies of inclusion and exclusion' (1999, 19). The methods that the TRC used to report its findings also led to the emergence of specific distortions. This outcome emerged because the methods that it decided to use were far too indiscriminate.

Although a range of cases were 'pierced together drawing on combinations of individual testimony and statements drawn from amnesty applications and gross human rights violations ... [it was not] clear why some aspects of the broader picture are deemed relevant and not others' (Posel, 1999, 19). The use of such an indiscriminate procedure

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<sup>98</sup> In 1978, the International Defence and Aid Fund for Southern Africa published a 'biographical list of political prisoners and banned persons in South Africa'. The introduction, states that 'Banishment orders are imposed on Africans only. They take the form of removal orders issues by the State President on the advice of the Minister of Bantu Administration, and are served by the police, requiring the individual named in the order to move his house and reside in a specified place elsewhere. ...the duration of a banishment order, unlike a ban, is indefinite, depending only on ministerial pleasure' (1978, 127). The TRC report failed to mention that this method of persecution was used against one group but not another.

enabled the commission to pass judgment on the consequences of specific violations without documenting the structural locations or the identities of the perpetrators.

The TRC tended to conflate the finding that specific offences occurred with the unargued assumption that the members of specific political organisations should be held to be politically accountable and morally responsible for a general *pattern* of violations. Following their documentation the report implied that a pattern of violations were likely to have been caused by the perpetrators who belonged to a known political organisation. For instance, the regional profile for Natal and KwaZulu between 1960 and 1975 states that ‘the state and allied groupings’ used a variety of torture techniques to inflict harm and suffering on the persons who were detained in custody by the security forces. They ranged ‘from severe assault to forcing a victim to assume contorted and degrading positions ... in some cases it is believed that death resulted from torture suffered during detention’ (3, 3, 167, 42). A number of cases were then cited to support these claims. Immediately following this section the report describes a series of offences that were committed by ‘resistance and revolutionary groupings’. They included acts of sabotage ‘directed at government installations’ (3, 3, 170, 50) and ‘attacks on collaborators’ (3, 3, 171, 54). The problem is that the reader acquires no insight into the reasons why specific courses of conduct were carried out in order to promote a specific end. The narrative implies that the commission was within its specific rights to *pass judgement* on the morality of the organisation who committed each pattern of offences. However, its ‘verdicts’ or judgments’ were problematic because the commission failed to specify the precise reasons ‘why’ it was valid for its analysts to reach each specific conclusion.

The conflation of the TRC’s ‘findings’ with the tendency to ‘judge’ the morality of the alleged (and often vaguely defined) perpetrators was often based on circular arguments. Posel is correct to note that the events of the past were recorded ‘only insofar as it [was] necessary to produce [a] moral judgement [about it]; and the only basis for these judgements is the version of the past as it is written in the report’ (1999, 20). The commission’s reliance on such a poorly grounded procedure begged but failed to solve a number of important questions. How many gross human rights violations had to occur before the commission made the allegation that the leaders and followers of a specific organisation should be held responsible for the occurrence of a ‘pattern’ of violations? The authors of the report do not provide a rationally defensible answer to this question.

The TRC attempted to avoid the outcome whereby it equated the violations that were carried out by 'state and non-state' actors (1, 4, 69, 70) by making a minor concession. The report states that 'those with the most power to abuse must carry the heaviest responsibility. It is of the gravest concern when the state, which holds the monopoly of public force, used that force to violate [the rights of its own] citizens' (1, 4, 69, 76). The problem with this assertion is that the report contains little evidence to no evidence to support the conclusion that the TRC did do all that it could be reasonably expected to do to establish 'the degree of planning attached to *particular* acts of violence' (Posel, 1999, 20). The report is characterised by an absence of facts relating to the decisions that were made by the state's military officers in each of the command structures that were established inside and outside of the country to authorise specific acts of aggression.

Therefore, we arrive at a conclusion that is as strange as it is paradoxical. The absence of primary resources on which the commission could base its key 'findings' and 'conclusions' did not prevent the authors of the report to make a series of judgments that sought to demonstrate the deficient 'morality' of the perpetrators who 'allegedly' committed gross human rights violations on all sides of the conflict. The decision to present the commission's results in this way was unfortunate. It resulted in its commissioners squandering their final opportunity to articulate a rationally defensible explanation of the causes and consequences of a series of related types of violations. The consequences of this decision could not be reversed once it had been entered into.

Towards the end of its life as a transitional 'truth-telling' agency the executive leaders of the commission decided that they would grant themselves a truth-telling function that far exceeded the range of the powers that it was granted when it was initially created. The decision was made to develop the 'in-house' methodologies that would enable the commission to establish and to disclose a broad range of 'perpetrator' findings. I shall now outline what occurred as a result of the decision to follow this course of conduct.

The structure of the report was shaped by the decision of the commission to reassert the most minimal 'accountability-creating' processes at the end of the truth-telling process. We do not know *why* specific commissioners decided to establish 'perpetrator findings' (Du Toit, 1999, 1) as official truths that were included in the commission's 1998 report. However, we do know that the decision to establish perpetrator findings became the

principal means through which the commission attempted to hold the leaders (and members) of all parties and organisations *to account* for the violations of the past. It is likely that as the priorities of the commission changed its commissioners (and support staff) realised that the only means that they could now use to settle their scores with their adversaries was the report that they had been formally instructed to compile. Contrary to its image as a body that promoted reconciliation at the expense of the truth it appears that the commission decided to reverse these relations during the final stages. The origins of this decision and the reasons why it occurred are shrouded in mystery.

The TRC's commitment to the goal of investigating the causes *and* the consequences of all gross human rights violations in an even-handed way confronted its report writers with a serious dilemma towards the end of its life as a truth-telling agency. On the one hand, the commission claimed that the primary sources that it had been able to establish as a result of its investigations and hearings were robust enough for its report writers to document the offences that were authorised by the National Party. It also claimed that it was able to use the sources that it had been able to establish to hold 'it morally and politically accountable for the many atrocities overtly and covertly committed by its Security Forces' (1999, 1). On the other hand, the commission's insistence on 'moral even-handedness as a matter of principle' (1999, 2) made it probable that it would use its additional sources of evidence to also criticise the conduct of all other parties too. However, the form that these findings would take was a matter of considerable debate. It was one thing for the commission to attempt to justify the assumption that parties other than the National Party authorised the occurrence of specific violations. It was quite another for it to attempt to justify the assumption that the leaders and allies of the African National Congress should be: (i) held to *account* for the consequences of the policies that it decided to follow during the mandate period; and (ii) attributed with the stigma whereby they were held to be *morally responsible* for the violations that were committed by their leaders and supporters in the course of a series of political struggles.

The decision to make perpetrator findings was fraught with problems. It was one thing for the TRC's commissioners to agree to report the occurrence of specific types of gross violations alongside a description of the organisations who allegedly carried them out. It was quite another for the commission to decide to *make perpetrator findings* against the office-holders of a specific organisation by linking the name of an individual to: (i) the

occurrence of an incident; or (ii) the occurrence of a specific type of violations. The commission could have presented its findings in the form of its official report by using the sources at its disposal to document specific events and types of offences. It could also have used the sources of evidence at its disposal to present a series of *conclusions* that outlined the reasons why it was possible for the members of different organisations to commit specific offences at different stages of the mandate period. In principle, the findings and the conclusions that the commission was able to establish on the basis of the sources of evidence that it had been able to corroborate to be true could have stimulated a wide-ranging debate concerning the entire range of their logical implications. By linking its findings and conclusions to an irrefutable core of hard evidence the commission could have also completed its mandate without bringing its underlying purpose into disrepute. It was not as if the Government of National Unity decided to grant the commission a god-given right to act as the guardian of the country's 'morality' and 'justice'. The mandate that the commission was initially instructed to follow limited its focus to the following course of action: 'to facilitate, and where necessary, initiate ...inquiries into (i) the nature, causes and extent of gross human rights violations; (ii) the identity of all persons, authorities and organisations involved in such violations; (iii) the question of whether such violations were the result of deliberate planning ...; (iv) and [the] accountability [of each party], political or otherwise, for any such violation' (1, 4, 56, 4a). After the commission established its own sources of evidence in order to address each dimensions of the mandate that I have outlined above it could have agreed to pass on the less well-grounded aspects of its findings to the appropriate authority within a fully functioning constitutional state. It would then have been the responsibility of the country's elected leaders (and their legal officers) to decide whether the evidence that the commission had been able to establish supported the argument that action should be taken against the alleged perpetrators who refused to apply for amnesty even though it was likely that they committed an offence.

The advantage of this course of action is that it would have enabled a constitutional state to uphold the rule of law by deciding that the persons who refused to *apply for amnesty* should be held to be legally (rather than politically or morally) responsible for their consequences of their actions before and after the commission was established. The TRC refused to follow this course of action and did so on its own initiative. It decided to develop an elaborate methodology that enabled its commissioners to link the

sources of evidence at their disposal with a quasi-legal mechanism whereby they decided to deliver verdicts on the guilt or innocence of specific ‘institutions’ and ‘persons’. To achieve this objective a structure of reporting mechanisms was created. I shall now introduce the methods that the commission used to establish these findings.

### **The structure of perpetrator findings**

First, the TRC decided to report the violations that occurred during the mandate period. The purpose of the first chapter of the second volume was to disclose the ‘violations’ that were committed by the country’s key political organisations ‘between 1960 and 1994’ (2, 1, 1, 1). In a series of stage by stage sequences the authors of this chapter used the sources of evidence at their disposal to: (i) ‘identify the perpetrators of gross violations of human rights’, (ii) ‘specify the ‘patterns of abuse’ that they carried out, and (iii) articulate the judgement that the persons who authorised their occurrence should be ‘held accountable’ for the consequences of their own conduct (2, 1, 1, 1).

Second, the TRC decided to reach a number of conclusions relating to the status of particular types (or patterns) of violations that occurred during the mandate period. For example, the third chapter of the second volume (the State inside South Africa, 1960-1990) specifies a range of violations that were carried out by the security forces. In order to offset the narrow range of sources at its disposal the commission decided to analyse *specific types of offences* as exemplary examples of a more general pattern. It did so by documenting a series of *methods* that were used by the South African state to persecute citizens whom its security forces were formally permitted to investigate. This section of the report refers to ‘overt’ methods such as ‘bannings and banishment, detention without trial, judicial execution and public order policing’ (2, 3, 165, 1). It also documents ‘clandestine methods’ such as ‘torture, extrajudicial killings and support for surrogate forces’ (2, 3, 165, 1). The key factor that ‘links the different cases dealt with are ...not primarily their chronological, causal or even contextual connections’ but the prescriptive and factual judgment that ‘they pertain to a particular political grouping

[the state or a liberation movement] and can be subsumed under a certain category of human rights (e.g. deaths in custody or extra-judicial killings)' (Du Toit, 1999, 21).<sup>99</sup> Third, the commission made findings relating to specific organisations and the offices or the positions that were allegedly used to authorise the occurrence of a violation. In relation to some human rights violations it also identified who the occupants of a particular office or position office were. However, in the vast majority of cases the descriptions were too general for the reader to identify the exact occupant. The commission failed to specify why it decided to disclose its findings in this way. This was a problem because the findings in the report indicate that its commissioners decided to attribute themselves the power whereby they would act as both a judge and a jury. They decided (often an unspecified basis) to 'identity' the agencies, organisations and individual 'perpetrators' who should be: (i) held accountable for commissioning or planning the occurrence of specific type of gross human rights violation; or (ii) held to be morally responsible for promoting the occurrence of a specific incident or event. As a result, the commission made adverse findings against: (i) specifically named individuals; (ii) the incumbents of a specific office; or (iii) where the boundaries between 'direct' and 'indirect' perpetrators were blurred a combination of (i) and (ii). For example, the fourth chapter of the second volume documents the gross human rights violations that were committed by the liberation movements between 1960 and 1994. The TRC's finding against the ANC was subject to the following minor qualification:

'the Commission endorsed the position that the policy of apartheid was a crime against humanity and that both the ANC and PAC were ..conducting legitimate struggles against the former South African Government and its policy of apartheid. Nevertheless, the Commission drew a distinction between a 'just war' and 'just means' and ... found that both the ANC and the PAC ..committed gross violations of human rights in the course of their political

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<sup>99</sup> The decision to publicise the commission's findings *and* conclusions in this form was problematic. First, the absence of an index made it difficult (if not impossible) for the reader to locate a specific case in the five volume report. Second, the absence of a consistent methodology between each of the volumes makes it equally difficult for the reader to grasp the reasons why the decision was taken to include some 'corroborated' cases in each of the volumes of the report but to exclude other equally valid examples. Third, the 'structure of the report does not allow' the reader to follow through 'the activities of individuals or groupings of perpetrators in any sustained way' (Du Toit, 1999, 22). The report's structure also makes it difficult for the reader to establish whether a perpetrator committed more than one offence.

activities and armed struggles, for which *they are morally and politically accountable*' (2, 4, 325, 2).

The TRC then set aside 41 pages of its report to describe the violations that the office-holders and/or allies of the African National Congress had allegedly committed. The key finding was that the ANC should be held to account for the following offences during the mandate period: (i) the casualties who were harmed as a result of the military decision to use bombs and land mines; (ii) the decision to kill individual 'enemies' and/or 'defectors'; (iii) offences that were committed against the members of its own organisations; (iv) the execution of dissidents and the killing of mutineers; and (v) the acts of torture that were committed against the cadres who were detained in its camps.

The decision to hold the 'ANC' morally and politically accountable for these violations begged the question as why it was necessary for the commission to do so. According to Du Toit, 'the TRC's commitment to the making of perpetrator findings [was] in large part due to a misplaced effort to see that some minimum of *justice* is done with regard to the perpetrators of gross human rights violations' (1999, 35). Its commissioners decided that if they had the evidence to suspect that specific individuals (who refused to apply for amnesty) were responsible (through their acts or omissions) for the occurrence of a specific type of violation then it was legitimate for the TRC to sit in judgment by declaring that the leaders of the ANC were responsible for a specific pattern of offences.

Andre du Toit is correct when he objects to the argument that the commission decided to *trade in* justice for the truth by pursuing the latter at the expense of the former. There was an unexpected but consciously planned reversal of the relations between the process and the product during the final report writing stage of the TRC's truth-telling process. He is also correct to show that the decision to make perpetrator findings against the African National Congress led to its relationship with the commission entering a new stage of meltdown in the period after the commission's report was formally published.

### **The disclosure of different types of findings**

The report also placed in the public domain the following results: (i) the finding that an *event* could be classified as a gross human rights violation; (ii) the finding that specific



individuals were the *victim* of a gross human rights violation; (iii) the finding that specific individuals were *granted amnesty* on a legitimate basis; (iv) the finding that specific organisations were complicit in the events that led to the occurrence of specific violations (either directly or indirectly) and (v) the finding that the office-holders of an organisation could be held to account for the occurrence of a pattern of violations.

First, the commission reached the conclusion that a specific *event* should be included as gross human rights violation on the basis of the evidence that it had established. The first chapter of the fifth volume of the report describes the procedures that the TRC devised in order to decide who could be the victims of a 'gross violation' (5,1,11,50).

This section of the report acknowledges that it was not always easy for its commissioners to reach a consensus with each other as to whether the occurrence of a specific act was of sufficient gravity for it to be judged to constitute a 'gross' offence. For example, although the act of arson was not initially judged to constitute a gross violation, 'the more it was discussed the more it was seen as a deliberate tool to devastate an area and to force people to move away' (5, 1, 12, 53). A further difficulty concerned the question as to whether a 'decision' that was 'legally' sanctioned to be a legitimate act during the apartheid era could now be judged to be an illegitimate act. Could a decision be classified as a form of conduct that led to the 'gross violation' of a victim's 'rights' even though it was a legally permissible course of action in the past? The commission concluded that an action that was lawful at the time when it was committed could contribute to the occurrence of a gross human rights violation. It agreed to classify the decision to execute a cadre for a politically motivated offence as a gross human rights violation. It followed that a high court judge who sentenced an activist to death by hanging could be judged against the same standard as a police commissioner who ordered his subordinates to kill civilians during a period of unrest.

Following the determination that specific acts should be classified as a gross human rights violation the commission sought to determine who was (or was not) the legitimate object of gross human rights violation during the mandate period. This resulted in its commissioner's deciding which *individuals* were the 'legitimate' victims of a violation. The second chapter of the fifth volume of the report includes a list of the individuals who were officially acknowledged by the commission to be the 'victim' of a violation. Although the list of names is incomplete it does refer to a sample of 15, 757 persons. The un-numbered list is eighty-two pages long. It fails to specify the reasons why a

listed person was judged to be the victim of a gross human rights violation. It also fails to specify whether a 'named' individual was a 'direct' or an 'indirect' victim (i.e. a relative of a victim rather than a victim or an immediate victim rather than a relative).<sup>100</sup>

The third type of finding was the decision to grant an amnesty to individual applicants. The disclosure that amnesty was granted to 171 applicants was not linked to the finding of the Human Rights Violation Committee that there were over 17,000 official victims. An administrative report of the Amnesty Committee referred to an appendix that listed the names of the applicants who were had been granted an amnesty by the commission. The problem with this list (the only source of its kind in the entire five volume report) is that it failed to refer to the following fields of information: (i) the reasons why the 'named' persons were granted amnesty; (ii) the offences for which they were being granted amnesty; and (iii) the political identities of each of the perpetrators.

The fourth type of finding was the determination of a judgment of complicity. In the preface to the first chapter to the fourth volume of the report the commission's Chairperson made a claim that stands out as one of the boldest claims of the report:

'without some sense of the antecedents, circumstances, factors and context within which gross human rights occurred, it is impossible to understand how ...people who considered themselves ordinary, decent and god-fearing found themselves turning a blind eye to a system which ... violated the lives and the very existence of so many of their fellow citizens' (4, 1,1, 1).

In order to unravel the enigma whereby members of the white community knew, 'what was happening' but did little to prevent gross human rights violations from continuing to occur the commission decided to organise an additional series of 'special' hearings. The representatives of a profession were invited to attend a hearing. They were expected to answer the question as to why their members refused to uphold the codes of their occupations by permitting themselves or others to carry out a human rights violation. In order to address this issue the commission decided to organise hearings throughout the

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<sup>100</sup> In some cases, the Security Forces decided to victimize the relatives of one of their immediate victims. Therefore it was not always possible for the TRC to distinguish between 'direct' and 'indirect' victims. The presence of these complexities is not reflected in the 'findings' that the TRC included in its report.

community for the nation's: (i) political parties; (ii) legal community (including the judiciary); (iii) prisons; (iv) business and labour; (v) health sector; and (vi) the media. The decision was also made for an additional tier of hearings to be organised around the following issues: (vii) the decision of the National Party to compel some citizens to serve in its military services at home and abroad; (viii) the impact of the conflict on children and youth; and (ix) the oppressions that women experienced as women and as the members of specific ethnic and racial groups within a highly stratified society.

The commission also decided to include in its 1998 report a summary of each hearing that included its conclusions on the performance of each of the occupational groups.<sup>101</sup> For instance, after the 'Business and Labour' hearing the commission reached the conclusion that some (unspecified) businesses and enterprises failed to admit that they were complicit in the creation of the infrastructures that enabled violations to occur. On the one hand, the report claims that the state would not have been able to establish a national security management system without the cooperation of big business (4, 2, 58, 166). On the other hand, it failed to mention (or to document) the benefits that 'capital' derived as a result of its decision to serve the political interests of the National Party. The refusal of the country's senior judges to attend the 'legal community' hearing in person also resulted in the commission reaching the following conclusion: 'history will judge the judiciary harshly. Its response to the hearing has once again placed the question of what accountability and independence mean in a constitutional democracy in the public domain for debate' (4, 4, 107, 46). Progress was very slow and halting.

### **The determination of findings against individuals and institutions**

It is reasonable to suppose that the decision to establish perpetrator findings would be orientated to the goal of establishing the personal identity of *individual* perpetrators. That is with the aim of establishing the names of the persons who: (i) admitted that their actions contributed to the occurrence of a violation; or (ii) refused to apply for amnesty.

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<sup>101</sup> The fourth volume of the commission's report is devoted to the documentation of the Special Hearings that I have listed above. The content of the nine 'substantive' chapters is largely descriptive. Some of the chapters in this volume include an Appendix that refers to the code of conduct of each profession. It is interesting to note that this volume of the report makes no reference to the Political Party hearings that occurred between the commission and the African National Congress and the National Party. In other words the controversies that I analysed in Chapter 5, 6, 7 and 8 were omitted from this volume.

In practice, the majority of the commission's decisions were not of this type. The TRC decided to report its perpetrator 'findings' by distinguishing between two categories of violations and two types of perpetrators. On the one hand, the report distinguishes between systematic patterns and specific types of gross human rights violations. On the other hand, it distinguished the role and the responsibility of specific organisations (i.e. the state structures, political parties, political organisations and social movements that emerged at different moments in time) from the conduct of named individuals who could be judged to be member or a supporter of a well-known political organisation

The commission was also permitted to investigate the issue as to whether specific violations were the product of deliberate planning or could be truthfully characterised in terms of the fact that they formed a more general or systematic pattern of violations. Although it made findings of this type (particularly in the second volume of its report) it often failed to specify the reasons why it was justified to arrive at a specific conclusion. For example, the report states that 'most of the victims of the government's attempts to cling to power lived outside of South Africa' (Cherry et al, 2002, 32). However, the commission failed to specify the basis on which it had arrived at this conclusion. The absence of supporting evidence was a product of the fact that the TRC's investigators and researchers failed to document the reasons why successive leaders of the National Party decided to authorise specific act of aggression during the mandate period. All in all, 'only a handful of soldiers – fewer than ten – made statements to the Commission, and all of them were conscripts' (2002, 32-33). As a consequence, it was unable to bridge the gap between 'alleged' and 'known' offences. The lack of hard evidence was also a result of the fact that 'a whistleblower in the de Kock mould [failed to emerge] from the ranks of the SADF (the South African Defence Force)' (2002, 33). Many of the commission's results were not 'earth shattering'. For instance, it concluded that without 'deliberate planning on the part of the SADF and the SAP' it would have been impossible for the following 'unconventional' operations to have occurred between 1963 and 1989: 'cross-border raids, abductions, assassinations and attacks on people and property beyond the borders of South Africa' (2, 2, 134, 376). Although, it found the aforementioned 'institutions and their members responsible for the ... gross violations of human rights' that occurred during this period the commission failed to clarify the status of this finding or the implications that might follow from its disclosure.

What were the logical consequences of the commission attributing a judgement of responsibility to the incumbent of an organisation rather than to a particular person? It is not obvious how one should answer this question. The commission failed to disclose in the great majority of cases the precise reasons why it arrived at a specific conclusion. A further difficulty is that the structures and institutions that the National Party used in order to implement its action plans were no longer in a state of operational readiness. Therefore, it was not self-evident what the consequences were likely to be of the commission deciding to make an adverse finding against an 'organisation' or 'office'. It is possible that one of the reasons why the commission decided to make this type of finding is because it wanted to distinguish the institutions of the past from those of the present through an *officially sanctioned* process of stigmatisation (Du Toit, 1999, 27).

A related type of finding was the product of a similar outcome (or conclusion) being arrived at through the decision to follow a slightly different methodological route. The commission decided to reach a series of conclusions relating to the reasons why a range of violations *of the same type* occurred at different moments during the mandate period. The commission's investigations into the offences that were committed inside South Africa was followed by the decision to make a series of *comprehensive conclusions*. The decision to plan the occurrence of 'extra-judicial killings' fell into this category. The report outlines the circumstances that led to the occurrence of violations of the same type by describing the functional consequences of a series of similar offences. By isolating the generic features that all of the instances of a certain type shared in common the commission made the error of equating the consequences of specific violations with a series of factors that may have been responsible for their occurrence in the first place. The report claims that extra-judicial killings were, typically: (i) 'undertaken by a number of security divisions'; (ii) 'co-ordinated through joint participation in target workgroups'; (iii) based on the aim of eliminating 'high profile activists inside and outside of South Africa'; and (iv) and 'accompanied' by the decision to place 'weapons on or near the bodies of the victims after they had been killed' (2, 3, 288, 509) in order to create the general impression that the victims of these violations were combatants. The problem is that the report failed to support its general findings by specifying the reasons why the members of different institutions agreed to respond to specific historical events by making a plan to carry out specific actions (that led to the occurrence of specific violations) in order to promote a specific political objective.

In relation to the extra-judicial killings that occurred during the mandate period the commission found 'the following structures and individuals to be accountable' for the killing of civilians: 'the state president, ministers of law and order, defence, foreign affairs, commissioners of police, chiefs of security branch and heads of c section ...' (2, 3, 289, 503). Although this finding states that designated office-holders should be held accountable for the occurrence of this *type* of violation the report fails to specify what the consequences of this judgment could possibly be. For instance, how can an official 'position' rather than the incumbent of an office be held to 'account' for an offence? Moreover, how can the occupant of a specific 'office' be held to be morally responsible for a particular 'type' of violation rather than a specific 'event' in a particular setting?

The report does not answer these questions. The decision to frame the 'conclusions' of the commission through the medium of these 'findings' contributed very little to our understanding of the reasons why different types of violations occurred in the past. The reader gains little to no insight into the reasons why violations of the *same type* occurred during the past or of the factors that may have prevented their occurrence in the past. In many cases, the report disclosed a finding without stating the reasons why it was justified to do so. The reader does not specify what might have occurred had a specific office-holder decided to step out of line by refusing to follow the official 'party' line. It is likely that the commission decided to frame its findings in this loose (and yet systematic) way because it had not been able to acquire the evidence to specify how a specific chain of command linked each of the aforementioned institutions together.

In summary, the decision to attribute responsibility to a list of positions and organisations that were no longer active demonstrated the difficulties that the commission encountered when it attempted to report specific types of violations. The framing of the commission's findings in this form was an implicit admission of its intellectual impotence and its inability to explain the causes of specific violations. Its influence was restricted to the making of judgements that it was unable to justify to be true. This is as absolute an admission of its impotence as it is possible to imagine.

A further type of finding was established through the commission reaching the conclusion that 'named' individuals should accept the judgment that they were 'morally responsible' for the occurrence of a violation as a result of their acts or omissions. The

majority of the commission's findings were not individual perpetrator 'findings' in this sense because they did not lead to an allegation being against a specific 'individual'.

Although the fifth volume of the report lists 171 perpetrators who were granted amnesty the TRC failed to state the reasons why each applicant had been granted amnesty. The decision to exclude any reference to the incident (or incidents) for which a perpetrator had been granted amnesty was arguably not an 'oversight' (Du Toit, 1999, 30). The names of the applicants who were granted 'amnesty' was made public before the commission publish the report. Therefore, it is arguably the case that 'the need for the Commission to make any further findings in their cases [fell] away' (Du Toit, 1999, 30). It 'would be either a needless duplication ...for the [commission] to make individual perpetrator findings on those who have been granted amnesty' (Du Toit, 1999, 30).

The logic of this argument begs the question as to who the 'remaining' persons were whom the commission decided to refer to in its five volume report as a 'perpetrator'. The answer is the leaders and the members of a government, party, or movement who refused to apply for amnesty but were generally suspected of having been involved (in one way or another) in the planning or the implementation of specific violations. In order to make an allegation against a 'suspected' perpetrator the commission was able to utilise three sources of evidence that it had been able to corroborate to be true. The first source of new information included the 'testimonial evidence' that victims and perpetrators disclosed during their participation in one commission's public hearings. The second source was the information that could be derived from a close study of the statements and the testimony that was disclosed by individual amnesty applicants. The third source was the evidence that resulted from the commission's own investigations.

The problem with the commission's sources is that were so limited in scope and poor in quality that it was not self-evident how its commissioners and support staff could make a case against a political organisation by documenting the conduct of its members. The TRC's report writers also had to deal with the problems that emerged as a result of the mismatch that emerged between the findings of one internal committee and another. Although the hearings of the Human Rights Violation Committee had been finalised by the time that the commission began to consolidate its findings in an official report the greater majority of the Amnesty Committee hearings had not even been scheduled. The

commission's ability to make a 'perpetrator' finding stick was limited by the lack of evidence that it possessed to make a coherent case against an 'alleged' perpetrator.<sup>102</sup> Paradoxically, the decision of the TRC to make an adverse judgement against a 'named' suspect who refused to apply for amnesty occurred at the same moment that he or she was denied the right to dispute the basis of an allegation before a finding was published.

The commission decided to give itself powers that are reserved for a court of law. It decided to do so at the same time that it denied the persons whom it was making an accusation against of the right to establish their innocence or guilt at a public hearing. It soon became apparent that the 'legal' basis of the commission's decision to make an allegation against a suspected perpetrator was based on shaky and hollow foundations. The commission's allegations were based on a balance of probabilities and it was unable to state that a finding was conclusively 'true' beyond all 'reasonable' doubt. Andre Du Toit has argued that the decision of the commission to make perpetrator findings was 'problematic and misdirected' (1999, 31). It could have fulfilled its mandate 'with equal and even greater information specificity' (1999, 31) by specifying the specific human rights violations that it had been able to conclusively corroborate. Following the decision to follow this course of conduct the TRC could also have agreed to pass the content of its findings to senior officers of the criminal justice system. It would then have been the responsibility of the country's public prosecutors to decide whether it was *appropriate* for each of the persons who refused to apply for amnesty (but were suspected of having committed a crime) to be prosecuted in a court of law.

### **The determination of findings against parties and organisations**

The commission decided to establish a fourth type of finding. The making of this finding was a product of the commission's decision to make adverse findings against a broad variety of parties, organisations and movements by arguing that their leaders (or members) were directly responsible for the occurrence of specific violations. The commission decided to make perpetrator findings against a continuum of parties. It did

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<sup>102</sup> I have been not been able to establish the exact standards of judgment that the commission used as the basis whereby it deciding who would and would not be included on the list of persons and organisations that its commissioners decided should feel the heat by being subject of an adverse 'finding' or 'verdict'. One can only presume that a specific sub-committee was established within the commission to sit in judgment of the persons and organisations who were included on one of the commission's hit lists.



so by publishing the finding that a variety of organisations were responsible (in one-way or another) for either: (i) the occurrence of a systematic pattern; (ii) a specific type of violation; or (iii) the actions of individuals who belonged to a specific organisation.

The decision of the commission to hold the leaders of the African National Congress to account for the occurrence of excessive acts of violence was even more problematic than its decision to level specific charges at individual leaders of the National Party. The sources of evidence that the commission could use to make an adverse judgment against the leadership of the ANC was based on a narrow range of offences and the sources of testimony that it used to support a conclusion were not robust in terms of their quality.

Although the commission made no attempt to justify the claim that the ANC was *as responsible* as the National Party for the occurrence of 'systematic abuses', it did decide to criticise the actions of its leaders by making specific allegations of a lesser nature. The commission extended its truth-telling function at the report writing stage holding senior leaders of the African National Congress to account for the following 'alleged' transgressions: (i) offences that were committed *in its name* by persons who claimed an allegiance to the causes that it promoted; (ii) offences that were committed in its name by perpetrators who were allegedly members of this party or movement; and (iii) offences that occurred as a result of the failure of its leaders to prevent their 'followers' and 'supporters' from committing offences in a series of external and internal locations.

The commission also accused the leaders of the United Democratic Front (UDF) of failing to utilise their authority to prevent the occurrence of specific violations (2, 4, 378, 229). It argued the leaders of this movement should be called to account for the allegation that they decided to implement a series of political strategies that: (i) failed to prevent their supporters from committing human rights violations; or (ii) made it more likely that violations might occur as a result of the strategies that they decided to follow. The problem with this approach is that the commission failed to give reasons why it was justified to make this allegation. It failed to fully document the case that it was making by relating its allegations to the context that shaped the occurrence of specific events. For instance, it made no attempt to specify: (i) the alternative courses of action that the leadership of the UDF could have followed before or after the occurrence of a specific event; or (ii) the reasons why the TRC was entitled to raise retrospective allegations.

It also failed to make the case that the 'supposed' acts of omission of the UDF were the necessary and the sufficient 'preconditions' that 'caused' a specific offence to occur. The commission explicitly refused to make the argument that the leadership of the UDF were the *only* persons who were responsible for influencing the occurrence of an event. Clearly, a series of causes other than the acts and omissions of the UDF precipitated the occurrence of the conflicts that led to the occurrence of gross human rights violation. The making of the claim that the acts and the omissions of the UDF leadership were the most decisive cause would have brought the TRC's general argument into disrepute. The fact of the matter is that many of the allegations that the commission made against the liberation movements were not based on sources of evidence that could be judged to be true or false in the form in which they were eventually presented in its 1998 report.

In circumstances in which the leadership of a movement decide to commit themselves and their followers to the goals of a particular political programme and its use makes it more likely that law-breaking behaviour might occur the occurrence of this outcome does not entail that they are morally responsible for what their followers decide to do. The only person who is responsible for the occurrence of an offence is the person who (right or wrongly) decided to carry out the act that led to the occurrence of a violation. It would have been more appropriate for the commission to investigate specific incidents than to make allegations that it was not able to justify with reference to the sources of evidence that it had been able to establish through its own investigations.

In the precise circumstances in which the leadership of a movement decide to implement a political strategy that makes it more likely that their supporters will commit a series of offences it does not logically follow that they are responsible for the events that occurred as a result of their decision to promote their likely occurrence. It may be that what they contributed to the occurrence of an event was not wrong. For instance, the decision to support a policy that prevents a state from being able to rule a country effectively cannot be judged to be a wrongful action if that choice contributed to the outcome whereby a criminal system of rule began to split apart at its seams. In other words, it is only possible to hold a movement to account for a specific 'pattern' of abuses insofar as the body or person who is making a specific accusation is prepared to argue their case by examining the circumstances that surrounded specific events. The commission refused to adhere to this principle by opting in favour of a looser approach.

For instance, it made its case against the UDF by proposing the following procedural argument, 'inasmuch as the state is held accountable for the use of language in speech and slogans, so too must the mass democratic movement be accountable' (2, 4, 378, 229). It also sought to justify this approach by arguing that if 'the political leadership [of another movement] has accepted political and moral responsibility for the actions of its members' then it should also follow that 'the UDF is [also] accountable for the gross violations of human rights committed in its name' (2, 4, 378-379, 229).

The commission used essentially the same terms of reference when it decided to publish the allegation that the leadership of the African National Congress should be judged to be responsible for a range of violations that occurred during the mandate period. The problem with this argument is that the normative and factual assumptions of the commission were not the same as those of the leaders of the liberation movements. Senior leaders of the ANC agreed to take some responsibility for the actions that their leaders committed in the course of the struggle. However, the meaning that they attributed to this statement was not the same as the meaning that the commission decided to impute to the leaders of the ANC in the final volume of its report. Although the commission was aware of the difference between their respective perspectives it made the unilateral decision to close the gap between the two at the report writing stage. It decided to do so in order to create the impression that the normative and factual basis of its critique of the conduct of the ANC was stronger in principle than it actually was. In opposition to the contorted intellectual postures of the commission the ANC maintained (rightly or wrongly) 'that [the] actions it authorised ..were justified and necessary'. This was because they contributed to the promotion of an outcome that would not have occurred in the absence of the interventions of its senior leaders. In other words, some of the means that the ANC decided to employ during the course of the struggles of the past *could be justified* in terms of the ends that they promoted. In other words, the senior leadership of the ANC would have not been able to achieve the political goals that were a central pillar of their political programme in the absence of the campaign to make the urban townships of South Africa an ungovernable place.

It was also a mistake for the commission to equate the idea that somebody should be held accountable for the occurrence of specific human rights violations with the idea that the leaders of specific movements were morally responsible for their occurrence.

Senior leaders of the ANC agreed to take the most minimal responsibility for the 'excesses' that its office-holders committed in the course of the struggle (by appointing a body of experts to investigate the allegation that some of its cadres were tortured). However, they were not prepared to assume any moral responsibility for the actions of others groups in society who acted in their name. Senior members of the ANC also refused to accept the judgement that they could legitimately be held responsible for the violations that were committed by their allies and supporters in the mass movement. In summary, the commission made a categorical error when it decided to move from the *factual premise* that the ANC agreed to accepted some responsibility for some of the violations (that were the product of the combined actions of its leaders and MK operatives) to the normative *conclusion* that they should also be prepared to accept the judgment that they were also responsible for offences that were committed in their name. The TRC established no basis on which it could rationally justify this argument.

A further problem with the commission's perspective is that it failed to acknowledge that the ANC acted responsibly when it intensified the focus of the armed struggle. The decision of its leaders to commit themselves to this course of action resulted in successive leaders of the National Party being compelled to continue to participate in negotiations with the African National Congress and its allies in the wider movement. The conclusion of the negotiated settlement also prevented additional violations from occurring and paved the way for the formal termination of a system of minority rule. It was one thing for the commission to imply that specific ANC leaders should accept the judgement that its members were responsible for specific human rights violations that its officials had been able to establish through their fact-finding investigations. It was quite another for its commissioners to imply with the benefit of hindsight that they possessed a unilateral right to pass judgement on the political (and military) strategies that the leaders and the allies of the ANC decided to follow at the height of the struggle.

## Conclusion

The first section of this chapter has shown that the findings that the commission included in its report as official truths were insufficiently grounded in fact to produce a consensus of convictions relating to the reasons why specific violations occurred. My first conclusion is that the commission was able to demonstrate that violations occurred

in all provinces throughout the mandate period. However it was only partially able to use the sources at its disposal to disclose the reasons why specific patterns occurred. There were several reasons why the TRC was unable to meet this exacting standard. First, opposing interpretations of the purpose of its mandate created a tension between the need to promote relations of reconciliation the members of different organisations and the need to promote a rationally defensible awareness of the reasons why different types (and patterns) of gross human rights violations occurred during the past. Second, the restoration of the dignity of all victims through the discovery of the multiple reasons why they suffered immense harm existed in tension with the procedure whereby the conduct of individual perpetrators were judged against the same 'invariant' standard.

My second conclusion is that although the commission made a valued contribution by reporting the gross violations that occurred during the mandate period the methods that it used to disclose their occurrence were far too blunt to promote its other objectives. On the one hand, the commission fell short of its intended target of disclosing 'the causes, nature, extent of gross violations of human rights ...including the antecedents, circumstances, ..and contexts of such violations' (Cherry et al, 2002, 19). On the other hand, the likelihood that its commissioners could stimulate a public debate that focused on the nuances of the findings that were included in its report was overshadowed by their decision to disclose to the public its own 'brand' of perpetrator findings. The complicated intellectual apparatus that the commission decided to create in order to include perpetrator findings in its report was a curse as much as it was a blessing. The decision to make these 'findings' distorted the reception of its other conclusions. Paradoxically, it seems to me that one of the reasons why the commission decided to construct such an elaborate structure of categories in order to report its key findings was because the commission was attempting to paper over (and/or to conceal) the narrowness of the sources on which the entire edifice of its findings were based. The failure of the commission to fully investigate the offences that were caused by successive leaders of the National Party made it almost impossible for the commission to create a more balanced picture of the historical period that it was investigating. A further problem is that although the commission was able to demonstrate the variety of circumstances that gave rise to specific violations it was not able to link this finding to a coherent and sustained analysis of the motives of different groups of perpetrators.

Therefore, it is fair to conclude that the commission's report writers played a role that was not too different to the chess-playing puppet that Walter Benjamin has evoked. The truths that they disclosed were a gargantuan imitation that stood in the way of the truth. Through the use of a heavy-handed methodology the authors of the report drove a wedge between the factual occurrence of specific violations on the one hand and the rational (and non rational) motives of the perpetrators of these offences on the other hand. As a result, the TRC's findings and conclusions were not very illuminating.

My third conclusion is that some of the truths that were disclosed in the report did not have as their central focus the goal of justifying a narrative of unity and reconciliation. On the one hand, the report does mention the initiatives that the commission decided to introduce in order to promote the consolidation and extension of these specific values. On the other hand, the report writing stage of the commission's truth-telling process was also an attempt to change the way in which the entire mass of South African citizens were able to interpret their relationship to the past in their immediate present. The commission decided to interpret the causes and the consequences of different types of violations in exactly the same way because it wanted to promote the normative outcome whereby acts of violence on all sides of the conflict were judged to be invalid. Through the selective use of a number of window cases the commission also attempted to use the findings at its disposal to change the meaning of the past after its occurrence. In other words, an implicit (but largely unstated) morality was built into the methodologies that the commission used to disclose its findings and conclusions. The key message that it was attempting to convey to its target audience was the idea that violations occurred as a result of the conduct of perpetrators on all sides of the conflict. Given the centrality of this finding the report was only partially based on the goal of promoting relations of reconciliation in the aftermath of a negotiated settlement. The commission also attempted to use its results to persuade ordinary South African citizens that they should perceive the relationship between the past and the present through the prism of each of the categories that emerged out of successive truth-telling processes. In summary, the investigations and the hearings that the commission organised became the material means through which ordinary South Africans were encouraged to revise their understanding of the material and normative consequences of the past in the present. The commission promoted this outcome without resolving many of the key issues.

## **Chapter 10 – The results of the Amnesty Committee**

### **Introduction**

This chapter sets out an analysis of the recorded decisions of the Amnesty Committee. In order to establish the results on which this chapter is based it was necessary to analyse the recorded decisions of the Amnesty Committee prior to October 1999. The findings that emerged out of the analysis have enabled me to develop a critique of the procedures that the Amnesty Committee decided to utilize in order to establish a sample of the applicants who were successfully granted an amnesty for a specific offence.

My starting point was the sample of cases that the commission's report writers decided to include as an appendix to the fifth volume of the 1998 report. The results of this analysis support the conclusion that the Amnesty Committee was unable to establish an authoritative record of the violations that occurred during the mandate period. I have analysed the recorded decisions of the Amnesty Committee by specifying: (i) the gross and non-gross offences for which each successful applicant was granted an amnesty; (ii) the date of occurrence of the offences that each applicant admitted committing; (iii) the pre-hearing status of the applicants; (iv) the type of offences that they committed; and (v) the political identities of each of the 'individual' applicants. The results support the conclusion that the documented decisions of the Amnesty Committee were not an accurate representation of the violations that occurred during the mandate period. I begin the chapter by specifying how the amnesty granting process was organised.

### **The amnesty granting process**

It is important to acknowledge the success of the commission as a whole in establishing procedures that enabled the appointees to the Amnesty Committee to grant (or refuse to grant) an amnesty to the applicants who agreed to submit an application for amnesty. The first stage of the process was completed behind the scenes. Evidence analysts were instructed to give priority to applications from applicants who were 'known to be already in custody' (1, 10, 273, 19). The reported estimates of the commission show that 'fewer than 10 per cent of all applications were complete and required no further preparation. When further work was required' (1, 10, 272, 19) it was the responsibility

of an evidence analyst to work through the following sequence of tasks: '(a) to decide whether an application complied with the formal requirements of the act; (b) to request further particulars from the applicant or the applicant's legal representative; (c) to obtain the relevant prison records from the Department of Correctional Services; (d) to request a criminal docket from the South African Prosecuting Service (SAPS); (e) to secure transcripts of all relevant court records from the registrars or clerks of court; (f) to acquire a report from the Attorney General; (g) to ask the Investigation Unit to investigate the application; and (h) to make a recommendation to the evidence leaders who were expected to schedule the occurrence of a hearing' (1, 10, 273, 19). The second stage involved the reassessment of incomplete applications and the decision to forward completed applications to a panel of Amnesty Committee members. If 'the application did not involve a gross human rights violation and a public hearing was, not required, it was referred directly to the Committee which dealt with it in chambers' (1, 10, 283, 21). Alternatively, 'if a completed application did involve a gross human rights violation, a public hearing was held' and the relevant documentation was forwarded to the respective committee members so that they could prepare themselves for a hearing.

The third stage consisted of the decision being made as to 'whether' a specific application was a 'hearable' or a 'chamber' matter' (1, 10, 283, 23-24). The report does not disclose who decided whether a specific application did (or did not) involve the occurrence of gross human rights violation. It also fails to specify the standards that the commission used to reach a decision at different stages of the amnesty granting process. The sample of cases that are included in the 1998 report included a small number of applications that fell on the boundary between a gross and a non-gross offence. The applications of Riaz Saloojee (the personal assistant to Mr Joe Modise) and Felicity Barbara Anderson fall into this category. They were Umkhonto we Sizwe (MK) operatives who used clandestine methods to supply arms to underground cells. The second set of borderline cases involved applicants who allegedly incited or instigated the creation of the conditions that made it more likely that a violation might occur. For instance, Jan Anton Niewoudt admitted training Inkatha Freedom Party members to commit unspecified acts of aggression against their enemies inside South Africa. If a case was heard in chambers the evidence analyst was permitted to play a further role in the proceedings by preparing a memo that set out 'the recommended decision and (the)



reasons for it' (1, 10, 283, 24). The report does not specify who was responsible for determining the actual decisions of the Amnesty Committee at one of its hearings.

In relation to the applications that were scheduled to occur in public it was the responsibility of the evidence analyst and the evidence leader to serve a Section 19(4) notice to all interested parties 'at least twenty-one days prior to the hearing date' (1, 10, 283, 25). A hearing bundle was also prepared. It contained between 50 and 500 pages of documentation. Couriers were used to forward a bundle to the 'members of the hearing panel, [the] applicants, [the] victims, and [any other] implicated person' (1, 19, 283, 25). The report states that the analyst and evidence leaders were also permitted to assist the Amnesty Committee appointees in the making of a 'correct' decision. However, it failed to document how (or if at all) their formal recommendations shaped or influenced the decisions that a panel of Amnesty Committee members finally agreed to arrive at.

The fourth stage involved the hearing of an application and the making of a decision. The report does not record which applicants were refused amnesty or the names of the appointed committee members who were responsible for the making of a final decision. The administrative report of the Amnesty Committee states that out of its sample of 4,443 applications a total of 4,020 applications were refused. Roughly 9 in every 10 of the applications that it received were rejected before the scheduling of a hearing. The fifth stage consisted of the commission's administrative staff documenting the decisions of the Amnesty Committee and publicizing the names of the individual applicants who were granted amnesty for the offences that they committed during the mandate period.

### **The total number of granted applications**

According to Bundy (2001, 16) the mandate that the commission was instructed to follow had the affect of narrowing the way in which its commissioners and amnesty committee appointees were permitted to interpret the events of the past. On the one hand, he refers to the difficulties that they experienced 'concentrating only on those who had been killed, tortured or severely mistreated'. On the other hand, he recognizes that the 'report is not shaped in any important sense by an intellectual or political critique of

**Table 1 -  
Reported Gross Human Rights Violations and Granted Amnesty Applications**

A	B	C	D	E	F	G	H
Office/ Region	Population Specified by region	Reported Gross HRVs	Granted Amnesty Applications	Acknowledged Amnesty Incidents	Involving Gross HRVs	Involving Non Gross HRVs	Un
<b>Cape Town</b>							
Western Cape	4,118,000	Not spec	20	10	6	4	-
Northern Cape	746,000	Not spec	2	2	0	2	-
<b>Subtotal</b>	<b>4,864,000</b>	<b>3,122 (1780)</b>	<b>22</b>	<b>12</b>	<b>6</b>	<b>6</b>	<b>-</b>
<b>Durban</b>							
KwaZulu- Natal	7,700,000	Not spec	28	13	10	3	-
<b>Subtotal</b>	<b>7,700,000</b>	<b>16,803 (10,292)</b>	<b>28</b>	<b>13</b>	<b>10</b>	<b>3</b>	<b>-</b>
<b>East London</b>							
Eastern Cape	5,865,000	Not spec	41	22	9	13	-
Free State	2,470,000	Not spec	25	10	6	4	-
<b>Subtotal</b>	<b>8,335,000</b>	<b>5,460 (2,843)</b>	<b>66</b>	<b>32</b>	<b>15</b>	<b>17</b>	<b>-</b>
<b>Jo/Burg</b>							
Guateng	7,170,000	Not spec	26	23	4	18	-
Mpumalanga	2,646,000	Not spec	7	5	2	3	-
North West	3,043,000	Not spec	10	6	4	2	-
Northern	4,128,000	No spec	6	2	1	1	
<b>Subtotal</b>	<b>16,987,000</b>	<b>11,550 (6,381)</b>	<b>49</b>	<b>36</b>	<b>12</b>	<b>24</b>	<b>-</b>
Incidents unspecified By region	-	-	6	6	-	6	
Unaccounted Cases	-	-	-	4	-	-	4
<b>Subtotal</b>	<b>-</b>	<b>-</b>	<b>6</b>	<b>9</b>	<b>-</b>	<b>6</b>	<b>4</b>
<b>Total</b>	<b>37,886,000</b>	<b>36,935 (21,296)</b>	<b>171</b>	<b>102</b>	<b>42</b>	<b>56</b>	<b>4</b>

*Note:* The cell entries for Column B (Population by Region) of the table are taken from the South African Yearbook 1998 (Burger et al, 1998, South African Yearbook, Pretoria: South African Communication Directorate). The population overviews for the provinces are listed on pages 5 to 19 of this report.

*Note:* The cell entries for Column C (Reported Gross Human Rights Violations) are the figures that were published in the first volume of the commission's report (see the 'Introduction to Regional Profiles', 3, 1, 3) The table from which I was able to extract these figures does not specify how many violations occurred in each region. However it does specify the number of violations that the commission was able to corroborate. The total of corroborated violations was a product of the statement-taking process in each region. To capture this aspect of the process I inserted an additional figure beneath the number of gross human rights violations. The figure *in brackets* refers to the *total number of statements* that were taken by each office. This figure is not the same as the *total number of gross human rights violations* corroborated by each office. The report does not specify which statements generated a corresponding gross human rights violation. The table on page 3 of the report does imply that the number of statements that the commission received does need to be interpreted in relation to the number of gross human rights violations. The problem is that the report does not show how the relationship between them should be understood. The report fails to specify: (i) the content of each victim's statement; (ii) how many incidents occurred as a result; and/or (iii) the incidents that the TRC was able to corroborate versus those that it could not.

*Note:* Columns D, E, F, G and H are the result of my analysis of the decisions of the Amnesty Committee.

*Note:* Column H has been added to reflect the fact that although the total number of perpetrators does equal the target figure of *one hundred and seventy one* there was a shortfall of *four* incidents. Adding the unaccounted cases raises the number of incidents from *ninety-eight* to *one hundred and two*. I have not been able to establish the basis for this discrepancy. The column title 'Un' stands for unaccounted cases.

its mandate' nor by an analysis that [seeks to] 'transcend that mandate' (2001, 17).<sup>103</sup>

The analysis that follows is based on the recorded decisions of the Amnesty Committee.

Table 1 discloses the finding that amnesty was granted to 171 perpetrators. A comparison of the totals for column B and D also shows that up until the end of 1998 amnesty was granted to 0.00045 of a percent of the entire population of South Africa. Therefore one can conclude that the number of applicants who were granted amnesty is very low in relation to the total number of citizens who resided inside the country. The commission failed to specify in its report the total *number of incidents* that generated each of the gross human rights violations that are listed in Column C of Table 4.<sup>104</sup> The commission's report writers reported the results of the commission so that it would not be possible for the reader to compare and compare different sources of information. For instance, it was not possible for a reader to relate the total number of incidents that led to the 'reporting' of a gross human rights violation to a corresponding survey of the

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<sup>103</sup> According to Mamdani, (1997, 23) the 1994 genocide in Rwanda led to the emergence of many victims but few beneficiaries. In contrast, in South Africa there were few victims of white minority rule but many persons who benefited from the presence of a system of rule that improved the condition of life of a small minority at the expense of the condition of life of a far larger majority of the population. The small sample of applicants whom the Amnesty Committee decided were responsible for the occurrence of specific offences would appear to bear out the basis of the latter judgment in a very unforgiving way.

<sup>104</sup> I was able to establish a figure of the total number of incidents by relating additional sources of information (such as the TRC's press reports) to the recorded decisions of the Amnesty Committee.

hearings at which an applicant was granted amnesty for the occurrence of an offence. Through a comparison of the regional subtotals for column D (granted amnesty decisions) and column C (reported gross human rights violations) one can disclose the magnitude of the gap that emerged between different aspects of the TRC's findings. For instance, the results for the Cape Town office would lead to the conclusion that the 22 applicants who were granted amnesty for offences that were committed in the provinces of the Western and Northern Cape were responsible for the occurrence of 3,122 gross human rights violations during the mandate period. The mismatch between the total number of violations and the total number of granted amnesties was considerable.

According to Charles Villa-Vicencio (the TRC's Director of Research) the commission initially made the estimate that it would receive 80,000 gross human rights violation statements from the victims of a violation or the relatives of a victim (Buur, 2003, 154). The second entry in the 'subtotal' entry of column C refers to the total number of gross human rights violations that were reported to the commission by individual applicants. The total entry at the bottom of the column shows that the four regional offices of the commission received a total of 21, 296 gross human rights violation statements. The step by step corroboration of these statements resulted in the Human Rights Violation Committee reporting the occurrence of 36, 935 gross human rights violations. The report does not specify how each of the 'reported' statement led to the Human Rights Violation Committee documenting the occurrence of almost twice as many violations. If we relate the total number of incidents that were corroborated by the Amnesty Committee (column E) to the number of gross and non-gross offences that were committed (column F and G) Table 1 discloses a finding of immense consequence. On the one hand, the Amnesty Committee made a positive finding in relation to 102 incidents. On the other hand, there were just 42 cases that led to the occurrence of a gross human rights violation. This finding was not disclosed to the TRC's readers.

In summary, these findings show that the total number of victims who reported a gross human rights violation to the regional offices of the commission far exceeded the total number of perpetrators who were granted amnesty for a gross or a non-gross offence. On the basis of such vastly disproportionate results the commission's regional offices were unable to meet the requests for information of the vast majority of the victims. The

emergence of this shortfall was a consequence of the fact that the Amnesty Committee was only able to establish the identities of a small sample of perpetrators prior to 1999.

### **The creation of a partial record of offences**

My analysis of the recorded decisions that the Amnesty Committee was able to establish before the commission's report was finalized does raise some uncomfortable issues.

First, I have shown that the number of applicants who were granted amnesty was very low in relation to the number of violations that occurred during the same period. The Appendix to the administrative report of the Amnesty Committee lists 171 perpetrators.

Second, this analysis also reveals that this list includes two types of applicants. 104 applicants committed offence that led to the occurrence of a gross violation and 67 applicants committed an offence that led to the occurrence of a non-gross violation.<sup>105</sup>

Third, by restricting their investigations to the applicants who voluntarily submitted an amnesty application the actions of the appointed members of the Amnesty Committee contributed to the emergence of a legally sanctioned process of forgetfulness. The acts of omission of the commission contributed to the outcome whereby the relatives of a great majority of the victims were unable to establish the identities of the perpetrators who were the source of much of their torment before the 1998 report was published.

The Amnesty Committee rarely delivered the 'results' that the victims were hoping for because of the time that it took to clear a backlog of cases that continued to mounted up.

The report also failed to mention other gaps in the coverage of the Amnesty Committee. The most important issue was its neglect of the human rights violations that occurred in a series of geopolitical locations outside of the borders of the South African state. The first column of Table 1 includes the cell entry 'Incidents Unspecified by Region'. The cell entry for column F is blank. The findings of the committee include no cases in which amnesty was granted for a *gross* violation that occurred outside of South Africa. This finding is significant. It means that all the amnesties that were granted by the Amnesty Committee for a gross violation were the product of an incident that occurred

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<sup>105</sup> The 'Appendix: Amnesties Granted' is an incomplete source of data. It makes no reference to: (i) the identity of the perpetrators; (ii) the date of occurrence of the offences that they admitted committing; (iii) the gravity of the offences that they committed; (iv) the question of whether an applicant was acting alone or in concert with others (including individuals who refused to apply for amnesty); (v) the prior status of the applicants; and (vi) the number of offences that each of the applicants admitted to having committed.

inside South Africa. The entry for column G refers to 6 'non-gross' incidents that occurred in areas that were 'unspecified' because they could not be subsumed within a provincial area of South Africa. There was one case that occurred outside of South Africa. Mr Niewoudt admitted training Inkatha Freedom Party cadres to commit acts of aggression inside South Africa. The Amnesty Committee decided that the offence that he committed did not merit a public hearing. As a result the case was heard in chambers.

In summary, at the moment when the TRC report was published it had granted no amnesties for a gross human rights violation that occurred outside of South Africa. The absence of external coverage is surprising given that 'most of the victims of the Government's attempts to cling to power lived outside of South Africa' (Cherry et al, 2002, 32). Although 'twenty to twenty-five thousand South Africans ... died in political violence within the country's borders during the mandate period ... hundreds of thousands of Southern Africans died ... as a direct or indirect result of South Africa's calculated destabilization of the region' (2002, 32). The perpetrators of these acts refused to comply with the law of the land by voluntarily agreeing to apply for amnesty.

### **Two types of amnesty applications**

The decisions of the Amnesty Committee can be characterized in terms of whether an applicant was granted amnesty for a gross or a non-gross human rights violation. The Amnesty Committee recorded the offences that were committed by 171 perpetrators. There were 65 perpetrators of a non-gross offence and 7 perpetrators of offences that were so poorly recorded that I was unable to establish their consequences. The actual offences that the committee acknowledged each applicant to have committed were (at least in part) a consequence of the leeway that its appointed members were given to change the parameters of the mandate that they had been instructed to follow.

Table 2 shows that the perpetrators of non-gross human rights violations were granted amnesty for the following offences: (i) acts of resistance to a colonial or alien form of rule (theft, robbery and the illegal possession of arms); (ii) localized acts of violence (including assault, arson, damage to property and civic disorder); (iii) acts of sabotage (the attempted destruction of specific facilities); (iv) acts of a covert nature (such as assisting a fugitive or passing on confidential information to the security services); (v)

**Table 2 - Non-Gross and Unspecified Human Rights Violations: Offences committed by perpetrators<sup>1</sup>**

Offences committed	ANC	UDF	PAC/APLA	PPF	NP	IFP	STATE	HOMELAND	AWB	BWB	OTHER	Unspecified	Total
Assault	1	-	-	-	-	-	-	-	-	-	-	-	1
Arson and public violence	1	1	-	-	-	-	-	-	-	-	-	-	2
Public violence	-	-	-	-	-	-	-	-	-	-	3	-	3
Public violence and malicious damage	1	-	-	-	-	-	-	-	-	-	-	-	1
Malicious damage to property	2	-	-	-	-	-	-	-	-	-	-	-	2
Causing an explosion	2	-	1	-	-	-	-	-	-	-	-	-	3
Sabotage	-	-	-	-	-	-	-	-	-	-	1	-	1
Robbery	-	-	2	-	-	-	-	-	1	-	-	-	3
Robbery and the possession of arms	4	-	-	-	-	-	-	-	-	-	-	-	4
Theft	-	-	-	-	-	-	-	-	1	-	-	-	1
Theft and the illegal possession of arms	-	-	-	-	-	1	-	-	1	-	-	-	2
Holding up a police station and stealing their weapons	-	-	-	-	-	-	-	-	-	-	-	-	-
Illegal possession of arms/firearms	8	-	-	-	-	-	-	-	1	2	4	-	15
Storage and distribution of arms	4	-	-	-	-	-	-	-	-	-	-	-	4
Possession of arms and their possible use against a civilian target	-	-	-	-	-	-	-	1	-	-	-	-	1
Possession of arms and their use to attack a state target	1	-	-	-	-	-	-	-	-	-	-	-	1
Bombing of a civilian target	-	-	-	-	-	-	-	-	4	4	-	-	8
Bombing of a civilian installation	-	-	3	-	-	-	-	-	1	-	1	-	5
Attempting to cover up a criminal act	-	-	-	-	-	-	2	-	-	-	-	-	2
Directing a subordinate to bomb the house of a civilian activist	-	-	-	-	-	-	1	-	-	-	-	-	1
Passing on confidential information to the security services	-	-	-	-	-	-	-	-	-	-	-	1	1
Training surrogate forces to carry out acts of aggression	-	-	-	-	-	-	-	-	-	-	-	1	1
Assisting a banned person	-	-	-	1	-	-	-	-	-	-	-	-	1
Harbouring a fugitive from the state	-	-	1	-	-	-	-	-	-	-	-	-	1
Making a hoax call	-	-	-	-	-	-	-	-	-	-	1	-	1
Refusing to serve in the armed forces	-	-	-	-	-	-	-	-	-	-	1	-	1
Unspecified	-	-	-	-	-	-	-	-	-	-	-	5	5
Not known	-	-	-	-	-	-	-	-	-	-	1	-	1
<b>Total</b>	<b>24</b>	<b>1</b>	<b>7</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>3</b>	<b>1</b>	<b>9</b>	<b>6</b>	<b>12</b>	<b>7</b>	<b>72</b>

<sup>1</sup> For three incidents involving seven perpetrators I was unable to identify the precise nature of the offences that the applicants admitted to have caused. Although I have listed these cases in a distinct appendix (see Appendix 6B) I have incorporated the results of these cases into the table above. The five unspecified incidents relate to the first case. The second incident involved the passing of confidential information to a security force officer and the final incident involved the training of Inkatha Freedom Party (IFP) members to commit acts of aggression. It made no sense to create an additional table for such a small number of cases.

<sup>1</sup> There were 3 incidents that were the product of the conduct of 7 perpetrators where I was unable to derive from the documented decision of the Amnesty Committee the outcomes of the 'offences' that they committed. It did not make sense to create an additional table for such a small number of cases. Table 2 includes the results of the 65 applicants who committed a Non-Gross Human Rights Violation and the 7 applicants who were responsible for the occurrence of a violation with an outcome that was 'unspecified'. The latter sub-sample included: (i) 5 applicants within the 'unspecified' row; (ii) 1 applicant in the 'training surrogate forces to carry out an act of aggression' row; and (iii) 1 applicant who was admitted that he was responsible for the decision to 'pass on confidential information' to a security officer.

acts of evasion (covering up a crime by committing additional crimes); (vi) the bombing of an enemy target; and (iv) commanding a subordinate to bomb the house of a civilian.

Out of a total of 72 perpetrators only 3 were members of the security forces. They included: (i) two policemen who were granted amnesty for their role in the cover up of the murder of the human rights lawyer Mr Griffiths Mxenge; and (ii) one district commander who was granted amnesty for ordering Mr Eugene de Cock to bomb the house of a civilian activist. These findings demonstrate that the decisions of the Amnesty Committee were not representative of the violations that were committed by successive leaders of the National Party, by senior state officials or their political allies.

Table 3 (overleaf) lists the offences that were committed by the perpetrators of gross violations. 73 per cent of all gross human rights violations were committed by applicants who were members of an organisation affiliated to: (i) the African National Congress; (ANC) (ii) the United Democratic Front (UDF); (iii) the Pan African Congress (PAC); and (iv) the Azanian Peoples Liberation Army (APLA). A subsequent section of the commission's report includes the conclusion that 'the predominant portion of gross human rights violations was committed by the state through its security and law enforcement agencies' (5, 6, 212, 77). Therefore, it comes as quite a surprise to discover that the offences that the commission claimed that the National Party and its allies committed in the past (i.e. assassination, torture and the severe ill-treatment) were barely present in the sample of cases that the Amnesty Committee was able to establish.

The results that are documented in Table 3 show the recorded decisions of the Amnesty Committee were not an accurate record of the violations that occurred during the past. Seventy three per cent of all the perpetrators of a gross human rights violation were



**Table 3 - Gross Human Rights Violations: Offences committed by Perpetrators**

Offences committed	ANC	UDF	PAC/ APLA	PFP	NP	IFP	STATE	HOMELAND	AWB	BWB	OTHER	Total
Abduction	-	-	-	-	-	-	-	-	-	-	-	-
Attempted assassination	-	-	-	-	-	-	-	-	-	-	-	-
Assassination	-	-	-	-	-	-	-	-	-	-	-	-
A bombing that led to the death of fewer than four persons	-	-	-	-	-	-	-	-	2	-	-	2
A bombing that led to the death of more than four persons	-	-	-	-	-	-	-	-	-	-	-	-
Attempted murder	12	-	2	-	-	-	-	-	-	-	-	14
Murder of fewer than four persons	23	5	7	-	-	1	5	-	2	-	-	43
Murder of more than four persons	2	-	6	-	-	2	1	-	3	-	2	16
Kidnapping	-	-	1	-	-	-	-	-	-	-	-	1
Kidnapping and severe ill-treatment	-	-	-	-	-	-	-	-	-	-	-	-
Kidnapping and murder	4	-	-	-	-	-	-	-	1	-	-	5
Killing in order to escape capture	1	-	-	-	-	-	-	-	-	-	-	1
Robbery and murder	-	-	6	-	-	1	-	-	4	-	-	11
Theft and murder	-	3	-	-	-	-	-	-	-	-	-	3
Severe ill-treatment	-	-	-	-	-	-	-	-	-	-	-	-
Torture	-	-	-	-	-	-	-	3	-	-	-	3
Not specified	-	-	-	-	-	-	-	-	-	-	-	-
<b>Total</b>	<b>42</b>	<b>8</b>	<b>22</b>	<b>0</b>	<b>0</b>	<b>4</b>	<b>6</b>	<b>3</b>	<b>12</b>	<b>0</b>	<b>2</b>	<b>99</b>

members of an organisation that was opposed to the continuity of white minority rule. No member of the National Party was granted amnesty for a gross violation. The table also shows that there were 'few' recorded decisions for the following offences: (i) abduction; (ii) assassination; (iii) attempted assassination; (iv) a bombing that led to the deaths of more than four persons; (v) severe ill-treatment; and/or (vi) the act of torture.

The sample of cases that the Amnesty Committee established can be characterized in terms of the offences that the applicants committed throughout the mandate period. According to Ronald Slye (1999) one of the central achievements of the commission was the fact that its Amnesty Committee was able to establish irrefutable proof that a series of offences occurred as a result of the conduct of specific groups of perpetrators. This statement is not untrue. However it means far less than Professor Slye would like us to believe. The ambiguity of the commission's position is thrown into sharp relief when we read between the lines and establish how much was lost in the small print. Professor Slye's colleagues at the commission partially misled its readers by incorporating into the 'findings' section of its report a series of decisions where the applicant carried out an action that did *not* lead to the occurrence of a gross violation.

This emphasis begs the question as to why the report of the commission failed to distinguish between the 'gross' and the 'non-gross' offences that were committed by the applicants whose applications were subsequently granted by the Amnesty Committee? Although it is not possible for me to answer this question in a definitive manner it is possible to state that the decision of the commission's report writers to disclose the results of the Amnesty Committee in this way was potentially misleading. This is because the commission decided to disclose the recorded decisions of the Amnesty Committee through the non-disclosure of the most important aspect of its findings. Although we do not know why this particular decision was made we can be certain of one central fact. The recorded decisions of the Amnesty Committee failed to establish an authoritative record of the violations that occurred during the mandate period.

### **The date of occurrence of offences**

Initially, applicants could apply for amnesty for 'any, omission or offence associated with a political objective between 1 March 1960 and 6 December 1993' (1, 0, 67, 2). An

amendment to the Interim Constitution extended the cut-off date to 10 May 1994.<sup>106</sup>

Table 4 specifies the date of occurrence of the incidents for which the perpetrators of a non-gross offence were granted amnesty. From a total of 171 perpetrators the committee decided to grant amnesty to 65 applicants for the occurrence of this type of offence. It also shows that the majority of incidents for which applicants were granted amnesty occurred towards the end of the mandate period. Only 17 per cent of the recorded decisions of the committee (for non-gross offences) occurred between 1960 and 1990. The most recent case involved Christo Brand, Morton Christie, Andrew Howell, Harry Simon Jardine and James Mkhazwa Zulu. Brand and Zulu were members of the Inkatha Freedom Party. Christie, Jardine and Howell were members of the Afrikaner Resistance Movement (AWB). Christie was a member of both organisations. They planned an

**Table 4 - Date of Occurrence of Offences: Non-Gross and Unspecified Human Rights Violations**

Yearly Intervals	Frequency	Total
1960-1975	-	-
1965-1970	-	-
1975-1980	2	2.8%
1980-1985	-	-
1985-1990	10	13.9%
1990-1994	56	77.8%
Not specified	3	4.2%
Not Known	1	1.3%
<b>Total</b>	<b>72</b>	<b>100%</b>

operation that involved the plan to steal arms from a police station at Flagstaff in the Eastern Cape. Unbeknown to the unit the police had been tipped off (allegedly by the AWB commander who gave the order for the unit to carry out the raid). A shootout followed. One policeman was killed and two others were injured. The applicants decided to steal a police vehicle in order to escape from the scene of the crime. For these applicants the amnesty granting process could not come soon enough. They had nothing to lose but their chains. One can hear Marx (or even Tutu and Boraine) exhorting them with the clarion call, 'tell the truth. You have nothing to lose but your manacles'. Amnesty was the light at the end of the tunnel for many of the applicants

<sup>106</sup> The cut-off date for any 'act, omission or offence' that was politically motivated should not be confused with the decision to introduce a second cut-off date. 'Midnight 30th September 1997' (1, 10, 267, 2) was the last moment when an application could submit an amnesty application. Any application that was received thereafter was not included in the Amnesty Committee's sample of 'hearable' cases.

who were caged inside a police or prison cell. It came as no surprise when applicants who were at various stages in the development of a criminal case adopted a calculating attitude towards a process from which they could potentially gain so much. The procedures that the Amnesty Committee decided to follow contributed to the cumulative decisions created the impression that very few human rights violations occurred between the Sharpeville massacre of 1960 and the national elections of April 1994.

**Table 5 - Date of Occurrence of Offences: Gross Human Rights Violations**

<b>Yearly Intervals</b>	<b>Frequency</b>	<b>Total</b>
1960-1975	-	-
1965-1970	-	-
1975-1980	-	-
1980-1985	3	3%
1985-1990	9	9 %
1990-1994	87	88%
<b>Total</b>	<b>99</b>	<b>100%</b>

#### **The pre-hearing status of the applicants**

Of the 72 applicants who were granted amnesty for a non-gross human rights violation only 35 of them were granted to applicants whom were Type 1 perpetrators. A Type 1 perpetrator was an applicant who had been: (i) subject to an investigation involving the cooperation of different members of the criminal justice system (the police or the judiciary); or (ii) convicted of a criminal offence by a South African court of law. Table 6 includes 35 perpetrators of this type. These applicants were placed in a more vulnerable position in relation to the state (and the commission) than other applicants because they had been subject to an investigation into their alleged criminal activities. The amnesty clause provided them with a unique opportunity to admit their involvement in a violation creating incident in exchange for an irreversible pardon. Every single perpetrator of this type had an interest in exchanging the victimless offences that they committed for the prospect of an early release date from custody. Type 2 perpetrators were applicants who were not caged within a prison cell. They were persons who were unlikely to be called for trial by one of the state's public prosecutors. They were also applicants who may have been uneasy with the prospect that if they refused to apply for amnesty they might be subject to an investigation in the future.

**Table 6 – The Pre-Hearing Status of the Perpetrators of Non-Gross Violations**

Pre-Hearing Status	AN C	UDF	PAC/APLA	PFP	NP	IFP	STATE	HOME-LAND	AWB	BWB	OTHER	TOTAL
Arrested for an Offense	2	-	1	-	-	-	-	-	2	-	1	6
Arrested and due to return to court	-	-	2	-	-	-	-	-	-	-	-	2
Pending a Trial	1	-	-	-	-	-	-	-	1	-	-	2
Scheduled for a Retrial	-	-	1	-	-	-	-	-	-	-	-	1
Convicted of an Offense	13	1	1	-	-	1	-	-	3	1	2	22
Charged but not Convicted	-	-	-	1	-	-	-	-	-	1	-	2
Escaped from the scene of a crime	-	-	1	-	-	-	-	-	-	-	-	1
Implicated in a Crime	-	-	-	-	-	-	2	-	-	-	-	2
Acquitted but later admits his guilt	-	-	-	-	-	-	-	-	-	-	-	-
Not specified	8	-	1	-	-	-	1	1	3	4	7+7	32
Not Known	-	-	-	-	-	-	-	-	-	-	2	2
Total	24	1	7	1	0	1	3	1	9	6	19	72

Table 8 includes 37 cases of this type via the cell entry 'not specified'. It follows that only 37 applicants (or 42 per cent of the total) could have been Type 2 perpetrators. These applicants were perpetrators who suspected that if they failed to apply for amnesty before the final cut off date the consequences of deciding to ignore the rule of law might be far worse for them than the decision to agree to apply for amnesty. Although one would be wrong to conclude that the applicants who applied for amnesty agreed to do so for altruistic reasons one would be correct to conclude that each of the applicants who were granted an amnesty derived a benefit as a result of having done so.

Table 7 specifies the pre-hearing status of the applicants who committed a gross human rights violation. The first significant finding is that 87 per cent of all the perpetrators of a gross human rights violation were Type 1 applicants. They had either been: (i) arrested for an offence; (ii) were awaiting trial; or (iii) had been convicted of a criminal offence. The decisions of the Amnesty Committee do not clearly specify whether the offence that an applicant was convicted of in the past (by a court of law) was the same as the offence for which he or she was being granted amnesty (by the commission). Only 13 applicants who were granted amnesty for a gross human rights violation were *not subject* to a criminal investigation before they decided to apply for amnesty. This finding refutes the judgment that the amnesty process contributed to the outcome whereby the perpetrators of the worst crimes of the past were rationally persuaded to apply for amnesty in order to evade the prospect of a criminal prosecution in the future. The fact of the matter is that many perpetrators ignored the Amnesty Committee. They were not called to account for their actions after its scheduled hearings were completed.

The second column of Table 7 shows that the applicants who had not been subject to a criminal investigation (but were applying for amnesty for a gross human rights violation) were members of the African National Congress. Therefore, it follows that there were no Type 2 perpetrators who were members of the National Party, members of the Inkatha Freedom Party or salaried employees of the state. This is a significant fact because the commission attempted to make a lot of mileage out of the claim that the advantage of the amnesty clause was that it was designed around the principle whereby alleged perpetrators were coerced to make an either/or choice. This choice was based on the calculation that if an alleged perpetrator agreed to reveal his or her involvement in

**Table 7 – The Pre-Hearing Status of the Perpetrators of Gross Human Rights Violations**

Pre-Hearing Status	ANC	UDF	PAC/ APLA	PFP	NP	IFP	STATE	HOME-LAND	AWB	BWB	OTHER	TOTAL
Arrested for an Offence	2	-	-	-	-	-	-	-	-	-	-	2
Arrested and due to return to court	-	-	-	-	-	-	-	-	-	-	-	0
Pending a Trial	-	3	-	-	-	-	3	-	-	-	-	6
Scheduled for a Retrial	-	-	-	-	-	-	-	-	-	-	-	-
Convicted of an Offence	27	5	22	-	-	4	3	3	12	-	2	78
Charged but not convicted	-	-	-	-	-	-	-	-	-	-	-	0
Escaped from the scene of a crime	-	-	-	-	-	-	-	-	-	-	-	0
Implicated in a Crime	-	-	-	-	-	-	-	-	-	-	-	0
Acquitted but later admits his guilt	2	-	-	-	-	-	-	-	-	-	-	2
Not specified	11	-	-	-	-	-	-	-	-	-	-	11
Not Known	-	-	-	-	-	-	-	-	-	-	-	0
Total	42	8	22	0	0	4	6	3	12	0	2	99

the occurrence of a human rights violation before the termination of the cut-off date the consequences of doing so might be more advantageous than an outright refusal to do so. The recorded decisions of the Amnesty Committee demonstrate that few perpetrators of a gross human rights violation agreed to step forward by disclosing the reasons why they should be held to account for the occurrence of a gross human rights violation. The Type 1 perpetrators were the key constituency from which the TRC recruited its sample. One wonders how the Amnesty Committee would have coped in the absence of a stable supply of convicts who formed the backbone for the establishment of a sample of cases.

### **The political identities of the perpetrators**

The results of the Amnesty Committee were not a true representation of the gross human rights violations that occurred during the mandate period. First, the statutory instruments that the Amnesty Committee decided to look through in order to detect specific violations were too narrow to achieve their intended truth-telling purpose. The commission failed to equip itself with the telescopic means to establish a panoramic survey of all of the gross violations that were committed during the mandate period. Second, the Amnesty Committee restricted its field of vision by scheduling hearings that were limited to the incidents that occurred towards the end of the mandate period. In order to support the judgment that the recorded decisions of the Amnesty Committee were not the same as the offences that occurred during the entire mandate period it was necessary to establish the political identity of the applicants who were granted amnesty.

Table 8 lists the total number of perpetrators who were granted amnesty by the political organisation that each applicant was recorded by the commission to be a member of. The first column (to the left of the table) refers to applicants who belonged to a political organisation who adopted a political programme that was generally opposed to the continuation of a system of white minority rule.<sup>107</sup> The two columns in the middle refer

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<sup>107</sup> The documented decisions of the Amnesty Committee specified a link between the identity of an applicant and the group to which he or she belonged at different levels of abstraction. For instance, Pumlani Kubukeli was referred to as a member of Umkhonto we Sizwe (MK) officer. For other applicants their relationship to the African National Congress was mediated through additional layers of organisation at a local level. Two Boy Jack was recorded as a member of a self-defence unit that was aligned to the ANC. The tendency for the struggle against white minority rule to be extended to a variety of fronts was also accompanied by the splintering of the liberation movements into competing factions at a local level.



**Table 8 - Applicants granted Amnesty by Organisation**

ANC		NP		AWB		TOTAL
Member	20	Member	0	Member	20	
Supporter	3	Supporter	0	Task Group member	1	
Youth League	19	-	-	-	-	
Aligned	1	-	-	-	-	
Self Defence Unit	12	-	-	-	-	
MK	11	-	-	-	-	
<b>Sub-Total</b>	<b>66</b>		<b>0</b>		<b>21</b>	<b>-</b>
<b>UDF</b>		<b>IFP</b>		<b>BWB</b>		
Member	5	Member	5	Member	2	
Supporter	1	Supporter	-	BWB/Conservative	3	
Affiliated	3	-	-	Party Member	1	
				Volksfront		
<b>Sub-Total</b>	<b>9</b>		<b>5</b>		<b>6</b>	<b>-</b>
<b>Other Liberation Movements</b>		<b>State</b>		<b>-</b>		
AZANLA	7	Police	9	-	-	
AZAYO	2	Security Police	4	-	-	
APLA	6	SADF	1	-	-	
PAC member	8	Prisons	1	-	-	
COSAS	1	-	-	-	-	
PASO	4	-	-	-	-	
SASO	1	-	-	-	-	
<b>Sub-Total</b>	<b>29</b>		<b>15</b>		<b>-</b>	<b>-</b>
<b>Other Parties</b>		<b>Homeland</b>		<b>-</b>		
Progressive	1	Elite Police	3	H'land rule subject	2	
Freedom Party		Def Force	1	Conscientious Obj	1	
		Prisons	1	Not specified	11	
<b>Sub-Total</b>	<b>1</b>		<b>25</b>		<b>14</b>	<b>-</b>
<b>Total</b>	<b>105</b>		<b>25</b>		<b>41</b>	<b>171</b>
<b>% of all cases</b>	<b>61.4</b>		<b>14.6</b>		<b>24</b>	<b>-</b>

to members of the National Party and their political allies. These were principally the leaders of the Inkatha Freedom Party, the rulers of the homelands and their officials who were responsible for upholding the security of these fragile entities.<sup>108</sup> The column to the right includes individual perpetrators who were the members of nationalist and/or right wing organisations. The miscellaneous category includes 2 subjects of homeland rule, 1 conscientious objector and 11 applicants whose 'political' identities were not specified in the documentation that recorded the decisions of the Amnesty Committee.

Table 8 shows that 104 amnesties were granted to the members of the following parties or movements: (i) the African National Congress; (ANC); (ii) the United Democratic Front (UDF); (iii) the Pan-African Congress (PAC); (iv) youth related organisations; and (iv) the members of independent self-defence units. With the exception of a single member of the Progressive Freedom Party (PFP) 60% of all the applicants who were granted amnesty were aligned with or members of a national liberation movement. The commission's report writers presented the recorded decisions of the Amnesty Committee as if there was no need to specify the identity of each of the perpetrators. The results that are included in Table 8 reveal that it was unwise for the commission to present the findings of the Amnesty Committee in such an indiscriminate way. The Amnesty Committee took the line of least resistance in relation to the persons who held the greatest amount of power in the community in the past *and* also in the present. It did so by deciding to replace the universality of amnesty for all suspected perpetrators with a more limited conception of the underlying function of the amnesty granting process. This conclusion is also supported by other facts that are documented in the TRC report. The 'findings' and 'conclusions' section of the report includes the primary finding that 'the predominant portion of gross human rights violations of human rights was committed by the former state through its security and law enforcement agencies' (5, 6, 212, 77). It also states that 'in the pursuit of these unlawful activities, the state acted in collusion with certain other political groupings, most notably with the Inkatha Freedom Party (IFP)'. Given these findings it is not unreasonable to suppose that the two organisations who were allegedly responsible for the lion's share of all gross human rights violations would also be the two organisations from whom the Amnesty Committee was also likely to receive the highest number of amnesty applications. Table

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<sup>108</sup> It does not follow that every single member of these organisations were natural allies of the state.

8 shows that the results of the Amnesty Committee do not support this conclusion. It received few applications from: (i) members of the National Party; (ii) employees of the state; or (iii) members of the Inkatha Freedom Party. From a sample of 171 perpetrators amnesty was granted to no more than 20 members of these organisations. In conclusion, 9 in 10 of all of the applicants who were granted amnesty were the members of an organisation that was not aligned with the National Party, the state or one of its allies.

One of the faults of the legislation that created the commission's mandate is that it failed to equip its commissioners with the means to reverse this particular outcome. The Amnesty Committee was unable to produce representative findings in circumstances in which the members of influential parties, movements and associations were able to use the legal means at their disposal to limit the scope of the commission's investigations. Unrepresentative findings were also more likely to be produced in circumstances in which the members of less powerful groups of perpetrators were unable to prevent the commission from initiating a series of investigations at a regional and/or local level. A central (and defining) aspect of this process is that amnesty granting process tended to reproduce the logic of the relations that were dominant during the apartheid era. On the one hand, the persons who were least likely to apply for amnesty were the persons who could use the means at their disposal (political, economic and legal) to exempt themselves from the rule of law during an open-ended 'amnesty granting' period. On the other hand, the persons who were the most likely to apply for amnesty were those person who had already been dispossessed of the means (economic, legal or political) to prevent the TRC from investigating the reasons why they committed specific offences.

The decisions of the Amnesty Committee support the conclusion that the commission was unable to reverse the consequences of these asymmetries of influence. As the amnesty granting process acquired its own momentum the commission appears to have perpetuated these imbalances by agreeing to organise hearings for the applicants who were already caged inside the prisons of South Africa but deciding to do very little to ensure that senior officers were investigated to the same extent as their subordinates. The strategic and normative debates that shaped the making of these decisions – within the commission and its Amnesty Committee – have not been disclosed to the public. Therefore I cannot specify the reasons why the commission produced these results. In relation to the sample of amnesties that the Amnesty Committee was able to establish

Table 9 -- Amnesties Granted to the Members, Supporters and Allies of a National Liberation Movement

Column A	B All Amnesties	C		D		E		F Total no of incidents
		Perpetrators	Incidents	Perpetrators	Incidents	Unspecified HRVs		
<b>ANC</b>								
Member	20	14	7	6	5	-	-	12
Supporter	3	2	1	1	1	-	-	2
Youth League	19	12	3	7	4	-	-	7
Aligned	1	-	-	1	1	-	-	1
Self Defence Unit	12	9	5	13	3	-	-	8
MK	11	5	3	6	6	-	-	9
<b>Sub-Total</b>	<b>66</b>	<b>42</b>	<b>19</b>	<b>24</b>	<b>20</b>	<b>-</b>	<b>-</b>	<b>39</b>
<b>UDF</b>								
Member	5	5	2	-	-	-	-	2
Supporter	1	-	-	1	1	-	-	1
Affiliated	3	3	1	-	-	-	-	1
<b>Sub-Total</b>	<b>9</b>	<b>8</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>-</b>	<b>-</b>	<b>4</b>
<b>PFP</b>								
Member	1	1	-	1	1	-	-	1
<b>Sub-Total</b>	<b>1</b>	<b>1</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>1</b>
<b>PAC</b>								
AZANLO	7	6	2	1	1	-	-	3
AZAYO	2	-	-	2	1	-	-	1
APLA	6	3	2	3	2	-	-	4
PAC member	8	8	2	-	-	-	-	2
COSAS	1	1	1	-	-	-	-	2
PASO	4	4	1	-	-	-	-	1
SASO	1	-	-	1	1	-	-	1
<b>Sub-Total</b>	<b>29</b>	<b>22</b>	<b>8</b>	<b>7</b>	<b>5</b>	<b>-</b>	<b>-</b>	<b>13</b>
<b>Total</b>	<b>105</b>	<b>72</b>	<b>30</b>	<b>33</b>	<b>27</b>	<b>-</b>	<b>-</b>	<b>57</b>

Table 10 – Amnesties Granted to the Members, Supporters and Allies of the National Party

Column A	B All Amnesties	C		D		E		F Total no of incidents
		Perpetrators	Incidents	Perpetrators	Incidents	Perpetrators	Incidents	
National Party (NP)								
Member	-	-	-	-	-	-	-	0
Supporter	-	-	-	-	-	-	-	0
Sub-Total	-	-	-	-	-	-	-	0
Inkatha Freedom Party (IFP)								
Member	5	4	3	1	1	-	-	4
Supporter	-	-	-	-	-	-	-	0
Sub-Total	5	4	3	1	1	-	-	4
The State								
Police	9	2	2	2	1	5	1	4
Security Police	4	3	1	1	1	-	-	2
Defence Force	1	-	-	-	-	1	1	1
Prisons	1	1	1	-	-	-	-	1
Judiciary	-	-	-	-	-	-	-	-
Sub-Total	15	6	4	3	2	6	2	8
The Homelands								
Elite Police	3	3	1	-	-	-	-	1
Defence Force	1	-	-	1	1	-	-	1
Prisons	1	-	-	-	-	1	1	1
Sub-Total	5	3	1	1	1	1	1	3
Total	25	13	8	5	4	7	3	15

**Table 11 – Amnesties Granted to the Members of the AWB, the BWB, miscellaneous and unspecified others**

Column A	B All Amnesties	C		D		E		F Total no of incidents
		Perpetrators	Incidents	Perpetrators	Incidents	Perpetrators	Incidents	
<b>AWB</b>								
Member	20	12	5	8	6	-	-	12
Task Force	1	-	-	1	1	-	-	1
<b>Sub-Total</b>	<b>21</b>	<b>12</b>	<b>5</b>	<b>9</b>	<b>7</b>	<b>-</b>	<b>-</b>	<b>12</b>
<b>BWB</b>								
Member	2	-	-	2	1	-	-	1
Supporters	3	-	-	3	3	-	-	3
VolksFront	1	-	-	1	1	-	-	1
<b>Sub-Total</b>	<b>6</b>	<b>0</b>	<b>0</b>	<b>6</b>	<b>5</b>	<b>-</b>	<b>-</b>	<b>5</b>
<b>Other</b>								
Subjects of Homeland Rule	2	2	1	-	-	-	-	1
Conscientious Objector	1	-	-	1	1	-	-	1
Organisation Not Specified	11	-	-	11	11	-	-	13
<b>Sub-Total</b>	<b>14</b>	<b>2</b>	<b>1</b>	<b>12</b>	<b>12</b>	<b>-</b>	<b>-</b>	<b>15</b>
<b>Total</b>	<b>25</b>	<b>13</b>	<b>8</b>	<b>5</b>	<b>24</b>	<b>-</b>	<b>-</b>	<b>15</b>
<b>Grand Total (For All organisations)</b>	<b>171</b>	<b>99</b>	<b>44</b>	<b>65</b>	<b>55</b>	<b>7</b>	<b>3</b>	<b>102</b>

the total number of incidents for which an amnesty was granted was 102. This figure is very low. If we divide the total by the number of years in the mandate period it would follow that no more than 3 incidents occurred in each successive year. This finding refutes the myth that the results of the Amnesty Committee contributed to the establishment of an authoritative record of the offences that occurred during the past.

Tables 9, 10, and 11 specify the relationship between the total number of incidents that resulted in a human rights violation and the political identity of the individual applicants who were judged by the Amnesty Committee to be responsible for their occurrence. The three tables divide the total sample of recorded decisions into three types of incidents. Those that led to: (i) a gross human rights violation; (ii) a non-gross offence; or (iii) a miscellaneous case whereby the outcome of a specific incident was not clearly recorded. Column C includes two distinct but related figures. The entries under the 'Perpetrator' column refer to the number of applicants who belonged to a specific organisation and admitted their personal involvement in the occurrence of a human rights violation. The cell entries to the 'Incidents' column refer to the number of incidents for which an amnesty was granted to the member of a 'known' party, movement or organisation. For instance, the sixth row of the ANC entry in Table 9 shows that an amnesty was granted to 11 applicants who were members of the armed wing of the ANC. 5 members of 'MK' committed offences that led to the occurrence of gross human rights violations. These violations were the product of just 3 incidents during the entire mandate period.

Amnesty was granted to 171 applicants. The total entry for column B of table 9 shows that a subtotal of 105 amnesties were granted to applicants who were recorded as the members of a broad church of organisations linked to the liberation movements. If we compare the number of incidents that were carried out by this constituency with the number of incidents that were carried out by other constituencies (see Table 10 and Table 11), it becomes apparent that 61.4 per cent of all of the recorded incidents that led to a human rights violation were carried out by members of this constituency. The results that are set out in Table 10 show that no amnesties were granted to a member of the National Party for any of the violations that occurred during the mandate period. The absence of granted amnesties to the members of this constituency does not entail that members of this group should not be held to account for the crimes that occurred during the past or that its leaders they were not responsible for specific offences. The

absence of granted amnesties to the members of this party simply implies that their members were able to place themselves outside (or beyond) the reach of the law. The results that are set out in Table 9 tend to imply that their counterparts in the national liberation movements were less able to achieve a similar or broadly similar outcome. These findings imply that the differentials of power that were established during the apartheid era continued to exert an impact on the decisions that the members of different political organisations made after the 'formal' demise of a system of minority rule.

It would appear that the procedures that the Amnesty Committee decided to follow extended the scope of the compromises that emerged out of the negotiated settlement. They did so by replacing the universality of amnesty for all suspected perpetrators with a far narrower conception of the underlying function of the amnesty granting process. Through the application of its so-called 'impartial' procedures the decisions of the Amnesty Committee contributed to the outcome whereby dissimilar offences were placed side by side even though they were the product of different forms of reasoning. The results that it produced were an incomplete record of the violations of the past. The documented decisions of the Amnesty Committee demonstrate that the leaders of the political parties whom one would most expect to have authorised or committed the most serious human rights violations were also the persons who were also the least likely to apply for amnesty. The results that I have outlined above demonstrate that the perpetrators of the most serious crimes were also the persons who were least likely to be investigated for the acts and omissions that they committed during the mandate period. It is hard to avoid the conclusion that the cumulative decisions of the Amnesty Committee contributed to the outcome whereby the groups who were responsible for translating unimaginable ends into a fully imaginable reality could use the documented decisions of the amnesty committee to refute the judgment that the organisations to which they belonged were also responsible for the occurrence of wrongful acts. The documented decisions of the Amnesty Committee were so unrepresentative of the violations of the past that they could be used by the leaders of the National Party to support the neo-revisionist judgment that the bad 'old days' were not so bad after all.



## Conclusion

Bundy has argued that the conduct of the South African Truth and Reconciliation Commission was not shaped by a critique of the mandate that it had been instructed to follow. The results of my analysis of the recorded decisions of the Amnesty Committee demonstrate that the basis of his argument does not criticise the commission far enough. The fact of the matter is that the recorded decisions of the committee shed little light on the violations that were committed by the state and its allies during the mandate period.

My analysis of the recorded decisions of the commission has also demonstrated that the appointed commissioners were also permitted to change the scope of the TRC mandate. The Amnesty Committee initiated its own form of compromise with the past by refusing to take action against individuals who refused to voluntarily admit their personal involvement in specific offences. It did so at the same time that it agreed to investigate the individual applicants who had agreed to apply for amnesty on a voluntary basis. Underlying this process was the logic whereby the commission as a whole failed to investigate the individuals who refused to admit their guilt but agreed to organise hearings for the individuals who agreed to apply for amnesty on a voluntary basis. In defence of the Amnesty Committee it could be argued that there was nothing that its appointed officials could do to prevent the occurrence of this outcome. Although its appointed members were legally permitted to take action against individuals who placed themselves inside the rule of law they were not *legally permitted* to take action against individuals who refused to come forward or to admit their guilt on an individual basis. Although the commission could record the persons who refused to apply for amnesty but in did in all *probability* commit an offence it was not granted the power to guarantee the prosecution of perpetrators who refused to apply for amnesty on an individual basis.

The decision to reinterpret the commission's mandate in one direction but not in another resulted in the causes and the consequences of the actions of high-ranking perpetrators being permitted to fall away as if the crimes that they committed did not in fact occur. This was one moment in a more general process whereby the need to establish specific truths was judged to be of lesser importance than the goal of returning the political culture of the nation to an anticipated but ultimately illusionary state of *normality*. The emergence of this outcome was not entirely unexpected. The procedures that the

Amnesty Committee followed led to an increase in the number of applicants who were granted amnesty for offences that did not lead to a gross human rights violation and a decrease in the number of applicants who were granted amnesty for a gross violation. In a Habermasian sense, the procedures that the Amnesty Committee decided to follow contributed to a neo-revisionist outcome by distorting the causal patterns that resulted in different groups of perpetrators deciding that they would commit specific offences. By agreeing to follow the prescription that an offence was only an offence if it was politically motivated the committee obscured the reasons why specific acts occurred. The results of its hearings demonstrated that an applicant who committed an offence for a non-political reason (i.e. their hatred of others) could be refused amnesty in spite of the fact that he or she was responsible for the occurrence of a gross violation. At the same moment the applicants who refused to admit that their actions were maliciously motivated were granted amnesty if they could show that their conduct was politically motivated. Applicants modified their self-presentations of the 'facts' at the same time that they were under no obligation to revise the basis of their own convictions. The procedures that the Amnesty Committee decided to utilize were not very well designed.

A related conclusion is that the beneficiaries of the amnesty granting process were the Type 1 perpetrators who had already been subject to a criminal investigation. The persons who paid the highest price were the victims who received few benefits as a result of the commission's refusal to extend the focus of its investigations beyond the perpetrators who had previously come to the attention of the state's investigators. The recorded decisions of the Amnesty Committee demonstrate that few perpetrators who had not been subject to the prospect of a criminal trial agreed to step forward and apply for amnesty on the basis of their own individual volition. Therefore, it is hard to avoid the conclusion that the goal of establishing the truth was far less of a priority for the architects of successive aspects of the TRC's truth-telling processes than the goal of returning the community to an anticipated but ultimately illusory state of normality. It also needs to be acknowledged that the amnesty granting process contributed to the outcome whereby the conflicts that existed between the members of different political groups were subject to a legally enforced process of pacification. There is a sense in which the emphasis on the need for a full 'working through process' existed in tension with the imperative for the commission to use the amnesty granting process to promote a series of outcomes that were only partially related to its initial truth-telling function.

## Chapter 11

### – Conclusion

#### Introduction

It has become a common practice for researchers in the human sciences to erase from their texts any reference to the circumstances that shaped the connections that they were able to establish between the theoretical and the empirical aspects of their studies. The links in the methodological chain are kept in the background because the disclosure of a series of contingencies might ‘gum up the narrative, ...[and] threaten its credibility, by showing on what thin strands of coincidence, accident, or unfair forms of friendship, ownership [and] geographical proximity, [their] discoveries were based’ (Kaplan, 1990, 104). It is also tempting to adapt to existing conventions of scholarship by writing up what you found and ‘concluded’ (Pryke et al, 2003, 134) and to omit from one’s account the ‘in between’ processes that enabled new connections to be established.

Through the use of a case study methodology I have been able to show that the connections that I have been able to establish between the ideas of Habermas (and others) and defining features of the South African truth-telling process was dependent on how I was able to modify his ideas in order to develop new generalities. These generalities made it possible for me to use the standards of judgment that I was able to derive from my understanding of the work of Habermas to judge the outcomes of particular aspects of the truth-telling process at different moments in time. By following through the implications of this argument I have been able to think through the accountability-creating purposes of different truth-telling processes in relation to the settings in which they were constituted and the relationships they permitted to emerge. According to Walter Benjamin ‘the true method of making things present is to present them in our space not to represent ourselves in their space’ (1999, 206, H2, 3). This I have attempted to do by judging the conduct of the participants in particular truth-telling hearings in relation to the standard of whether they were prepared to work through the full consequences of the past in relation to the present. By maintaining this focus I have been able to construct a cumulative theoretical argument that has used the ideas of Habermas to disrupt (and to dispute) the argument that the action plans of the South

African Truth and Reconciliation Commission made a decisive 'rational' contribution to the resolution of all of the offences that emerged out of the political conflicts of the past.

Habermas is often at his best as a theorist when he refuses to force particular insights into the straightjacket of a single and/or totalizing perspective. Some strands of his thinking can be used to make sense of the truth-telling process insofar an attempt is made to maintain an open-ended relationship between their initial formulation and their carefully framed use and application in relation to aspects of a case study. His insights do matter because they can contribute to the refutation of the belief that particular truth-telling processes contributed to the emergence of a defensible settlement of damages. By following through the logic of this idea I have been able to demonstrate that this idea can be used to challenge the orthodoxies that have been used to legitimize the creation of the commission and the action plans that its commissioners decided to implement. The Habermasian methods of analysis that I decided to employ were constructed in order to demonstrate the weakness of the reasoning that underpinned the decision to create a commission and to use it to promote a series of narrow instrumental objectives. Although the Government of National Unity attempted to use the mandate of the commission as the principal means through which the consequences of the past could be remedied in the present its decision to do so was based on an a precarious foundation.

At the same moment in time I decided to reverse my exclusive Habermasian focus. Through the analysis of the truth-telling process I have also used the results of the analysis to pinpoint the deficiencies of some of the ideas that Habermas has formulated. My analysis of the Amnesty and Human Rights Violation hearings enabled me to use the evidence that emerged to criticize the limitations of the consensus theory of truth. A further aspect of my approach is that I became aware that aspects of the truth-telling process could not be interpreted within the theoretical framework that I initially devised. As a result the balance between the theoretical and empirical aspects of the research changed. For instance, I was only able to substantiate the argument that the Amnesty Committee failed to produce a representative sample of perpetrators by changing my focus and relating my critique to the application of a far more empirical methodology. This change in focus was also a product of the fact that new and emerging features of the procedures and processes that I was investigating could not be accounted for or explained through a direct reference to the ideas of Habermas or another theoretician.

I have sub-divided the content of this chapter into four related sets of conclusions. The first set highlights the difficulties that I encountered when I attempted to use the ideas of Habermas to address the issue as to how the legacy of apartheid could be addressed. His emphasis on the human ability to learn from the catastrophic consequences of the past in the present proved to be a particularly non-productive starting point for the analysis. Habermas's judgment that human beings should be able to learn from the catastrophes of the past in the present did not give me much purchase on the problems that the leaders of the African National Congress and the National Party encountered as they attempted to address the legacy of apartheid as a form of rule that promoted the emergence of a unique set of political, cultural and economic relations. I was unable to directly address this issue from within a Habermasian perspective. Given the absence of a Habermasian answer to the question of how the legacy of apartheid could be approached I decided to address this issue from a different angle. By linking the choices and the actions plans of the National Party to the emergence of a series of political offensives I was able to establish the criminal consequences of a system of racial rule.

I also framed the focus of Chapters 4, 5 and 6 in order to identify the costs and benefits of using Habermasian ideas to address a range of normative issues that have not been sufficiently addressed by other analysts of the commission's truth-telling hearings. Through my analysis of successive aspects of the truth-telling processes of the commission I have also been able to establish the limited applicability of specific Habermasian ideas and this has proved to be a valuable dimension of the study. The limits of his thinking has also encouraged me to think through the alternatives that are required in order to account for aspects of the truth-telling process that could not be adequately addressed within the context of a Habermasian perspective or framework.

My second set of conclusions relates to the issue of whether I could justify the decision to give priority to one approach rather than another by using the ideas of Habermas (rather than another theorist) to analyse particular aspects of the truth-telling process. At the beginning of Chapters 4, 5 and 6 I have argued that some of the ideas that I was able to derive from the work of Habermas can be persuasively used to identify a series of issues that other analysts of the commission's hearings have neglected to their cost. Habermas has formulated a series of ideas that provide us with an indispensable basis against which it is possible to judge the outcomes of specific truth-telling processes. For

example, a commission should attempt to establish: (i) an authoritative record of violations; (ii) diagnose what went wrong in the past; (iii) unmask oppressive traditions of thought and action; (iv) restore the dignity of the vanquished and victimised; (v) rehabilitate perpetrators back into the community; (vi) revise the identity-forming traditions of the participants; and (vii) legitimise open public rituals of remembrance.

Through the use of my case study methodology I have been able to demonstrate that the generalities that Habermas has formulated in one context can be demonstrated to be of use in a context that is different than the one in which they were initially formulated. My methodology has also enabled me to establish a dialogue between the configuration of factors that shaped the mandate of the truth commission and the Habermasian idea that it should have aimed to promote a full rather than an empty settlement of damages. Through the carefully crafted interweaving of this idea with a more concrete analysis of the Human Rights Violation and Amnesty Committee hearings I have mapped out a middle ground between the extremes of sociological realism and normative idealism. It has also been very interesting to discover that even in circumstances in which it was not possible to use the ideas of Habermas to make direct sense of a truth-telling process it was still possible to incorporate the logic of his ideas into a different framework. For instance, I implied at the end of Chapter 10 that the recorded decisions of the Amnesty Committee could enable the National Party to engage in a 'revisionist' offensive by using its results to support the conclusion that its leaders committed few offences.

My third set of conclusions relate to the achievements of the commission. The central substantive question that determined the initial focus of this thesis was whether the leaders of the political parties who participated in the Government of National Unity could establish a rationally defensible remedy to the catastrophic consequences that followed from the decision to implement a series of civilizing offensives. On the one hand, there were the acts of aggression that were committed by the South African state in order to weaken the strength of their political opponents at home and abroad. On the other hand, there were the offences that emerged out of the National Party's use of legal and non-legal means to persecute and also in some cases to authorise their execution.

Following the negotiation of a political settlement between 1990 and 1994 the leaders of the ANC and the National Party made the explicit decision that they would not settle

their accounts with all of the consequences of the political developments of the past. They refused to repay the full cost of the damages that followed from the decision of the National Party to inflict a system of white minority rule on the mass of its people. In other words, they attempted to sidestep a past that will not go away by tacitly agreeing to pay the least costly premium that it was possible for the country's leaders to pay. In this context, the limited remedies that were included in the *Promotion of National Unity and Reconciliation Act of 1995* need to be subject to a merciless and relentless critique. One of the key reasons why the multiple legacies of apartheid refuse to go away has been clearly stated by Habermas when he made the argument that 'the less communality a collective life allowed internally and the more it maintained itself by usurping and destroying the life of others, the greater the burden of reconciliation loaded onto [subsequent] generation's allocated task of mourning' (1989a, 26/27). It is from this vantage point that the successes and failures of the commission need to be judged.

A fourth set of conclusions relates to the failures of the commission. A key issue that has determined the focus of this thesis concerns the question as to who can be held to be responsible for the inability of the commission to contribute to a rationally defensible resolution of the consequences of the past in relation to the conditions of the present. The preceding chapters of this thesis have demonstrated that it is not self-evident how this question should be answered in a definitive manner. It is surprising that no-one has evaluated the permission of the commission through the use of similar terms. Du Toit, Posel and others made a valuable contribution to the debates that emerged following the publication of the commission's official results. The problem is that their contributions to the debate have been limited to a relatively narrow aspect of the entire process. My contribution to this debate is valuable because I have analysed the successes and the failures of the truth-telling process at different stages and phases in its development. I shall now use the four categories that I have distinguished above to specify the main conclusions that have emerged out of my analysis of successive truth-telling processes.

### **The non-applicability of the ideas of Habermas**

Through the use of a case study methodology I have been able to establish that it is not possible to use some of the generalities that Habermas has formulated in his work to identify the depth and the scale of the problems that the leaders of the country's main

parties had to address before, during and after a series of protracted negotiations. There is the danger that the categories that Habermas uses to address the question of what a full settlement of damages could consist of are too imprecise to be of use. There is also the danger that when we relate different strands of Habermas's thinking together the theories that emerge answer neither to the responsibility 'of an accurate description of the world, nor of critical proposals for a better one' (Anderson, 2005, 127). This is a very immediate risk and one that can only be overcome through systematic reflection.

In the second chapter I related the theme of the cruelty of the crimes of apartheid to the decision of the National Party to implement a series of civilizing offensives. This chapter demonstrated that it was possible to theorise the depth and the scale of these offensives by establishing the different levels of criminality of its systems of rule. We also discovered that the leaders of the National Party consciously formulated a series of policies that led to the members of one group benefiting from the impact of a civilizing offensive at the same time that many other groups became its immediate victims.

Apartheid was a criminal system of rule that established the domination of one racial group over many others through the use of invasive legal and non-legal measures. Elias has correctly argued that one of the unique characteristics of a racial state is that the introduction of a civilizing offensive is compatible with a janus-faced outcome. On the one hand, the democratically elected leaders of a constitutional state can decivilise the relationship between the state and its non-white members by using legal measures to force black members of the population into a series of racial and ethnic ghettos. On the other hand, the decision of the National Party to grant political, civil and economic rights to white citizens broadened the basis of its appeal with an all-white electorate. Although, the National Party set the logic of both sets of processes in motion its leaders failed to establish a system of rule that could generate active political consent. The institutionalisation of a system of white minority rule bound specific constituencies of white citizens together but only at the expense of turning the architects of this system against other citizens who rejected the manifold consequences of this form of rule. The presence of this contradiction made it more likely that the defence of this system of rule would depend on whether the members of the Broederbond, successive leaders of the National Party and their core constituents could agree to create a centralized system of repression that could be used to persecute their external and internal opponents. The uniqueness of the crimes of humanity that resulted from the presence of this system is



that they were: (i) systematically organised; (ii) carried out in order to further a policy of the state; (iii) the product of a series of intentional decisions; and (iv) specifically designed in order to persecute civilians who were the legal inhabitants of a state. The violations that I documented in the second chapter show that it was possible to show just how noxious the legacy of apartheid was by demonstrating how the leaders of the National Party authorised the decision to carry out a series of criminal actions. Having accomplished this goal the key issue was whether the leaders of the Government of National Unity would be able to devise a solution that enabled the ‘people’ to work through the consequences of the past in the present without provoking a backlash.

It seems to me that Habermas tends to underestimate the scale of the issues that need to be addressed in order for the leaders of a coalition of parties to settle their accounts with the events of the past by agreeing to pay the fullest and the least evasive remedy.

Contrary, to his central thrust it was neither possible nor feasible for the Government of National Unity to agree to use all of the means at its disposal to compensate its Black South African citizens for the life-altering changes that followed from the consolidation of apartheid as a system of rule before and during the mandate period. Paradoxically, the consortium of leaders who established the commission’s mandate did so by explicitly deciding that the citizens who suffered irreversible harm as a result of successive acts of engineering would not be permitted to pursue their own remedy. In addition, a series of policies that were a central aspect of apartheid as a system of rule were excluded from the mandate that the commission was permitted to investigate.

These decisions determined the context within which the successes and the failures of the South African Truth and Reconciliation Commission were subsequently enacted. In the aftermath of the exit of the PLO from Beirut in September 1982, Mahmoud Darwish wrote, ‘the world is closing on us, pushing us through the last passage, and we tear off our limbs to pass through’ (Said, 2005, 137)<sup>109</sup>. The same principle could be applied to the multitude of victims of the civilizing offensives of apartheid. The elected leaders of the Government of National Unity decided to create a dead end. The direct victims of these offensives were given little to no choice but to enter this passage. The

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<sup>109</sup> The term PLO stands for the Palestine Liberation Organisation. It was formed by President Nasser in 1964 to keep ardent young Palestinian nationalists such as Yasser Arafat in check (Hirst, 2004).

world closed in on them and aspects of their suffering were forgotten once more.<sup>110</sup> Because of an endless and bottomless desire to placate their former adversaries the leadership of the African National Congress agreed to establish a limited mandate. Through this decision they also came to resemble their National Party colleagues.

### **The applicability of the ideas of Habermas**

Chapter 3 demonstrated how the impact of the mandate of the commission interacted with an embryonic ideology of reconciliation to limit the scope of the truths that could be disclosed by the participants in the Human Rights and Amnesty Committee hearings. *Nine factors created a tension between the ends that the commission was expected to promote and the means that were placed at the disposal of its commissioners. Each moment of the truth-telling process was subject to a series of contingencies that placed a limit on the accountability-creating outcomes that each of these hearings could produce. They included: (i) the relativism that was introduced through the participants being permitted to use levelling comparisons to deny the normative consequences of their actions; (ii) the tendency for the intellectual and political authors to be subject to less scrutiny than the frontline operatives; and (iii) the pressures that were placed on the victims to participate in the process because there was nowhere else where they could go to alleviate the suffering and harm that was inflicted on them by a perpetrator. The systematic denial of the rights of a person is as real a reality as anything that a person is likely to experience in the whole of their lifetime. As is the harm that occurs when the victim of a specific violation is not provided with the means to alleviate their suffering.*

Chapter 4 extended the focus of this analysis by investigating whether there was a tendency for members of the commission to equate a partial meting of minds at one level with the achievement of a more complete consensus between the participants. It was at this point in my analysis that I was able to use the standards that Habermas has

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<sup>110</sup> According to Mahmood Mamdani, 'the TRC's version of the truth was established through narrow lenses, crafted to reflect the experience of a tiny majority... The TRC defined over 20, 000 South Africans as the 'victims' of apartheid, leaving the vast majority in the proverbial cold' (2000, 178). He notes the 3.5 million citizens who were forcibly removed from their homes. He concludes by stating that 'the South African Gulag was called forced removals' (2000, 180). The suffering of these victims was not alleviated through the agreement to establish a remedy to these man-made catastrophes. The list of the casualties of the civilizing offensives of apartheid can be extended. For a review of 'The Politics of Memory' collection see my contribution to 'Jenda: A Journal of Culture and African Women Studies'.

devised in order to judge the outcomes that emerged from particular public hearings. Although the Human Rights Violation and Amnesty hearings contained elements of the ideal speech situation the structure of each situation was also a deviation from it. There was a lack of correspondence between the ideal and the reality in three respects. First, insofar as the idea of equality resulted in perpetrators being granted the same right to speak as their victims there was the danger that a perpetrator might use the spectacle of the occasion to attempt to minimize the normative consequences of his or her actions. For instance, by refusing to participate in a hearing with the fullness of their being. There was also the danger that a perpetrator of a violation might use the spectacle of the occasion to disclose a partially inaccurate description of the events of the past. Through the use of techniques of evasion individual perpetrators attempted to settle their accounts with their own shady past by attempting to pay the least costly premium. Conversely, the relatives of a victim attempted to raise the threshold by ensuring that a perpetrator was held to account for the offence that he or she had actually committed. Given the contested nature of the relationship between perpetrators and victims the presumption of equality could not be taken for granted in specific truth-telling hearings.

The second issue was a product of the fact that although the disclosure of factual truths enabled both parties to reach a joint understanding of the circumstances that gave rise to a violation there was no guarantee that this process would be followed by a perpetrator agreeing to revise his or her most elementary normative convictions. This is a significant finding. It shows that the conception of the ideal speech situation may not be compatible with the spontaneous emergence of a full settlement of a specific damage. It also shows that the principles of truth and justice are not interchangeable equivalents. Although it was possible for factual or forensic truths to emerge from the dialogue that occurred between a perpetrator and a victim it does not follow that the participants in this process could agree with each other that a just outcome resulted from this process.

A third difficulty relates to the achievability of the goal of promoting open dialogue between two parties in circumstances in which their prior relationships were so unequal. Perpetrators were more likely to enter into dialogue with their victims with the smallest fraction of their being rather than with the largest amount that one can possibly imagine. The problem with Habermas's thinking is that he fails to specify what would need to occur in order for the participants to bridge the gap between the ideal and the reality.

The commission was dependent on the coerciveness of the law to persuade individual perpetrators that they should agree to apply for amnesty on an individual basis. As a result, the Amnesty hearings were based on the if-then structure of a coercive sanction. Moreover, the content of this threat was so finely tuned that a perpetrator was acting entirely rationally when he or she made the decision to disclose one truth but not another. A perpetrator who agreed to disclose the full reasons why they followed a specific course of action could be refused amnesty if it subsequently emerged that he or she committed a gross violation as a result of a malicious motivation. Given this constraint it was difficult to imagine why an amnesty applicant should agree to pay the highest premium that it was possible for him or her to pay. The content of the amnesty clause was based on the if-then structure of a threat. Therefore it was not obvious how the amnesty granting process could promote a full settlement of damages. This is a significant finding because it highlights the tensions that exist between different and potentially incompatible aspects of Habermas's thinking in relation to a concrete issue.

Chapter 4 utilized a second model in order to investigate whether there was a tendency for the commission to equate the disclosure of specific truths with the achievement of the outcome whereby the participants were able to agree a common definition of reality. The problem with Habermas's consensus theory of truth is that the tripartite division of validity into the dimensions of truth, rightness and sincerity is too general to be of use. For the victims and the relatives of the victims it would appear that the truths that matter the most to them are not factual or forensic but moral and interpretative. The issue that mattered the most for the victims was whether a perpetrator could help them to identify who was responsible for the decision to order and then to carry out a well ordered plan.

For the perpetrators it was likely that even if all the conditions were present for a common definition of reality to emerge between the participants in a dialogue the most that this process could achieve was to contribute to the realignment of their opinions. A detailed understanding of apartheid as a system of rule was a precondition for understanding the reasons why some violations occurred with such alarming regularity at different moments in the past (for example, during a national state of emergency). Given this starting point there was no guarantee that an open disclosure of the reasons why an incident occurred would also be followed by the immediate participants in a truth-telling process being able to establish a common definition of reality. There is

nothing inherent in the structure of the truth-telling process that makes it reasonable for Habermas to suppose that perpetrators and victims would be able to resolve their differences after they have established the reasons why a specific violation occurred. A central aspect of the truth-telling process is that a perpetrator's conception of him or herself as the guardian of a form of life that was based just or right ideals was likely to enter a stage of meltdown in the circumstances in which it became apparent that the continuity of a preferred form of life could only be defended through the use of force. One of the central achievements of the Human Rights Violation hearings is that the one to one testimony of perpetrators and their victims contributed to the breaking of the spell that a system of racial rule had cast over the mentalities of the participants. Paradoxically, the promotion of this outcome was achieved at a specific cost. The decision to grant amnesty to the perpetrators of all gross human rights violations led to the refutation of the belief that the liberation movements were a paragon of virtue. The disclosure of the gross human rights violations that were committed by different groups of perpetrators could proceed hand in hand with a process of normative disenchantment.

In summary, through the carefully crafted inter-weaving of the ideas of Habermas with particular facets of the truth-telling process I have been able to demonstrate that the remedies that he has proposed are less watertight that they might at first appear. The participants in particular hearings agreed to act as rational agents by using competing conceptions of rightness to justify the consequences of their actions. However, it does not follow that they were always able to resolve their differences after a perpetrator agreed to disclose the reasons why a specific course of conduct occurred. Habermas is not persuasive when he presupposes that the participants in a dialogue will be able to rationally resolve their differences by establishing a common definition of reality.

Chapter 5 argued that although the participants in some of the truth-telling hearings were unable to establish a pure form of understanding their inability to do so should not cast doubt on their sincerity to come to terms with aspects of their own experiences. Having removed the idea of a pure consensus of convictions from our field of vision I discovered that it was necessary to formulate additional standards of judgment in order establish whether particular hearings were capable of promoting alternative outcomes. In order to accomplish this objective I devised a series of standards that were implicit in the action plans that the commission decided to follow at different moments in time.

The value of these standards is that they enabled me to judge the effectiveness of different aspects of the truth-telling process in relation to a plurality of standards. It was because new and emerging aspects of the events and processes that I was studying resisted the focus of the frameworks that I had previously formulated that it became necessary for me to utilize the ideas of Habermas (and others) in a looser framework.

In conclusion, what is admirable about the work of Habermas is its openness. Habermas is a very high-minded democratic thinker and the intrinsic difficulty of his ideas that he conceived reflect his conviction that issues of public interest can be rationally resolved. I have no issue with the seriousness of his proposal that it is necessary to promote a settlement of damages that asks the participants to settle their own account with a shady past by agreeing to pay the highest premium that it is logically possible for them to pay. The central difficulty is that Habermas fails to take on board the need to relate the content of this proposal to the real and existing problems that the participants in a truth-telling process encountered when they attempted to put this ideal into practice.

One of the advantages of a case study methodology is that it has helped me to demonstrate that a breakthrough in our understanding can be made by linking a series of ends or goals at a meta-theoretical level to the goal of addressing the peculiarities of specific hearings and the forms of dialogue that emerged between the participants. One of the problems with the conception of the ideal speech situation is that Habermas has failed to justify the presupposition that the participants in a dialogue will use the communicative competences that have been placed before them in a benign way. My critique of Habermas's formulation of the consensus theory of truth demonstrates that insofar as it is necessary to choose between normative idealism and sociological realism it is always necessary to choose aspects of both approaches at the same time.

Habermas fails to acknowledge that the objective material contradictions that exist in the present may not be overcome through the spontaneous initiative of the individuals who agreed to participate in a hearing as a commissioner, a perpetrator or as a victim. The limits also lie in the presence of a series of objective constraints that shaped the conduct of the participants before, during and after the occurrence of a public hearing. It was precisely the presence of these constraints that made it necessary for me to analyse the contradictions that emerged between the ends that the commission was permitted to promote and the means that were placed into the hands of the participants in a hearing.

Paradoxically, it appears to me as if Habermas has not learnt enough from Adorno. Adorno has consistently reminded us that the conflict between theory and experience 'cannot be conclusively decided in favour of one side or another ...and must be played out in such a way that the contrary elements interpenetrate one another' (Jay, 1993, 25). One of the perplexing aspects of the sociological thought of Habermas is not that he is unaware of the conflict between idealism and realism but that he never attempts to establish the reasons why one side of this dichotomy tends to eclipse the other side. There is a transcendental dynamic to his thinking that triumphs its sociological side. Although Habermas has consistently defended the idea that an absolute form of understanding is possible he has also failed to specify the means that would need to be present in order for the participants to establish a pure form of understanding. My case study methodology supports the conclusion that it is necessary to demystify a way of thinking that sets one dimension of thought in polar opposition with another. It is left to the reader to judge whether I have achieved my goal of using the methods of analysis at my disposal to achieve a justifiable balance between the poles of idealism and realism.

### **The successes of the commission**

At the very first juncture it seems to me that the mandate that the commission was expected to implement was the product of a series of partially justifiable compromises that locked a series of catastrophes into the hour of the commission's greatest triumphs. The decision was made in the period after April 1994 for a sub-committee of appointed officials and parliamentary representatives to establish a narrowly focused mandate. Locked into this process was the idea that the Government of National Unity would not settle its accounts with the consequences of successive civilising offensives by agreeing to compensate the mass of the oppressed majority for the harm that they suffered during the historical period when a system of white minority rule was in its formal ascendancy. The commission was burdened from the beginning by the decision of the country's political leaders that they would not allow it to address the consequences of the past in relation to the present in the most rational and (therefore) the fullest possible manner. Seen from this perspective, the decision that was made to create a truth commission and to use it as the means by which the consequences of the past could be remedied in the present was an experiment that was based on unstable and non-persuasive foundations.

The argument that it is always necessary to specify the reasons why it is not possible to promote a full settlement of damages in a particular conjuncture of circumstances is an indispensable basis against which the action plans of a commission can be judged. Insofar as a fully defensible settlement of damages is a sign of a positive utopia its absence also reveals the negative results that emerged out of the decision to address the consequences of the past in the present via the formation of a limited mandate. Adorno is correct to argue that 'the true thing determines itself via the false thing, or via that which makes itself false known' (Bloch, 1998, 12) through its consequences. At the heart of the commission's mandate was the irreconcilable tension between the goal of establishing the truth no matter where it might lead the participants and the goal of restoring relations of civility between the participants in the conflicts of the past. The commission was never able to resolve the tension between these poles of reference. The terrifying truth is that the decision to restrict the focus of the commission's mandate to a series of politically defined offences also left untouched a wide range of decisive issues. First and foremost the commission decided to leave unexamined the emergence of a political culture that made it possible for successive generations of National Party leaders to authorise a complex range of external and internal offensives. The first casualty of the commission's decision to interpret its mandate in this way were the peoples of Southern Africa who were the victims of the acts of aggression that were carried out in the past in order to lengthen the life of a system of white minority rule.<sup>111</sup> The second group of casualties was the victims and the relatives of the victims who were denied the means to pursue their own remedy in a civil or a criminal court of law.

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<sup>111</sup> Hyam and Henshaw have recently argued that the total onslaught strategy was not a radical departure from the past but the continuation of a century long tradition: 'the South African state was inherently expansionist from its inception' (2003, 31). The appetite of the white rulers of South Africa for the conquest of the territories of its neighbours was first wetted during the negotiation of the Act of Union in 1909. This Act established a procedure for the incorporation of Rhodesia and other High Commission territories into the Union. Jan Smuts the architect of Anglo-Boer reconciliation after the Boer War, 'made it clear that the conquest of the interior should be seen as a mere beginning. Ahead lay a greater South Africa, encompassing not only the three protectorates [Swaziland, Basutoland and Bechuanaland] but South-West Africa, Rhodesia and Southern Mozambique' (Johnson, 2003, 30). He also envisaged the creation of a white superstate between these areas and the peoples of East Africa. For this, he declared, 'is one of the richest parts of the world and only wants white brains and capital to become enormously productive ...the cry should be the "highlands to the whites" and a resolute white policy should be pursued' (Hyam et al, 2003). The persistence of these goals between the past and the present was also reflected in the fact that the National Party's appetite for territory was just as strong as its predecessors. Its leaders ought to achieve formal political control of the territories of their neighbours and the incorporation of the three protectorates into a confederation of Bantustans. This process of expansion would have enabled the rulers of a white-ruled state to move the black population into these areas. The implementation of this policy choice may have consolidated the political and social stability of apartheid.



The third group of casualties was the black South Africans who were not the direct victim of a gross violation but were the victims of successive civilizing offensives. This conclusion is compatible with a key argument of Mamdani. He has argued that although, 'the search for truth – understood as shared memory, history – is important in providing a durable basis for a political community – truth alone cannot provide that basis' (1996b, 5). The mandate that the commission was instructed to follow extended the compromises of the past to the present by compelling its commissioners to ignore the radioactive core that lay at the heart of the conflicts of the past and the present. At the heart of this time bomb was the nucleus of a criminal system of political rule. Mamdani is also correct to argue that the restoration of relations of civility between perpetrators and their victims was achieved at the expense of a much larger issue. There was no guarantee that the promotion of a limited programme of reconciliation between perpetrators and victims would be followed by the beneficiaries of the systems of rule that apartheid consolidated would address the consequences of their conduct. In the absence of a systematic examination of the causes and the consequences of these relationships it was likely that the forms of justice that the commission could promote were insufficient to appease the outrage of the victims and the fear of the beneficiaries. It is tempting to argue that the persons who had been previously been disposed of the means to improve their quality of life were still present as the enemy at the gates. The commission totally failed to come to terms with the problem of how it could link reconciliation on a face to face level with social reconciliation at other levels of society. As a consequence it was doubtful whether the initial truth-telling successes of the commission could be sustained at a deeper level within an internally divided society.

At the second juncture the utopian promise of a full settlement of damages was derailed through the non-actualisation and/or displacement of a series of persistent possibilities. A key issue that is absent from the literature is the way in which the leaders of the Government of National Unity and the appointed leaders of the commission worked together to prevent the structure of the society around them being changed into an infinitely better world than the one that currently existed for the mass of its members. The utopian promise that existed at the start of the truth-telling process was gradually undermined because the procedures that the commission decided to use to achieve its purposes did little to alleviate the disenchantment and discontent of the victims. The commission decided to adopt a more accommodating attitude towards alleged

perpetrators who were could use their means to situate themselves outside of the law. Its Amnesty Committee also agreed to limit its focus by investigating perpetrators who had nothing to lose and everything to gain from the decision to grant them an amnesty. The commission reinforced this bifurcation of the rule of law by agreeing to grant amnesty to perpetrators who were already in custody but refusing to take any action against the 'alleged' perpetrators who refused to step forward and to voluntarily admit their guilt.

In spite of these weaknesses the commission was able to use the limited means at its disposal to promote a partial understanding of the reasons why some offences occurred. The hearings that were organised by the Human Rights Violation Committee also led to the recognition that gross human rights violations were committed in the past. This process contributed to a process of acknowledgement that was absent in the past. The hearings of the Human Rights Violation Committee supported the rule of the law by drawing attention to 'officially sanctioned transgressions of the law' that occurred during the period that the TRC was permitted to investigate (Dyzenhaus, 2000, 483). The commission also implicitly acknowledged that the systems of rule that were established during the apartheid era coexisted with the officially sanctioned outcome whereby whites were granted access to the rule of law but black citizens were not. According to Allen, 'giving victims an opportunity to tell their stories is [also] a form of recognition that acknowledges the historical fact of their exclusion from legal recognition ...[and] is related to justice ...because it acknowledges the injustice of the exclusions that made [it possible for] abuses [to occur]' (Dyzenhaus, 2000, 484).

To a limited extent the Human Rights Violation hearings also provided the commission with the opportunity to use the truth-telling process to revise minor aspects of the country's political culture and to symbolise a break between the past and the present. These hearings were significant events. They challenged the realist position that might equals right and that the truth would always be determined by individual leaders who possessed the greatest level of influence within the pre-existing political community. The rituals that were institutionalised within these hearings consolidated the principle that not all sources of normativity can or should be derived from the dominant class.

The commission also built into its truth-telling rituals the doctrine that the rejection of revenge or retribution was linked to the communal tradition of ubuntu. The doctrine of

ubuntu states that 'I am I through you, and you are you through me' (Battle, 2000, 179). There is no single work for ubuntu in the English language. Its origin in the nguni and sotho languages indicate the complexity of the term and its multiple meanings. For Desmond Tutu 'the humanity of the perpetrator of apartheid's atrocities was caught up and bound up in that of his victim *whether he likes it or not*. In the process of dehumanizing another, in inflicting untold suffering, the perpetrator was inexorably being dehumanized as well' (1999, 35). For Tutu the term also denoted the possibility that Black South Africans could draw on a communal tradition that gave them the resources to agree to forgive their oppressors by granting them the opportunity to leave their 'prisons of shame' and their 'dungeons of denial' (Battle, 2000, 181). The application of the doctrine of ubuntu to the relationships between perpetrators and victims was also consistent with the theological belief that the truth shall set you free.<sup>112</sup>

These hearings were also significant because they challenged the idealist assumption that the truth-telling process should promote a pure form of understanding. They did so by creating a space in which perpetrators and victims were encouraged to revise the belief that the end justifies the means and that it was legitimate for one person to violate the human rights of another in order to establish their supremacy or their dominance. Although these hearings operated on the basis of procedures that were differed than those a court of law they were also similar to them insofar as they aimed to: (i) hold a perpetrator to account for the consequences of his or her actions; (ii) restore the dignity of a victim by acknowledging the harm that resulted from a violation; and (iii) create the conditions that would prevent an additional offence occurring after a public hearing. These hearings were also expected: (i) to lead to the formal acknowledgement that it was wrong for the apartheid state to deny that harmful acts occurred in the past; (ii) to give expression to the legitimacy of a law that promoted relations of reconciliation between perpetrators and victims; and (iii) to articulate the sentiment (or belief) that gross human rights violations should never be permitted to occur on the same basis.

The partial achievement of these ends was only made possible because the black majority (the victims of the civilizing offensives of the past) were the beneficiaries of

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<sup>112</sup> Verse 31 to 32 of St John states that, 'then Jesus said to those Jews which believed in him, if ye continue in my word, then ye are my disciples indeed, and ye shall know the truth, and the truth shall make you free' (No author, 1957, 973).

the decision to restore their citizenship rights before the commission was created. In the absence of this specific change it is unlikely that the commission could have used its hearings to steer a course between the 'realist' doctrine that might establishes right and the pragmatic doctrine that something less than a pure meeting of minds was necessary in order to promote a limited process of reconciliation throughout the entire community.

In the transitional period after the Government of National Unity was installed in power the Human Rights Violation hearings also coincided with other peculiarities. On the one hand, leading members of the white community who supported apartheid had to reconcile themselves with the fact that the persons whom they had previously regarded as non-members of their country were now acknowledged as their equals. Black South Africans were granted the same political rights as whites. They were also granted the right to establish at least some of the reasons why they were persecuted in the past. On the other hand, the black community had to live with the contradiction whereby they were expected to treat their adversaries as free and equal citizens of their community. The Human Rights Violation hearings also consolidated the relations that emerged out of the negotiated settlement by providing all South Africans with the resources to co-exist alongside each other and to begin to face the prospect of an uncertain future. They also provided a dramatic illustration of the idea that if a perpetrator and his or her victim could be motivated to respect each other's rights then so could all of the other members *of the same community who were not implicated in the occurrence of a gross violation.* In this limited sense, the Human Rights Violation *hearings helped to forge a new link* between the state and its citizens based on an equal respect for the rights of everyone. The promotion of this outcome was not without its risks. The commission was unable to use the truth-telling spectacle to establish a pure symmetry between the victims and perpetrators who agreed to give testimony at a public meeting. This is because a hearing could also promote disunity and division through the ritual (Alexander, 2002, 127):

'of a sequence of middle aged, white (mostly Afrikaans-speaking) men being interrogated by the commissioners about their evil deeds. Whether it was intended or not, the imagery was, and is, reminiscent of a victorious revolutionary movement accusing the traitors and the perpetrators of the previous regime, and there is very little doubt that dragon's teeth were being

sown here. The sense of humiliation induced by this procedure will at some point in the future find expression in cyclical violence or some other reaction'.

### **The failures of the commission**

My analysis of the failures of the commission has as its central focus the question of who can be held responsible for the relative inability of its commissioners to use the means at their disposal to establish a defensible remedy to specific criminal acts. At the first juncture, it is important to acknowledge that what is distinctive about my approach is that I have consistently followed through a key 'Habermasian' theme. This theme is based on the idea that the participants in this process should pay the highest premium that it is possible for them to pay in respect of the harm that was caused by one form of life being constructed on the basis of the usurpation of another. Judged against this standard, the mandate that the commission was instructed to translate from a vague blueprint into a series of realistically achievable action plans was found to be wanting in a number of respects. I shall now outline several of the pitfalls. On the one hand, the unanimity of purpose that appeared to be present at the end of 1996 was subject to a series of challenges that limited the commission's effectiveness. On the other hand, leading figures within the commission decided to take advantage of the conjuncture of opportunities that emerged following the negotiated settlement and the inauguration of Mr Mandela as the President of the Government of National Unity. The liberal and pro-capitalist opponents of apartheid (such as Dr Boraine) were also instrumental in the formulation of the legislation that created the TRC's mandate. Boraine notes that 'in the final vote all the parties voted for the bill, with the exception of the Freedom Front, ... and the Inkatha Freedom Party, which abstained because they were not convinced that 'even-handedness' would prevail' (2000, 71). We have also seen that individual commissioners (such as Archbishop Desmond Tutu) took advantage of the fact that the defence of apartheid alienated both the oppressor and the oppressed. Tutu made the most of this opportunity by linking the Human Rights Violation hearings to the doctrine of ubuntu and the symbolic use of rituals of reconciliation. The use of quasi-legal procedures to grant amnesty to the individual perpetrators of gross human rights violations irrespective of their identity or political affiliation also confirmed that the pacification of the relations between former adversaries would proceed hand in hand with the delegitimation of the politics of the past in the conditions of the present. In

summary, a unique combination of circumstances, personalities and unrepeatable opportunities interacted together to determine the precise functions of the commission.

The subsequent phases of the truth-telling process demonstrate that it was one thing for the leaders of the Government of National Unity to support the creation of a truth and reconciliation commission. It was quite another for them to encourage members of their core constituencies to participate in the process with the fullness of their being. The significance of the Political Party hearings as a political spectacle is that representatives of the National Party and the African National Congress refuse to settle their accounts with the past when the disclosure of specific truths undermined affirmative aspects of their self-identity and questioned the extent to which they were paragons of virtue. In this respect, the truth-telling outcomes that the TRC could produce were quite modest.

At the second juncture, the commission's commissioners and investigators also contributed through their own autonomous initiative to the promotion of a less than full and/or positive resolution of the violations that occurred during the mandate period. Indeed there have been moments when I have wondered whether it was necessary to formulate a theory of the crisis tendencies that rocked the commission and threatened to undermine its unity of purpose by dividing its commissioners into a series of factions.<sup>113</sup>

We saw in Chapter 3 that there was a contradiction between the ends that the commission was instructed to follow and the means that were placed at the disposal of its commissioners and support staff who were appointed to each of its committees. A further difficulty is that the mandate gave the individuals who agreed to apply for amnesty actionable rights that were not extended in equal measure to the victims (or the relatives of the victims) following the occurrence of a gross human rights violation. The asymmetrical relationship between perpetrators and victims lay in contradiction with the judgment that the commission should seek to restore the dignity of each of the victims. Through the analysis of the recorded decisions of the Amnesty Committee I have been

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<sup>113</sup> This theme has not been fully documented. According to Fullard 'some of the racial tensions and conflicts have been described in former TRC investigator Zenzile Khoisan's book *Jakaranda Time* (Khoisan, 2001). He argued that a 'locus or bloc of white power controlled the activities and flow of information within the Commission. The crisis that unfolded regarding allegations against Commissioner Dumisa Ntsebeza, is a key illustration of this argument' (2004, 39). Not all the crises were racially based. 'The axis of conflict within the TRC were not always along the ...black-white dichotomy' (2004, 39).

able to demonstrate the high price that the victims paid as a result of the decision to exchange truth for justice at the earlier stages in the commission's development. By the end of 1998 the commission had granted amnesty to the perpetrators of 102 incidents. The number of incidents that resulted in a gross human rights violation was 42. It is perhaps not surprising that this finding was not openly disclosed in the 1998 report. The occurrence of this result does bring the purpose of the commission into disrepute by revealing the mismatch between the related 'results' that it was able to establish. The number of acknowledged gross human rights violations (36, 936) far exceeds the number of amnesty applicants (171) who were granted an amnesty by the commission. On the basis of such disproportionate results it follows that the commission was unable to meet the most basic requests for information of the vast majority of the individuals who were officially recognized to be the victim of a gross human rights violation. The wretched performance of the Amnesty Committee was caused (at least in part) by a decision that was finalised before its members were formally appointed. President Mandela decided to cave in to the pressure that was exerted by the National Party by agreeing to appoint the members of this committee on a semi-autonomous basis.

As I argued throughout this thesis one of the glaring gaps in the secondary literature is the failure to establish the reasons why the Government of National Unity decided that it would agree to pay an empty (i.e. a 'negative') rather than a full (i.e. a 'positive') settlement of damages before, during and after the negotiation of a political settlement. Although the appointed members of the TRC participated in the truth-telling process by making the well-intentioned promise to promote a full settlement of damages they ended up implementing a series of action plans that were not clearly related together. The decision to use different methodologies at different moments in time limited the effectiveness of the results that the commission could produce in a limited time span. The final stages of the truth-telling process were accompanied by the decision of its commissioners to commit themselves to the promotion of some ill-judged adventures. It was at this juncture, that the commission decided to use a series of neo-positivistic methods to construct the 'official' truths that were included in the October 1998 report.

According to Du Toit, the commission was a 'statutory body' and a 'commission of inquiry' and it was expected to 'hand down *findings* of different kinds, including findings of fact stating the outcomes of their formally mandated enquiries' (2005, 445).

The problem with his analysis of the 'confusions and contradictions' (2005, 419) that characterized the final stages of the truth-telling process is simple. Du Toit fails to specify how the translation of the mandate into a series of disconnected action plans made it difficult for the TRC to report its results in an intellectually persuasive form. The factual truths that the commission decided to disclose in its 1998 report were a monstrous imitation of the offences that occurred during the mandate period. In addition, the narrow range of sources on which the commission was able to base its conclusion did not prevent the authors of its report from making prescriptive judgments that were not supported by the evidence that the commission had been able to establish. The methods that the commission used to forge a link between its 'factual' findings and the 'normative' conclusions that it derived from them were not always coherent. The methods that the commission used to present its findings and conclusions to its target audience undermined the intellectual authority of the truths that were contained in its report and threatened to eclipse or to reverse the impact of its previous successes. It really does need to be acknowledged that there is a gloom and a wretchedness to the commission's 1998 report with its vast cargo of poorly grounded 'schematic' truths.

At the fourth juncture, the completion of the truth-telling process was shaped by the decision that was made within the commission for a unique category of results to be added to the 'official' findings and conclusions that the TRC was able to produce. These findings were of two types. On the one hand, there were 'individual' perpetrator and on the other hand, there were collective or organisational 'perpetrator' findings. The nature of the links that the commission was able to establish between the sources of evidence that emerged out of its investigations and the adverse judgments that it decided to make against specific 'named' individuals were often incomplete and at times tenuous. This is not surprising. Many of the incriminating records had already been destroyed. It remains a puzzle why the decision was made to disclose 'individual' perpetrator findings and to publish them as 'official' truths of the commission. This was especially the case in circumstances in which its commissioners were unable to demonstrate that a finding could be demonstrated to be true beyond all reasonable doubt. Du Toit has correctly argued that it was unclear whether these findings 'were supposed to function independently or whether they .....could be used in court proceedings' (2005, 447).



The decision to make a finding against a party, a movement or an organisation was a greater misadventure than the decision to make a finding against specific individuals. The sources of evidence that the commission used to support an adverse finding failed to unambiguously support the conclusion that it was correct for its commissioners to hold the leaders of particular movements to account for specific types of violations. The commission made an error when it decided to conflate the premise that someone was responsible for the occurrence of particular type of human rights violations with the conclusion that the leaders of a movement were responsible for their occurrence. The commission failed to devise a watertight or logically consistent method for determining who was actually responsible for the violations the occurrence of a specific violations. It also failed to establish the sources of evidence that could be used to show how the conduct of officers in related command structures led to the occurrence of a violation.

This critique runs in parallel but also diverges from the critique of Du Toit. He has argued that the commission ‘managed with some success to speak of ‘truth’ and ‘justice’ on *behalf* of the new state, and to do so in relation to victims as well as to perpetrators’ (2005, 447). I can find no basis on which to disagree with this claim. However, his argument that the attempts of the commission ‘to speak ‘truth’ and ‘justice’ to the *old* apartheid regime, as well as *to* the new democratic state, were less well-conceived’ (2005, 447) does not go far enough in specifying its overall frailties. Du Toit lets the commission off the hook by failing to consider two determinants that limited the outcomes that the commission’s commissioners were able to produce. On the one hand, his explanation fails to consider the extent to which the creation of one form of life was based on the usurpation of another during and after the apartheid era. Due to this omission he overestimates the extent to which the fault-lines that were contained within the country’s political culture were transformed from the top down as well as from the bottom up as a result of the varied initiatives of the TRC as a whole. On the other hand, his exclusive focus on the decision of the commission to include perpetrator findings in its report obscures the cumulative impact of earlier compromises. One of the unique features of the Political Party hearings is that they demonstrated that the representatives of the National Party and the African National Congress would not accept the criticisms that were being levelled at them if the consequence of doing so was that they could no longer retain affirmative aspects of their political identity. Seen from this perspective, the commission’s attempts to use these hearings to revise the

political culture of the country were less complete than Du Toit 's criticisms imply. The efforts that were made by the National Party to lower the level of the debt that it was prepared to pay for the civilizing offensives of the past were simply breath-taking. The acts and the omissions of the leaders of this party were of great consequence. They sent out the message that little would be done to reverse the multiple legacies of apartheid.

## Conclusion

It needs to be added that a striking feature of South Africa's Truth and Reconciliation Commission was the tendency for its commissioners to *promise* the prospect of a particular outcome and then to *deliver* another in a series of poorly defined sequences. The emergence of double standards is nothing new to many black South Africans. They have witnessed the failure of the National Party to deliver one promise after another. It was a dominant motif of the country's history throughout much of the twentieth century and may turn out to be a defining characteristic of the twenty-first century too. In 1971 Tatz argued that the black population were given no choice but to surrender real rights in exchange for the *promise* of the remedy of compensation. First, African members of the population were 'deprived of a right to free purchase of land on the explicit understanding that definite areas would be set aside for their exclusive purchase and occupation' (1971, 209). This promise was not subsequently fulfilled. Second, Cape Africans were *asked* to surrender their individual franchise by exchanging the 'shadow' of the vote in exchange for the 'substance' of the land. The content of this promise has 'not been fulfilled to this day' (1971, 209). Third, all other African citizens were 'deprived of their Parliamentary representation: the *quid pro quo* is the promise of future political rights in their own areas' beyond the centre of white power (1971, 209).

Part of the fascination and the horror of the commission lies in the legally authorised outcome whereby its commissioners failed to reverse the asymmetry whereby perpetrators were granted enforceable rights in excess of those of their victims. The mandate of the commission repeated the past in the present by promoting the outcome where the victims were forced to surrender recently established rights in exchange for the knowledge that the offences that a perpetrator would be formally acknowledged. The idea that justice was reducible to the restoration of the equal rights of perpetrators

and victims revealed the depth of the compromises that shaped the remedies that the commission could promote before and after its Human Rights Violation hearings.

Seen from this perspective, the settlement of damages that the commission promoted between 1996 and 1998 was far less complete than anyone could have imagined in the days, months and years before the commission's mandate was formally established. The victories and the triumphs that subsequently emerged are almost indistinguishable from a series of defeats when they are viewed from close up and from the point of view of the dispossessed majority whose suffering has yet to be publicly recognized or remedied. Insofar as they were a defeat they signaled a new era that was not so different than the history that preceded the decision to create the commission. Its mandate established a very partial break between the past and the present. The prospect of a full and positive settlement of damages lives on because the moment for its realization was missed.<sup>114</sup>

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<sup>114</sup> This is a paraphrase of the opening line of Adorno's *Negative Dialectics*. The original reads as follows, 'Philosophy, which once seemed obsolete, lives on because the moment to realize it was missed. The summary judgment that it had merely interpreted the world, that resignation in the face of reality had crippled it in itself, becomes a defeatism of reason after the attempt to change the world miscarried' (1990, 3, Introduction, *The Possibility of Philosophy*). The 'struggle continues' (*La Lotta Continua!*).

## Bibliography

### Types of Citations and references

The following sources offered some useful advice on how to construct a bibliography.

- (i) Leeds University Library., (June 16 2005) 'Harvard style bibliographies and references'. Page [online]. Available from:  
<http://www.leeds.ac.uk/library/training/referencing/harvard.htm#introduction>.  
[Accessed 21 September 2005].
- (ii) Bournemouth University., (July 2005) 'Citing References – The Harvard System'. PDF [Online]. Available from:  
[http://www.bournemouth.ac.uk/academic\\_services/documents/Library/Citing\\_References.pdf](http://www.bournemouth.ac.uk/academic_services/documents/Library/Citing_References.pdf).  
[Accessed 22 September 2005].

First, I used the Harvard System to cite the books and articles that I refer to or quoted from in the thesis. It works by specifying the name of the author of a book or article, the date of publication, the place of location and the name of the publisher. I also decided to place each of the entries in an alphabetical order under a list of twenty subject headings.

Second, in addition to the Harvard System I also used a second system to cite the quotations or sources of evidence from the commission's five-volume report. To ease the readability of thesis I decided to cite these sources by using the following method: the volume number, chapter number, page number and paragraph number. The advantage of a numerical method is that it simplified the location of multiple quotations and made it easier to identify which of the commission's reports I was referring to.

- e.g. At the beginning of his foreword to the TRC report, Mr Tutu stated that 'All South Africans know that our recent history is littered with some horrendous occurrences ... our country is soaked with the blood of her children of all races and of all political persuasions' (1, 1, 1, 1).

This reference refers to volume 1, chapter 1, page 1 and paragraph 1. I use the same method for all of the other citations from the 5-volume report.

Chapters 5, 6 and 7 use quotations from the transcripts of the Political Party hearings. I decided to cite a quotation from these sources by using a third abbreviated method: the author of the source (i.e. the TRC), the date of the hearing (i.e. 1997 plus d for the National Party Hearing or c for the African National Congress Hearing) and the page number where the quotation can be found.

- e.g. Directing his comments at the TRC's Chairperson, Mr Mbeki declared that 'there are some other people behind me, that we might depending on how difficult the questions are ..move to the front' (TRC, 1997c, 2).

This citation refers to the commission's transcript of the Political Party hearings that took place between its investigators and commissioners and the representatives of the African National Congress. It occurred in 1997. The statement appears on page two.

In addition, I also make reference to two other types of sources in the body of the thesis. The *figures* that are included in the main body of the thesis exist alongside a source at the bottom of the page. It describes the methods that were used to compile a diagram. The *tables* in the main body of the thesis also include a reference to a note. They specify the sources that I decided to use to construct the cell entries to a column in each table.

### **The structure of the bibliography**

I have made a further modification to the Harvard System by dividing the published sources that I refer to in the main body of the thesis into the following categories:

- (i) Bibliographies
- (ii) Books and journal articles
- (iii) Charters and judgments of the Nuremburg International Military Tribunal
- (iv) Articles, conventions, charters, resolutions and protocols of the United Nations
  
- (v) Commission of enquiry of a political party
- (vi) Published legislation of the Government of National Unity (GNU)
- (vii) Published transcripts of Human Rights Violation Committee Hearings
- (viii) Submissions of other parties to the TRC
  
- (ix) Documentary submissions of the African National Congress (ANC) to the TRC
- (x) Documentary submissions of the National Party (NP) to the TRC
- (xi) Requests by the TRC to the ANC for further documentary evidence
- (xii) Requests by the TRC to the NP for further documentary evidence
- (xiii) Transcript of the African National Congress (ANC) Political Party Recall hearing
- (xiv) Transcript of the National Party (NP) Political Party Recall hearing
  
- (xv) Official reports of the South African Truth and Reconciliation Commission
  
- (xvi) Who's who in South African Politics
- (xvii) Newspaper articles, features and obituaries
- (xviii) Published e-papers and e-books
  
- (xix) Documented decisions of the Amnesty Committee
- (xx) Demographic statistics

I shall now specify the methods that I used to cite the sources in each of the subsections listed above.

#### **(i) Bibliographies**

The bibliographies that I refer to were invaluable guides to the existing literature. The writings of Habermas run into many volumes and securing access to specific papers was not always easy. The bibliography by Demetrious Douramanis is the best of the bunch. It places the German title of the articles, books and publications that Habermas wrote and published between 1952 and 1995 side by side with an English translation. It also summarises the content of many of the book collections. The bibliographies (by

Deflem, Matustik, Rasmussen and White) are less comprehensive. However, they did contain useful surveys of an impressive body of ever expanding secondary literature.

Although Verdoolaege's bibliographic essay on the South African Truth and Reconciliation Commission lists 437 entries the publications vary in quality. A literature survey that I carried out using a bibliographic database of the National Library of South Africa (NLSA) produced 521 entries between 1993 and 2003. The website of the commission also includes a 91 page guide. It includes a list of articles, books and journal articles that touch on issues with a relevance to the work of the commission. Very few articles analyse the primary sources that the commission was able to produce.

## (ii) Books and journal articles

I used the following method to cite a source from a book: the author's Surname, Initials., (Year of Publication) *Title*. Place of publication: Publisher

e.g. Adorno., T.W., (2003) *Can one live after Auschwitz? A Philosophical Reader*. Stanford: Stanford University Press.

To cite a contribution of a specific author to a book I used the following method: the contributor's Surname, Initials., (Year of publication), 'Title of the Contribution'. Followed by In: Initials. Surname, of the author or editor of the publication followed by *Title* of book. Place of Publication: Publisher.

e.g. Cherry, C, Daniel, J, & Fullard, M., (2001) 'Researching the 'Truth': A View from Inside the Truth and Reconciliation Commission'. In: D. Posel & G. Simpson, editors. *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*. Johannesburg: Witwatersrand University Press.

If an author published more than one document in the same year I distinguish between them in the text and the bibliography by adding a lower case letter (a, b, c, d, etc.) after the year and within the parantheses.

e.g. Habermas, J (1997a) *The Theory of Communicative Action: Volume 1, Reason and The Rationalization of Society*. Cambridge and Oxford: Polity Press.

Habermas, J., (1997b) *Legitimation Crisis*. Cambridge: Polity.

I used the following method to cite an argument from a journal article: the author's Surname, Initials., Year of Publication, Title of Article. *Title of the Journal*, Volume Number (part number if specified), Page numbers of the contribution.

e.g. Anderson, P., (2004) 'The River of Time'. *New Left Review*. 26, March/April, 67-77.

## (iii) Charters and Judgments

The sources under this sub-heading refer to official publications of an international military tribunal that have been published in a journal, a command paper or a book. I used different methods to cite similar material that appeared in different publications.

(iv) **Articles, Conventions, Charters, Resolutions and Protocols of the United Nations**

I decided to group these sources together because they refer to official instruments of the United Nations that were published in book form by an approved publisher. I used the following method to cite these sources: the author's Surname, Initials., (Year of publication), 'Topic or Contribution'. In: the *Title* of book. Place of Publication: Publisher.

e.g. Djonovich, D. J., (1984) 'Definition of Aggression'. In: *United Nations Resolutions. Series I, Resolutions adopted by the General Assembly*. Dobbs Ferry, New York: Oceana Publications.

(v) **Commission of Enquiry of a Political Party**

I used a method that is an approximation of the Harvard System.

(vi) **Published legislation of the Government of National Unity (GNU)**

I was unable to locate a full copy of the *Promotion of National Unity and Reconciliation Act* via an entry to a book or a journal article. The commission's report does not include a copy. However, the Act (Number 34 of 1995) has been published by the Department of Justice and Constitutional Affairs at its website. It is this source that I refer to below.

(vii) **Published transcripts of the Human Rights Violation Committee hearings**

The transcripts of these hearings have also been posted at the website of the Department of Justice and Constitutional Affairs. The transcripts that I used can be found there. I used the following method to cite these sources: Author., Full date of publication. *Title*. Available from: the name of the website. URL. [Accessed date].

(viii) **Submissions of other parties to the Commission**

As above.

(ix to xiv) **Documentary submissions, requests for information and transcripts of the Political Party Recall Hearings**

As above.

(xv) **Official Report of the South African Truth and Reconciliation Commission**

I cited the volume of the first five volumes of the official report by using the following method: the author., (Year of Publication) *Title*. Place of publication: Publisher. Volumes 1 to 5 have been published in book form. Volumes 6 and 7 are e-books only.

**(xvi) Who's Who in South African Politics**

As above.

**(xvii) Newspaper articles, features and articles**

As above. The main exceptions are the Mail & Guardian (M&G) references. The Harvard System and the British standards do not specify how electronic sources should be presented. I decided to use the following method to cite references from a website: Author's Surname and Initials., Full date. *Title*. Available from: the name of the website. URL [Accessed Date].

- e.g. Thomeycroft, P., (25 July 1997) '*NIA man 'tortured' Chief Seremane*'. Available from: the Mail and Guardian website.  
[http://www.mg.co.za/articledirect.aspx?articleid=206606&area=%2farchives\\_\\_print\\_edition%2f](http://www.mg.co.za/articledirect.aspx?articleid=206606&area=%2farchives__print_edition%2f). [Accessed 31 November 2002].

The Southscan entry is a bulletin of Southern African affairs. It is similar to a news digest. It contains a short summary of news from a number of different sources. Its central focus is politics and government affairs. It is a brief but very useful source.

**(xiii) Published e-papers and e-books**

The following method was used to cite references from these sources: Author's Surname and Initials., Full date of publication. *Title*. Available from: the name of the website. URL [Accessed date].

- e.g. Darwish, M., (August 1982) *Memory for Forgetfulness*. Available from: Berkeley, California.: University of California Press.  
<http://ark.cdlib.org:/13030/ft1Z9n7g7/>  
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**(xix) Documented Decisions of the Amnesty Committee**

As above.

**(xx) Demographic statistics**

The following method was used to cite an official source that was published by an agency of the South African government: Name of Issuing Body, Year of Publication. *Title of Publication*. Place of Publication: Publisher. Report Number (where relevant).



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