

Truth Commissions as a tool for consolidating democracy-

A case study of the South African Truth and Reconciliation
Commission

Abstract

The thesis examines the truth and reconciliation commission in South Africa and its possibilities to act as a vehicle in the process of consolidating democracy. The norms and values that can be found in the principles and practices of the commission are scrutinized, and the means of presenting this norms to the public is also looked into. The issue of how to deal with the human rights violations of a past regime forms the theoretical framework, and the truth commission is compared with the traditional solution of court proceedings. In particular, the question of whether to grant amnesty or not is in focus. Further, the possibilities to strengthen the rule of law, promoting a human rights culture, promoting accountability, and deterring future return to non-democratic governance are examined. In the study both shortcomings and advantages of a truth commission are displayed.

Nyckelord: South Africa, Truth commissions, democratization, transitional justice, amnesty

Abbreviations

ANC	African National Congress
EU	European Union
IFP	Inkatha Freedom Party
NP	National Party
PAC	Pan African Congress
SADF	South African Defence Force
SAP	South African Police
TRC	Truth and Reconciliation Commission
UDF	United Democratic Front
UN	United Nations

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Content

1	Introduction.....	6
1.1	Subject and Purpose	6
1.2	Method and Material	7
1.3	Definitions and Delimitations	8
2	Theoretical framework.....	10
2.1	Arguments in favour of prosecution.....	11
2.2	Arguments in favour of amnesty	12
3	Promoting the consolidation of democracy	15
3.1	A Democratic establishment?.....	15
3.1.1	Composition	16
3.1.2	Civil society.....	18
3.2	Preventing a return to a non democratic order	19
3.2.1	The terms of reference.....	20
3.2.2	Access to information.....	22
3.3	Promoting the rule of law	24
3.4	Promoting accountability	26
3.5	Promoting a human rights culture	29
3.5.1	Impartiality	29
3.5.2	Naming names and due process	31
3.6	Public criticism of the TRC.....	34
4	Public outreach	36
5	Conclusions and Summary	38
5	List of references.....	40

1 Introduction

This chapter will give an introduction to the subject and the aim of the study. The truth and reconciliation commission (TRC) is here explained in a wider context, that is, as part of the dilemma concerning what will happen with those who have committed serious violations against human rights. The problem examined in the study- to what extent has and will the TRC improve the process of consolidating democracy- is also justified as a relevant topic.

The methodology and the material I am using will be addressed in this chapter. Further, the delimitations I have made to be able to present a structured thesis and the definitions of certain concepts that play an important role in the study will be discussed. Especially the concepts of “democratic consolidation”, “rule of law”, and “accountability” are presented.

1.1 Subject and Purpose

During 45 years of apartheid and 30 years of armed resistance by the African National Congress (ANC) and others, tens of thousands of South Africans suffered serious human rights violations and war crimes. In 1995, the Promotion of National Unity and Reconciliation Act establishing the TRC was passed by the South African Parliament. The model of a truth commission is a relatively new innovation and, besides in South Africa, it has especially been practised in the Latin Americas. The Truth Commission is a phenomenon that has increasingly gained ground and its pros and cons are in need of further evaluation. Admittedly, there are circumstances which separate each case and each country, but the core issue remains the same; how should the new democratic regime reckon with the human rights violations committed by, and during the former regime? A vast academic literature is available on this dilemma; not only political scientist but international lawyers and philosophers have discussed the above-mentioned question thoroughly. The Truth Commissions were introduced in the early 1990's as the answer to this question. In Hayners' definition of Truth Commissions they have certain core characteristics:

- They focus on the past and try to paint the overall picture of certain human rights or humanitarian law abuses over a period of time, not focusing on a specific event.

- They exist over a temporary and pre-defined period of time, ceasing to exist with the submission of a report.
- They are vested with some authority that allows it greater access to information, greater security or protection to address sensitive issues, and a greater impact with its report than other investigations have. (Hayner 1994)

Truth commissions are non-judicial bodies and have fewer powers than do courts, perpetrators will not be put in prison by the commission for instance. (Freeman, Hayner:123)

Truth Commissions evoke a number of questions such as; how do we prevent the former regime to block the transition to democracy? How can victims of the former regimes' human rights violations get a feeling of justice? Should we forgive, forget, punish or prosecute? Is it necessary to know the truth in order to advance reconciliation? In order to be able to present a focused and coherent argumentation it is necessary to further distinguish the question that I will devote my thesis to. The issue that will be in focus in my thesis is;

- What are the advantages and shortcomings of the TRC relating to the process of consolidating democracy?

I intend to look beyond the issue of transitional justice, appertaining to the democratic transition, and focus more on the phase of consolidation of democracy. In making this priority, I hope to bring some new conclusions to the already vast literature on truth commissions. It would not be possible to make a complete evaluation of the impact that TRC has had on the democratic process in South Africa, given that reconciliation and promotion of democratic values are both long-term processes. Rather, the object is to examine the possibilities for the TRC to promote the consolidation of a democratic State. In this study I hope to be able to also draw conclusions of a general nature, which are not only applicable to the South African case

1.2 Method and Material

The methodological point of departure derives from the school of normative institutionalism. TRC is then looked upon as an institution, or as a part of an institution, that could influence actors. Normative institutionalism argues that an institution can have an impact on the values, norms, interest, identities and believes of actors. The values that are promoted by the TRC are considered to influence the basic values among the population, and political democracy also depends on the design of political institutions. (March, Olsen:17, Lowndes:95, 99)

In chapter 2 the theoretical framework will be presented, but more recent theories on truth commissions in particular will be presented and integrated in the subsequent chapters. Thus, the thesis will also be theory consuming. Chapter 3 is devoted to the norms and values to be found in the TRC, while chapter 4 looks at the means of reaching out to the public. In the final chapter I will summarize the conclusions reached in the study.

I was granted a Minor Field Study scholarship and spent two months in South Africa, where I was accommodated by the Centre for Human Rights in Pretoria. The purpose of the field study was to optimise the possibility to gather relevant material and information on the topic. The material mainly consists of secondary material; that is academic literature and reports, but I have also used primary resources such as legislative Acts. During my stay in the country I also engaged in numerous discussions with locals, which enhanced the understanding and brought new perspectives to the issue examined.

1.3 Definitions and Delimitations

In my project I will use a rather maximalist view of the concepts of democracy and democratic consolidation. According to Diamond and Grugel, liberal democracy requires that the executive power is constrained by the independent power of other government institutions. An independent judiciary and parliament are functioning as actors of horizontal accountability and a complex bureaucracy that can make claim of impartiality needs to be established. It is also crucial that the elected and representative government should be controlled by constitutional channels of accountability, and citizens should be politically equal under the law. In a democracy an independent, non-discriminatory judiciary effectively protects individual and other centres of power enforce group liberties and its decisions. (Diamond. 1999.: 65, 111-112, Grugel.. 2002. :69-70.)

According to the rule of law legal rules are applied fairly, consistently and predictability on equivalent cases. All citizens should have political and legal equality, and the state agents are themselves subject to the law. In a democracy the rule of law protects citizens from unjustified detention, exile, torture and undue interference in their personal lives, by states and other organized forces. (Diamond. 1999.:11, 65, 111-112) Thus, the rule of law means that minimal rights and duties of citizens are vested in the legislation and that the limits of state activity are legally defined (Grugel:69). Accountability and rule of law are therefore essential concepts for this study.

Consolidation is here used to describe the process of achieving broad and deep legitimation to the concept of democracy. Democratic consolidation encompasses a shift in political culture, the society agrees that democracy should be the system that governs the country, even in times of political and economical poor governmental performances; it becomes the only game in town. (Diamond. 1999.: 65, 111-112, Grugel. 2002.: 69-70.)

Diamond lists three tasks that all new democracies must handle if they are to become consolidated:

1. Democratic deepening. This requires greater executive and military accountability to the law, to other branches of the government, and autonomy for independent action by civil society, and more effective protection for the political and civil rights of all citizens..

2. Political institutionalisation, strengthening the formal representative and governmental structures of democracy, the judicial system must have a high degree of institutional coherence, capacity and autonomy if individual and group rights are to be protected. Strengthening the bureaucracy, such as promoting a professional and effective police, political parties, legislatures are also important aspects of consolidating democracy.
3. Regime performance. Over time and over a succession of specific governments, the democratic regime must produce sufficiently positive outcomes to build broad political legitimacy. The citizens expect, at least, accountability, political freedom and constitutionalism. (Diamond: 74-76)

Democracy can be consolidated only when no significant collective actors challenge the legitimacy of democratic institutions or violate its constitutional norms, laws and procedures. (Diamond: 66-67) At the level of mass public, consolidation is indicated when the overwhelming majority of the public believe that democracy is the best form of government in principle and the most suitable form of government for their country at their time. (Diamond: 68)

As shown above the topic is in certain respects interdisciplinary; it concerns both political science and law, although emphasis is laid on the former in this thesis. In this study, human rights are addressed as far as they are part of the concept of consolidating democracy. Some interesting aspects, like the emerging right to know the truth, may therefore partly fall outside the scope of this project.

2 Theoretical framework

This chapter will provide the reader with an introduction to the previous research on the question concerning how the new democratic regime should deal with the human rights abuses during the former regime. I will primarily discuss the theories of Huntington, who addressed the issue that he referred to as “the torturers’ problem”, and O’Donnell and Schmitter. These theories do not specifically discuss truth commissions, rather they concern the transition to democracy and the issue of prosecution at a more general level. Although the theoretical framework presented here primarily focuses on the transition to democracy, they compose a necessary background to understand the phase of consolidating democracy as well. The problems of transitions to a vast extent also apply in the consolidating phase.

Huntington concludes that in practice the choice of the new regime depends almost exclusively on politics, if it even can be described as a choice. About half of the pre- 1990 democratizations were transformations initiated by the leaders of the existing authoritarian regimes and almost all these regimes decreed an amnesty as a part of that process. In many cases the authoritarian regime not only acted in their own interest in legislating amnesty, they had also the power to make the amnesty stick. (Huntington:215-216)

According to Zalaquett a policy to deal with past human rights abuses should have two overall objectives: to prevent the recurrence of such abuses and to repair the damage they caused. In order to succeed in this the country must achieve a measure of national unity and reconciliation, and build and reconstruct institutions that are conducive to a stable and fair political system.(Zalaquett:5-6)

The policy must also meet certain conditions of legitimacy: The truth must be known, otherwise could a harsh policy against the former regime be tantamount to arbitrariness or revenge, while a policy of clemency would be equivalent to granting impunity. Further, the truth must be complete; including the nature and extension of violations, who were perpetrators, and the fate of victims. The truth must also be officially proclaimed and publicly exposed, so that it allows the findings to form part of the historical record of the nation and establishes an authoritative version of the events.(Zalaquett:6-7) The policy must represent the will of the people and it must not violate international human rights law.(Zalaquett:9)

2.1 Arguments in favour of prosecution

Prosecuting human rights violations can substantially enhance the chance for establishing the rule of law and signalling that no individuals are outside the reach of legal accountability. (Minow:57-58) Democracy is based on law and the point must be made that neither high officials nor the military are above that law. (Huntington:213) O'Donnell and Schmitter believe that the worst of bad solutions would be to try and ignore the issue of what to do with the former perpetrators.. Such a position would be to reinforce the sense of impunity and immunity of the armed forces.(O' Donnel, Schmitter:30) Punishment is a way of restoring the rule of law by protecting the individual against other powers in society. It is also a way to provide victims a form of legal redress. Prosecutions could also help to deter future crimes, either on an individual or a general level. (Teitel:149) In some countries one can show that a policy of impunity results in encouragement of further human rights violations, (Méndez:276-277)¹

Making state criminals accountable says something about the democracy that the country is trying to establish, and preserving memory and setting human rights accounts can be part of the formula for a lasting peace. (Méndez: 257-258) It is difficult to imagine how a society can return to some degree of functioning which would provide support for political democracy without coming to terms with the most painful elements of its own past. By refusing to confront itself of its worst fears and resentments, such a society would be burying not just its past but the very ethical values it needs to make its future liveable. (O' Donnel, Schmitter:30-32)

Méndez further argues that the purpose of punishment reaches beyond merely restoring the rule of law by protecting the individual against other powers in society. It also heightens the value of certain norms like prohibiting torture and disappearances. (Méndez:277) To assert the supremacy of democratic values and encourage the public to believe in them is one task of the new regime that could be enforced through prosecutions. (Huntington:213) An obstacle to democracy is the authoritarian legacy that still plays a role in the democratizing society. The past continues to shape the culture, composition and legality of the state (Grugel: 85) In many countries this has led to the urgent challenge of reducing the autonomous and unaccountable power of the military. The military must be removed from the political sphere, limiting in its involvement in domestic affairs. (O'Donnell, Schmitter:30-32) One important task would therefore be to stigmatise and separate the military from the public realm. (Teitel:149) Another important issue is to deter future human rights violations by security officers, and to clear out the perpetrators of the old regime from high positions would be one way of doing this. To prosecute and punish would of course be an effective way of removing certain actors. Another alternative is to use civil law measures, like dismissal. But to purge the institutions without determining the individual guilt in a fair process seems to be contrary to the rule of law. In order to make the public trust in the institutions it would be of great importance to put an end to the influence of the actors of the old regime, prosecution would be a mean to restore faith in the institutions.

¹ This has been the case in Peru and Colombia according to Zalaquett.

In order to be able to hold state bureaucrats, soldiers, police and executives accountable there must be a judicial system that has political and constitutional autonomy to ensure the rule of law. This of course requires independent and professional judges. It also demands that the courts have the staffing and other resources to be effective. Further, there needs to be an effective legal system including prosecutors, police, public defenders etcetera. It also requires a clearly codified body of law. Only when organized actors in politics and civil society recognize their long-term interest in a strong, independent judiciary can that branch of the government gain the authority and resources to impose accountability on other state actors. (Diamond: 111-112). However, practical reasons often interfere with or prevent prosecution; insufficient material and resources, untrained staff, lack of enough power or courage are some obstacles. (Minow:57-58) Reforming the police and the judicial system is therefore crucial when it comes to strengthen a culture of democratic rights. (Grugel:77) According to this argument prosecutions could help to restore faith in the judiciary.

Establishing and habitualizing the commitment to the rules of the democratic game is the core feature of the process of consolidation. To become consolidated, greater executive and military accountability to the law and to the public is necessary. More effective protection of civil and political rights of the citizens also needs to be established. Political institutionalisation is the way to create workable rules of the game, and in this system the judiciary must have a high degree of institutional coherence, capacity and autonomy. (Diamond:73-75) . Accountability for criminal acts is something a democracy should provide. Failure to do so is a proof of poor political performance of the new regime, (Diamond:90-91) and this poor performance is a clear threat to the emerging democracy. (Grugel:82)

Prosecution is also said to be the most effective means of separating collective guilt from individual guilt. (Méndez:277) It expresses who is a criminal and who is not. (Teitel:149) By prosecuting the offender, the people that belonged to a particular group that was allegedly responsible for atrocities can clear their names if trials take place. (Huysse:105)

Finally, the process of prosecution has been said to allow judicial resolution of past wounds, and thereby enable reconciliation of the various interest groups. (Teitel:149)

2.2 Arguments in favour of amnesty

History reveals that the more brutal, inhumane, and extensive were the repressive actions, the more their actual perpetrators feel threatened and will tend to form a block opposing any transition. A policy of impunity would seem most viable and least dangerous for democratization where the repression was initially less brutal and extensive, or where they did not occur a long time ago. Ironically, it seems, where and when it is easier to bury the past, is where and when it is less important to do so. On the contrary, where these past accounts are of greater weight and more recent origins and involve a wider spectrum of persons, it is much more difficult and dangerous to attempt to collect them. (O' Donnell, Scmitter:30-32) Diamond also agree with the view that prosecution for past crimes usually is more than the relation between the civil regime and the military can bear. There is a good chance of a military reaction, ultimately in the form of a coup if the

government choose to prosecute. (Diamond:112-113) Punishment of individuals is seen as impeding the consolidation of democracy, and to consolidate the democracy in a country where human rights are guaranteed should take precedence over the alternative to seek retroactive justice that could compromise that process.

Whitehead suggests that accountability could be viewed as a mean to fulfil normative objectives in a democracy, such as liberty, security or equality. If seen as only a mean to achieve certain goals, it could also be possible to have too much accountability. Certain forms of impunity could then be argued for if that is considered as a better way to achieve the objective goal than accountability would have been. Accountability through legal process is but one form of accountability, supervision of an independent mass media, internal administrative investigations, electoral sanctions are other means. (Whitehead:94-96) Too much enthusiasm for accountability might even lead to demands for strong leadership and unchecked authority. (Whitehead:98) However, as elaborated on in a section 1.3, in this thesis I am using the theory that accountability is not just a mean to achieve certain objects but a necessary precondition for a democracy.

The judicial integrity is often in the hands of political compromise. Prosecution could form the cornerstone of a political program. If the new regime presents them as committed to this aim and tries to build their legitimacy on this, it might be troublesome if the political realities are putting up obstacles. The authoritarian legacy might cause compromises that does not go well together with the announced ethic. This will probably lead to the public regarding the new regime as hypocrites. To base the regimes' legitimacy upon the promise of true judicial independence can be devastating. In worst case such a policy of implies that the courts' and the laws' autonomy are dependent on the rulers wishes. (Osiel:139-144)² Thus, the democratic values will not be strengthened by the trials, instead there is a risk of non-democratic groups making political use of the failures of the government.

The prosecutor may chose to only prosecute the highest ranking officers. This approach risks drawing a line between blameworthy and blameless parties. Such an approach might fail to win the publics acceptance as it could seem morally arbitrary only holding some of the offenders accountable. The line between culpable and inculpable parties is not clear. In many cases both opposition groups and governments grossly violated human rights. Many groups and people might have shared in the guilt for the crimes committed by the authoritarian regime. In such a case a general amnesty for all provides a far stronger base for democracy than efforts to prosecute according to Huntington (Huntington:213). By pinning blame on a limited sector of the society, human rights trials re-invent history. Blaming the military but not the civilian perpetrators can deepen the political conflict. The trials thereby risks to weaken the credibility of the new democratic judiciary. Sometimes this is referred to as the question of collective guilt, the atrocities involves so many people in so many ways that it is misguided to focus only on those within the narrow scope of criminal liability. Moral and political argument often ascribes responsibility for actions not falling within the scope of criminal liability. A judicial assessment may only address the contribution of the atrocities of the former regime. If the acts of the opposition, for instance a guerrilla, is not addressed there is a clear unbalance. There needs to be an adequate account for the connection between those

² This was the case in Argentina, and the government was thereby sending out a signal that the rule of law would advance when politics permitted and retreat when politics required.

aspects of the past violations judged in a Court and on the other hand those excluded from criminal investigation. There also needs to be a distinction between the two sorts of contribution to the atrocities that justifies such differential treatment by law, the nature of the offences must be clearly defined.

A refusal or inability of telling the whole truth can evoke a public's view of the trials as hypocrisy. In the period of democratic transition, expeditious and confidential procedure is often impossible. Courts are not committed to produce a coherent narrative about the nation dilemma, they are not likely to call for account of the entire regime. The problem is very much linked to the fact information is not accessible. State archives containing evidence of the practices of the state actors could be confidential or hidden. The offenders themselves are probably unwilling to reveal the crimes committed. Witnesses will not testify in public for fear of being killed and the courts are incapable of rendering justice. There is an obvious risk that a Court respecting the standards of fair trial will not be able to punish many of the perpetrators. Lack of proof can lead to the acquittal of well known perpetrators, which will certainly damage the public's trust in the legal system. Then, court proceedings do not seem to be the answer to disclose the full truth and to lift the mantle of absolute impunity?(Cassel: 330, Osiel: 125-128, Minow: 57-58).

Insisting on punishment without due process and other principles of fair trial would be irresponsible, because the quest for justice would be contrary to the principle that it is based on. A decision to prosecute might be incompatible with fundamental standards of criminal law. To insist on prosecutions in the presence of an important legal obstacle like a pre-existing amnesty law would be irresponsible, because it would violate the very rule of law, including the principle of "nulla poene sine lege". The latter meaning that is a person should not be convicted for an act that was not illegal when it was committed. (Méndez: 271-273) (Kritz: xxvii). The new regime should therefore not ignore an amnesty law that has been legally established by the former regime. There is also a risk that the act did not constitute a crime when it was committed. In this case it would be difficult for a regular court to order any sanction.

Concerning administrative penalties, the rule of law rejects collective punishment and discrimination on the basis of political opinion or affiliation. (Kritz: xxv) Citizens' right to vote, to run for office, or to exercise freedom of association are fundamental elements of a democracy, and exercising these freedoms should not result in any sanction. (Kritz:xxvi)

That the courts must themselves be trustworthy and efficient is of course a crucial element. (Whitehead: 94-96) In times of transition this requirement is a very troublesome one. The institutions of the old regime generally did not have much credibility among the citizens, since structures and compositions of the courts are not easy to change over night. Staff working for the old regime might still occupy important positions. Even if a completely new staff is recruited for the task of prosecuting and judging the offenders the problem still remains. There is a great risk that the public still connect the judiciary with its malfunctioning predecessor. The decisions of the court will then be looked upon as just another arbitrary judgment. Judicial impartiality may also fall victim to political pressure, time constraint, insufficient number of trained judges and lawyers. The risk of trials becoming a victor's justice is evident.

3 Promoting the consolidation of democracy

The TRC has been called a uniquely democratic commission, (Liebenberg: 147) and this view is something I will examine in this main chapter of the thesis. A number of aspects is shed light on, both concerning the establishment and work of the TRC. In particular, the questions of accountability and rule of law, including the promotion of a human rights culture, are addressed.

3.1 A Democratic establishment?

The truth commissions are also dependent on the political reality that forms the political outcome of the transition. Popkin argues that truth commissions do not bring about transition to democracy but instead are most useful after such transitions are well underway. There needs to be a considerable consensus in order to break with the past (Pokin:289) Albon also subscribes to the view that there must be consensus in society that the commission is needed and that its membership is appropriate.(Albon:290-291) On the other hand Hayner argues that it should be implemented as soon after the resolution of a conflict or government transition as possible. (Hayner:652) If initiated by a new president overseeing a fundamentally unchanged military, the initial weeks or months of his or her administration, when presidential power is strong, may be the only chance to establish a truth commission. (Hayner:640)

There is also a clear risk that the commission will be established with improper political motives. The government may use the truth commission as a vehicle for pursuit of political vendettas. it may also be made deliberately weak, just so that the results could be easier to challenge. By installing a commission, the government escape criticism of not redressing the past human rights abuses, although the result of the commission may be very poor. (Freeman: 127)³

Neier challenges the view that democratic decision-making and consensus is always conducive to democracy in this process. Victims of abuse often belong to a minority, and if the majority should determine the rights of this group the outcome may be counter productive to democratic consolidation. (Neier 1997:102) However, in South Africa it was actually the majority who were the victims, and this objection is therefore not as relevant is this case

³ Establishment and operation of the truth commission can be undermined where there is widespread social identification with the perpetrators rather than the victims. (Freeman, Hayner:128)

On 2 February 1990 President de Klerk announced that certain prisoners should be released, and that political parties, including ANC should be allowed. The indemnity Act from 15 May 1990 gave the President the right to grant temporary immunity. Qualified amnesty was granted to protect ANC personnel who were to return to South Africa. (Liebenberg: 129) The further Indemnity Act granted an additional 200 persons amnesty, many of them had been denied amnesty under the first act. (Jeffery:79) In South Africa, those who were in power remained in control and the security forces were still controlled by the old government. (Sarkin 1998: 657)

Several options concerning the issue of whether or not granting amnesty were discussed. A blanket or general amnesty was proposed, this solution was advocated for by F.W. de Klerk and the security forces, but was considered as untenable by the ANC. The alternative to claim accountability in the form of prosecutions and sanctions was supported by the liberation movements in exile. However, Thabo Mbeki has witnessed that high level generals had warned him about the consequences if members of the security forces should be prosecuted after the election. The third option, the TRC, therefore became the only reasonable alternative. (Boraine 2000:143)

The TRC was established by a Parliament Act, thus, the South Africans opted for a truth commission via their parliament. The Act was established after the first democratic election in South Africa and a broad support among the representatives of the people could thereby be ascertained.

Contrary to many other commissions the TRC was a domestic project, although it received donations from a number of countries⁴. Advantages to UN sponsorship generally include the legitimacy derived from the international community's strong support of the commission's work, which pressures the parties to collaborate with the truth commission. The greater international attention will also increase pressure for fulfilment of the recommendations or the implementation of reforms. (Hayner:642-643)

3.1.1 Composition

Unless the people feel that they have part of the process of decision-making, they will doubt the integrity and motivations of the commission, and those involved in the process. Legitimacy means that the process is accepted as an objective body capable of finding an unbiased truth. This perception is generally achieved by having a well-balanced commission of highly respected people. (Sarkin: 230-231) Hayner and Freeman also agrees that a truth commission enjoys greater legitimacy where the process of defining their powers and mandate include active involvement from many different sectors of society. (Freeman, Hayner:130)

To be successful, investigatory commissions must establish their independence from all the actors in a contested history and their moral authority to be able to examine and judge the acts

⁴ (EU, Sweden, US, Norway, Denmark, the Netherlands, Austria, Belgium) Vol 1)

and motivations of others.⁵ An international commission has several advantages: distance from domestic political bickering, a claim to greater objectivity, and a higher degree of protection from reprisals, the possibility to publicise its recommendations internationally and use international pressure to see them implemented (Popkin:269) This distance may however give rise to the perception and, perhaps, the reality that the report is merely a UN document which gives an outside version of a historical period. (Popkin: 270) The main disadvantages of an international sponsorship are that staff might not have any experience of the country and the fact that the international staff leaves the country, which may hamper the strengthening of the structures within the country. (Hayner: 642-643)

The candidates for commissioners could not be high-profile members of any political party. (Sarkin: 658) Further, it is important to have a variety of ethnical and political backgrounds represented. Sarkin1999: 231) If the commission is balanced and represents all political sectors, it stands a better chance of being accepted as an impartial, independent moral authority. (Albon:290-291)

The persons selected to manage the truth commission will be a crucial factor for the success of failure of the commission. The members of most truth commissions have been appointed through procedures with no or little consultations of civil society. On the other hand, in South Africa a consultative approach to commissioner selection was practised. Mandela appointed a small representative selection committee, consisting of individuals from the largest political parties and civil society, including representatives of human rights organisations. The committee called for nominations and received 300 names that it trimmed down to 50 people to be interviewed. The interviews took place in public session and were closely followed by the press. The selection committee narrowed it down to a list of 25 candidates, which it sent to Nelson Mandela for final selection. (Boraine:144-145, Freeman, Hayner:129-130) The president announced the appointment of the 17 commissioners on 15 December 1995. In all the TRC hired more staff than previous commissions, over 200 multidisciplinary staff, including both nationals and non-nationals.

Two of the appointed commissioners⁶ were not on the selection panel's recommended list. (Sarkin 1996:621) Mandela apparently chose to include them in order getting a better balance of the commission. The Commission included 8 lawyers and 4 Christian Ministers of Religion. 7 of the members were black (black constituted 70% of population. And 6 of them were white (17 % of population.) Two of the commissioners⁷ politically came from the far right, members of the Afrikaner Broederband. (Bell: 242) The selection procedure represents a democratic norm and could serve to strengthen a fair election procedure.

⁵ For instance, in El Salvador, only foreign dignitaries were selected as commissioners and there was a prohibition on using Central Americans as staff to the commission. The parties to the peace agreement had attached great importance to the international character of the commission, and consequently no Salvadorans were hired to work for the commission. Buergenthal:296)

⁶ Khoza Mgoja and Denzil Potgeister

⁷ Wynand Malan and Chris de Jagger

3.1.2 Civil society

The role of the civil society in the process of consolidating democracy is a matter of debate. Most authors seem to agree that a vital civil society could be a useful tool in these processes. Diamond argues that the most basic function of the civil society is to provide the basis for the limitation of state power, hence for the control of the state by the society, and for democratic political institutions as the most effective means of exercising that control. (Diamond:239-247) By enhancing the accountability, responsiveness, inclusiveness, effectiveness, and hence the legitimacy of the political system, a vigorous civil society gives citizens respect for the state and positive engagement with it. (Diamond:249) Grugel argues that the most important democratic function of the civil society is its engagement with the state as a force of change. In this argument she is combining the liberal approach, according to which the civil society contributes to democracy by aiding the state, and the radical approach saying that the role of the civil society is to transform the state. (Grugel:95) In a new democracy the civil society may be looking for revenge or they may be weak, and there is also a risk that they will take over the role of the state. (Crocker:114)

The public rarely plays a role in crafting the terms of reference of a truth commission but the TRC were the first example of a process officially opened to encourage public debates and input on the terms of reference of a truth commission. (Hayner:639) The creation of the TRC could be described as a democratic procedure, since as many parts of the society as possible were given a possibility to be part of this process. Alex Boraine, who became the vice Chair of the TRC, started a NGO named "Justice in Transition". (Liebenberg: 145) Academics held public lectures on the topic, and several conferences were held; two seminars entitled "Dealing with the past" and "Truth and Reconciliation" were held in 1994. Points of view from the civil society were presented to the Parliamentary Standard Committee on Justice. (Boraine:144-145)

One of the compromises between the ANC and NP, namely that amnesty hearings could be held behind closed doors, was effectively contested by human rights NGOs. Instead, the principle of open hearing, except where it defeats the ends of justice prevailed. Several volunteers from NGOs, community-based organisations, religious and civic organisations were employed to take statements from victims. The TRC organised a "designated statement taker program". This program trained staff in community organisations, allowed for focus in rural areas. Victims could then tell their stories in their mother tongue, often to people they knew. (Vol.1:140) In the institutional and special hearings NGOs directly contributed with their expertise. (Vol.5: 145-150) This interrelatedness suggests that the TRC could be viewed as a hybrid between the State and the civil society. (Crocker:110)

International civil society also played a certain role.⁸ Academic reports and publications could contribute with ideas, lessons can be learned from other truth commissions. Human rights NGOs, among them Amnesty International and Human Rights Watch, was also active in the

⁸ Pressure from national or international non-governmental human rights organisations, or from other governments, has often played a role in pushing the president or parliament to set up a commission in democratic transitions. (Hayner: 641)

debate. International encouragement could make the truth commission immune from domestic criticism, and the TRC actually referred to the international support when answering to the criticism. (Crocker:114)⁹

The TRC did at least to a certain extent encourage the participation of the civil society which must be seen as conducive to the democratic consolidation. Moreover, the civil society did have an impact on the TRC by participating in the process and affecting the practice and procedures of the institution.

3.2 Preventing a return to a non democratic order

Memories of the past human rights violations have the potential of haunting the nation and its citizens far beyond the initial phase of transition to a democratic regime. (Huntington:215-216) A truth commission may help prevent basic points of facts from continuing to be a source of conflict or bitterness among the political elite. We remember in order not to repeat past atrocities. (Villa-Vicencio 1999:200) Sarkin concludes that in the absence of a Truth and Reconciliation Commission, anger, resentment, hatred, and revenge tend to be the order of the day. (Sarkin 1999:225) Villa-Vicencio holds that in South Africa, primarily those who suffered least are most determinate to forget the pain of others. (Villa-Vicencio 1999: 199)

Méndez concludes that experience shows that the old regime perpetrators are probably just as terrified at the prospect of truth being revealed as they are that some of them will have to face trials. The problem with the old regime inevitably wanting to have a saying in the decision on how to deal with past abuses is not put aside by the labelling of the investigation as a truth commission. The risk of renewed violence or coups is not impeded by the choice of creating a truth commission instead of prosecuting the offenders. (Freeman, Haynes: 127) This problem however mostly appertains to the transitional phase of the democratisation. Commissions can help establish the truth about the past. An accurate, detailed, impartial, and official record can serve to counter the false or exaggerated accounts of the past that were propagated by the previous regime.¹⁰ A truth commissions could signal a break with the dark and violent past and the transition to a more open and democratic future. It could also weakening anti-democratic actors who might otherwise continue to pursue their goals outside the democratic process. (Freeman, Hayner:125-126)

Compensation has many purposes, it aids the victims to manage the material aspect of their loss, it constitutes an official acknowledgement to their pain, and it may deter the state from future abuses. (Kritz: xxvii) The TRC gave compensation to both victims and perpetrators who witnessed for their costs. Larger sums were paid to the perpetrators, and this could be

⁹ In El Salvador, strong international support was critical to providing the Commission the financial resources, diplomatic support and ultimately international credibility for its potential controversial findings. (Cassel: 332)

¹⁰ According to Popkin, the greatest achievement of the commissions in Chile, El Salvador and Honduras has been the official presentation of an authoritative history, which counters the former regimes account. (Popkin, 287)

seen as a reminder of old structures. (Levinsson: 226) Besides cash payment, reparation was also offered in form of *inter alia* issuing of death certificates, reburials, and expunging of criminal records¹¹ (Vol 5: 118) The individual reparation grant structured as cash payment was unwise according to Commissioner Malan. Some of the victims may be in need of ongoing treatment, while some may not need treatment at all. (Vol 5:452) Truth commissions' role in listening to, and validating, the stories of the victims, is described as a major success by Popkin. This suggests that it is the process of compiling the commissions' report, as much as the final product, which is important. (Popkin, 287) However the TRC recognises that the cross-examination did have a traumatising effect on many victims. (Vol 1:185)

Concerning the issue of amnesty two competing views could be argued for. On the one hand, amnesty could be said to undermine deterrence, and promote cynicism and disillusionment among victims of human rights abuses. (Freeman, Hayner: 137) The TRC on the other hand argued that the disclosure made during the amnesty process could produce insights, on which basis reconciliation could be made. According to the latter argument, the amnesty process was therefore preventing future human rights violations. (Vol.1;121) There seem to have been no case of vengeance by victims against those perpetrators that have appeared before the commission. (Boraine 2003:175)

The TRC expressed that selective recollection of past violence would easily provide the mobilisation for further conflict in the future. Jeffery concludes that the report only told some of the truth, although it was required to tell the full truth. For instance at least 12 000 killings were left unexplained. (Jeffery:6) The TRC carefully selected those victims who should testify in public. This assessment was based on the nature of the abuse and which part of the society the victim represented. The TRC sought to get representation from different types of abuses and from all sides of the conflict. (Vol 5:8) The statements and the policy of the TRC displays an awareness of the need to present as a complete picture of the past as possible. Probably the most important tool in order to fulfil this object is the access to information, and I will therefore turn to examine this question below. The mandate of the commission is of course vital in its work, and I will therefore look into the terms of reference to examine whether there were any inherent obstacles to the object of displaying the full truth.

3.2.1 The terms of reference

To create authoritative history a commissions work must be broad enough to cover the principal harms and to focus on the appropriate time period. It must be detailed enough to convince sceptics that the facts found are true, yet must also provide the overall patterns and explanations that shape historical accounts. Hayner emphasis that a truth commission should recognise up front that it is impossible to carry out a complete investigation: a commission must focus on the essential. (Popkin:271, Hayner:653) In the final report, the TRC itself acknowledge that the picture it reveals is by no means complete. (Vol.1 p. 29).

Unrealistic expectations is a factor that could produce mistrust against the new institutions. Commissions can try to expose the multiple causes and conditions contributing to the massive

¹¹ Earlier sentence for political activity was deleted in the record.

violations in a way not possible for courts. However, the problem of truth and interpretation does not end with the launching of a report. To believe that the discussion concerning what really happen will end by the commissions report would be naive. No matter how thoroughly the commission has dealt with the past abuses, there will always be other competitive interpretations (Minow: 82)

The terms of reference of a truth commission should be sufficiently broad to allow investigation into all forms of rights abuses, preferably leaving to the commission itself the responsibility to identify the most appropriate cases or practices to investigate. (Hayner:636) This is because prioritisation can create frustration on the part of the victims of those violations that are excluded from the commission's mandate. To avoid the appearance of bias, it is generally important for the time span considerations chosen to be consecutive and not broken up to focus only on selected periods in a nation's history. (Freeman, Hayner:131)

In South Africa, the major tasks of the Commission to fulfil the overarching objective of promoting national unity and reconciliation were-

1. Analysing and describing the causes, nature and extent of gross violations of human rights that occurred between 1 March 1960- 10 May 1994.
 2. Granting amnesty to persons who made full disclosure of all the relevant facts relating to a criminal acts associated with a political objective.
 3. Restoration of the human and civil dignity of victims of gross human rights violations through testimony and recommendations concerning reparations for victims.
 4. Making recommendations on measures to prevent future violations of human rights.
- (Vol 1:)

The question of the period that should be scrutinised was a matter of debate. Some proposed 1652 -when the white settlers first arrived-, others suggested 1910- when the first Constitution of South Africa was established. 1948- when the National Party came to power- was also proposed. The parliament finally proposed that the TRC should focus on the period from 1960- when the prohibition on political parties came into force- to December 1993. (Boraine:141)

The parliament act established three different committees of the TRC. The Human Rights Committee held public hearings for victims and survivors. The reparation and rehabilitation committee designed a long-term policy for compensation and urgent assistance. The Amnesty committee investigated the applications for amnesty. (Boraine:145) The Mandate held that the TRC should finalise its work by 31 July 1998, but this deadline was postponed to 31 October the same year. (Puuvunen:13)

Combining investigations of government acts and those of non-governmental forces is one strategy for increasing authoritativeness, and avoiding charges of victor's justice. One danger is that the two types of violence will be seen as functionally equivalent. (Popkin:274) The mandate of the TRC did not exclude offences committed by other actors than those belonging to the former regime, instead the commission had a broad spectra of potential perpetrators to examine.

The Act held that any killing, torture, abduction, or severe ill treatment should be considered as a *gross violation of human rights*. (vol.1:72) The term *gross violations of human rights* thereby excludes a number of violations committed during the apartheid regime. For instance,

detention without a trial of at least 78.000 people, jailing of about 18 millions of people for pass law offences, and the forcible removal of millions of people did not fall within the jurisdiction of the TRC (Sarkin:659) This exclusion must be seen as the most problematic one. Many victims of human rights abuses would never have the chance to tell the commission about their fate, and many perpetrators would not be publicly named. Of course, it would be impossible for the TRC to investigate all abuses that took place within the given timeframe, but there is a risk that the final report would not be able to provide a complete picture if certain patterns of human rights violations, not amounting to gross violations, were left unexamined.

3.2.2 Access to information

The standpoint taken by the TRC is that truth is necessary for reconciliation. This point of view is not uncontroversial. It could be argued that reconciliation would be difficult to achieve when the truth is as horrific as in the case of South Africa. On the other hand it seems implausible that true reconciliation could be achieved when there is no complete picture, and no knowledge about what to forgive, forget or reconcile with. However, this thesis is not elaborating further on this question. Instead it takes the position that a commission that is not able to present facts about the past in an impartial and precise manner will receive little confidence among the public and its findings will be largely neglected. The impact of the commission depends on its possibilities to display a complete picture. It is therefore important to examine to what extent the TRC had access to information.

Access to information could be seen as the most evident advantage of a truth commission, since it makes it more likely than a court to present a balanced picture of the past. However, inability to call hostile witness, preserve or obtain documents, visit military or police installations had made it difficult for most investigating commissions to go beyond descriptions of general patterns. (Popkin:273) Further, widespread destruction of evidence of crimes by the outgoing regime, public fears about testifying, weakness or corruption in the administration of justice and lack of co-operation from the police or army are common problems for truth commissions (Freeman, Hayner:128). The problem of inadequate resources, whether a deliberate strategy or not, also applies to truth commissions. Human rights investigations for the purpose of establishing the truth about controversial and important cases demand an intensive investment of human resources. (Cassel: 333)

At the TRC, there were hundreds of days of public hearings. There was also a unique diversity in the types of hearings held, including victim hearings, amnesty hearings, special thematic hearings¹², special event hearings¹³, institutional hearings¹⁴ and political party hearings.¹⁵ (Albon: 290-291).

¹² Special hearings were held to identify patterns of abuse, for instance attention was drawn to women, youth, and compulsory national service.

¹³ Event hearings included testimony from victims, experts, and perpetrators. 10 different events were highlighted, including the 1976 Soweto student uprising and the 1990 seven days war between ANC and Inkatha.

The TRC was granted powers of subpoena and seizure and investigations. They could secure documents and political parties and the security institutions agreed to hand over material. (Boraine:146) In the individual victim hearings, no cross-examination took place, while in the investigative hearings, people were subpoenaed to appear, and lawyers, victims, and commissioners could question them. (Vol 5:8) In all the Commission examined about 50 000 cases of gross violations of human rights. (Vol 1:136)

The amnesty committee was composed of judges, lawyers, and advocates from the South African legal system. The committee has been said to often marginalize victims. It has also been alleged of being a legal show between lawyers. Since the lawyers tried to protect their clients from incriminating themselves, they often played the role of a silencer and restricted the valuable information that could be obtained. (Fullard, Roussea:202) The absence of thorough investigations also meant that the committee missed opportunities for gathering as complete a picture as possible. The investigation and research unit closed down in 1998, just as the amnesty process started its most hectic phase. (Fullard, Roussea:209)

The investigations unit's inspections of inquest records, court records, prison and police registers, and other historical documentation provided information to the TRC. (Vol 1:86) Statements were received from those who had approached the TRC, this indirectly excluded witnesses from those hostile to the Commission. For instance the IFP, who was hostile to the Commission, did not give many statements on alleged violations committed by ANC, and was subsequently found to be the principal perpetrator in the KwaZulu Natal region. In addition, statement takers also sought out potential statement givers. (Jeffery: 41-42) This may have led to an unbalanced selection of information.

The dissenting commissioner, Malan, claims that because of the threat of extradition and persecution in other countries, applicants often refused to disclose information on cross-border operations, most of which were carried out by the SADF. (Vol 5:453) The TRC experienced great problem in receiving information from the military. The person appointed the focal point, channelling information, was in fact acting as a gatekeeper. (Bell:262) In the final report, the commission also expresses disappointment on SADF, SAP, and the National Party for their submissions. (Vol 5: 196)

Boraine argues that the TRC has been able to secure information far beyond what any trial could have done. (Boraine 2003:172) One counter argument is that regular courts are in a better position to produce accurate information. In these courts the defendant are usually more passive himself, while in the TRC the applicant will testify in order to be granted amnesty. Testimonies in a regular court could then be seen as more credible. The rules of evidence will also increase the credibility of information received. (Slye:173)¹⁶

¹⁴ Institutional hearings were carried out in order to seek evidence from various professions, institutions, and organisations about their role. These hearings triggered self-analysis and helped the commission in formulating recommendations. (health sector, prison, media, legal, faith community)

¹⁵ Political party hearings enabled the parties to make their own submissions and for the TRC to ask substantive questions to them. (Vol 5: 145-150)

¹⁶ The commission must use fact-finding methods that are understandable and beyond challenge. Popkin:271 The Commission in El Salvador had two primary objectives: come up with a fact-finding process that inspired confidence in the sense that the public was convinced that the Commission really wanted to know and tell the truth, do everything in their power to ensure that the truth of their findings could not be impugned. Buergenthal: 318)

3.3 Promoting the rule of law

It is clear that rule of law was not a fact in apartheid South Africa, both legislation and practices indicates this. For instance, the Vorster laws meant the suspension of the principle of no detention without being brought before a competent court. The security legislation's definition of sabotage included more or less all forms of dissent. (Vol. 1 p.38) The separation of educational facilities and the creation of Bantu States are also clearly examples that implies the lack of rule of law.

Equality before the law is a basic precondition for the rule of law, and treating those who witness impartially is a crucial matter. (Crocker:106) The Act holds that victims shall be treated equally without discrimination of any kind, and there does not seem to have been any severe critic against the commission on this ground.

To promote the rule of law, the TRC should recognise that it is itself a subject of law. The very mandate derives from a parliamentary Act which upholds the position of legislation in the country. Both domestic and international law is promoted in other respects as well. In arguing for its position on issues concerning its mandate, the TRC applies international law and its norms.¹⁷ (Vol 1 p. 72) When determining whether an act was associated with a political objective, the TRC used criteria from extradition law and the notion of a political offence.¹⁸ (McDonald: 166) All the gross violations of human rights also constituted crimes under the laws that operated during the apartheid years. (Vol 5: 449). Thus, the principle of non-retroactive legislation was upheld, since no-one was inflicted for an act which did not constitute a crime at that time.

The question of whether the TRC and its power to grant amnesty is contrary to existing international law is also relevant. If the process itself constitutes a breach of the existing legislation, the rule of law is ignored. Mendez recognises that the international community has made progress in recognising that a legacy of grave and systematic violations generate obligations that the state owes to victims and society, although disagreement remains as to the content of this obligation. (Méndez: 255) According to Dugard, international law obliges a successor regime to punish members of the previous regime for acts that constituted crimes under international law. (Dugard: 262) Boraine is on the other hand invoking a duty to safeguard human rights and prevent future violations by state officers or other parties, rather than a duty to prosecute. (Boraine 2003: 168) One can at least conclude that granting amnesty in the way it was practised in the TRC is not a clear-cut violation of international legal norms.

Further on the power to grant amnesty, Neier argues that concern for victim is necessary to uphold the rule of law, one cannot sacrifice the victims on behalf of a larger concern. The granting of amnesty would therefore counter the rule of law. (Neier 1997: 99) Zalaquett on the other hand says that according to the rule of law the victims cannot hold a veto power or decide on the general rules of society. (Zalaquett 1997:103) Since the amnesty power is

¹⁷ See for example discussion on victims right to reparation and the notion of gross violation of human rights.

¹⁸ Motive of the offender, the context in which the act took place, whether it was committed in the course of or as part of political uprising, disturbance or event, and whether it was directed at a political opponent/state property or individuals.)

vested in national legislation and is not violating international law according to most academics, the process of granting amnesty must be said to be compatible with the rule of law.

The legality of the amnesty provision was also addressed in a South African court decision. In a case brought against the TRC¹⁹, the Constitutional Court was asked to declare the Act, or at least those sections dealing with amnesty as unconstitutional. The Court dismissed the application and held that the limitation of right to access if victims to the courts and the granting of amnesty for criminal liability were found to be permitted in the Constitution according to the court.

There was no legal basis for the procedural work of the commission, instead a small number of persons set up the rule and practices that guided the commissions work, and a lot of the practices were also established a long the way. This does not appear to be a democratic solution, nor in accordance with the rule of law. (Henwood)

It is of crucial importance to establish public confidence in the administration of justice. (Fernandez: 219) The rule of law requires a proper working judiciary and to develop a well functioning court system must be a priority. A truth commission could be an important tool in pursuing this object. However, instead of contributing to institution building or encouraging the courts to take action, they may serve to take serious human rights violations out of the sphere of judicial action. It is also a danger that the commission will be viewed as a substitute for other actions. (Popkin:289) The truth commission could in its efforts to pursue justice diminish the authority of the judiciary.

Investigating commissions shortcut some of the difficulties inherent in using normal investigating channels. Both the courts and the police have been at least complicit in the rights violations, and neither is capable of independent inquiries. Reforming or creating an independent, capable judiciary is a long-term undertaking. The appointment of competent judges, not associated with the failings of the past often awaits the emergence and training of a new generation (Popkin:264) In a society in transition, the courts are often composed of judges from the old order, and this was also the case in South Africa. (Sarkin 1999:254)

During the apartheid regime, Many people viewed the judiciary as independent, and sometimes even referred to as a liberal institution. But some judges obviously supported the apartheid legislation, and the margin of interpretation that existed was not utilized to lessen the oppression. Instead pro-apartheid interpretation of the legislation was often the case, and the courts did contribute to the apartheid regime. The lack of confidence in the judicial system among the black population led to a development of alternative courts. (Bindmann:110, 117) The Commission's findings on the judiciary held that it collaborated largely by omission, in the legislative and executive pursuit of injustice. It also actively contributed to the execution of apartheid.²⁰(Vol 5:253)

The South African criminal justice system was already under severe pressure. The possibilities to investigate, prosecute, and accommodate prisoners were all limited. (Vol.1:122)

¹⁹ AZAPO, the Biko, Mxense, and Ribeiro families v. the State president, Minister of Safety and Security, and the TRC. CCT 17/96

²⁰ The Pretoria Bar's refusals to admit black members and an apparent collusion with the police regarding torture of detainees is two examples

Even though the existing judicial system was not living up to sufficient standards, a financial and educational effort into the system might have got it on the right track. If the money spent on the TRC would have gone into the judiciary instead that system might have been able to deal with the past accurately. Crocker is on the other hand arguing that the TRC is less expensive and speedier than a regular court procedure. (Crocker:104) Parallel court proceedings against perpetrators during the apartheid years has taken place. For instance, the prosecution and imprisonment of Eugene de Kock, a police force leader²¹, took place when the TRC started its work. (Crocker:104). As a point of reference it could be mentioned that in this trial alone it took 18 months to secure a single conviction. (Vol. 1:123)

The TRC criticised criminal trials on various grounds, claiming they were too costly and took too long time. Former Commissioners have now been appointed to high positions as judges and may promote a TRC approach in the ordinary criminal justice system as well. (Jeffery: 17-19) By criticising the judiciary, the TRC may have reinforced the public perception of them as an inappropriate forum for enforcing justice.

3.4 Promoting accountability

As held earlier, accountability is a crucial feature of a democracy. The lack of accountability for the past abuses risks the creation of a human rights culture. (Slye:179) Different truth Commissions have had different practices when it comes to the issue of amnesty and accountability, so there is no single, necessary relationship between truth commissions and amnesties. (Cassel: 327)

Truth commissions can promote the accountability of perpetrators of human rights violations in several ways. One way to provide some individual accountability for past abuses is to publicise the names of those thought to be responsible for organising or executing the crimes committed. This might have negative effects on the reputation, career, and political prospects of the individual. (Popkin: 280)²² The publication of a persons' name is popularly understood to indicate their guilt, even though the reports stress that it is not a judicial body. (Hayner: 648) According to this line of reasoning naming names will contribute to putting an end to a culture of non-responsibility. An alternative is to turn the names obtained over to the regular courts for subsequent prosecutions. (Popkin:280)

By granting amnesty, perpetrators are supposed to be encouraged to tell their story. However, granting amnesty to perpetrators in return if they choose to reveal the history might not attract them. In some cases the risk of persecution is so insignificant due to the lack of proof that the perpetrators do not really have anything to gain by putting themselves in the limelight. One of the most significant shortcomings of past truth commissions has been their inability to secure meaningful cooperation from perpetrators. TRC has been described as an exception, with its power to grant individual amnesty to perpetrators of politically motivated crimes. In the absence of a credible threat of prosecution, it is unlikely that perpetrators will feel compelled

²¹ commander of the Vlakplaas command, also known as the police death squad

²² In El Salvador, the commission recommended that those identified as responsible for serious act of violence should be removed from the offices that enabled them to commit these acts. (Buergenthal: 318)

to apply for an amnesty. They are more likely to prefer to remain silent, thereby avoiding any risk of public shame or social indignity. (Freeman, Hayner: 137)

It would not be possible to claim criminal accountability for all human rights violations. Criminal procedures are time-consuming and it is often difficult to find sufficient evidence. This means that a majority of the perpetrators will not be convicted for their crimes. (Boraine:147) Further, the small number of trials would only reveal information directly relevant to specific charges. (Vol 1:122)

There was unwillingness among some political leaders to accept accountability. Boraine:156) Only a few applications came from high level security officers or police officers. Many of the most important persons, like Botha and other Ministers, did not apply.²³ (Puuvunen:16) The Inkatha party continued to demand a general amnesty for their members, and most of its members refused to participate in the amnesty process. (Slye:172)

Truth commissions can complement the work of criminal prosecutors by gathering information, organising and preserving evidence. They can also build a case for and recommend forms of accountability short of criminal sanctions, such as civil liability, removal from office, restitution or community service schemes. (Freeman, Hayner:126) By gathering information and preserving evidence that can be used in prosecutions, accountability could be ensured in cases where an exclusive trial procedure would probably not have been able to gather sufficient evidence. Both Albon and Benomar argue that truth commissions should submit evidence of crime to the courts for criminal prosecution. (Albon:290-291)

By naming their names the truth commission can impose the moral punishment of public condemnation.²⁴ On the other hand the naming of names could possibly reinforce the impunity it is supposed to put an end to, by making it clear that these persons have committed human rights violation, and still should not be held accountable.

The provisions on amnesty held that in order to get amnesty, the applicant give full disclosure of his or hers acts. The acts must have been committed in good faith as part of a struggle against the state or against any publicly known political organisations or liberal movement engaged in the struggle against the state. The acts must also have been committed within the scope of the persons' authority and duties, or the person must have believed they were. (Boraine 1997: 153)

Applicants were required to apply for amnesty for each offence they committed and the applications had to be made within the timeframe.²⁵ The applicant should declare the nature of their offences thereby effectively acknowledging their culpability. Amnesty hearings involving gross violations of human rights were to take place in public, save in exceptional circumstances. The name of person, information relating to the crime, would be published if a person was granted amnesty. In cases were amnesty applications were not made or unsuccessful, the way was left open for conventional criminal trials, when the prosecuting authority decided that there wee sufficient grounds for prosecution. (Vol.1: 118) The Act

²³ Only one Minister, Adriaan Vlok applied for amnesty.(Fullard:201)

²⁴ In El Salvador, the commission also made binding recommendations that they should be removed from office and that legislation should be enacted to bar them from public service during 10 years. (Cassel: 330)

²⁵ Only acts committed between 1960-1994 were considered. The applications had to be handed in by the latest 10 May 1997. (Boraine:148)

prevented victims from pursuing criminal or civil suits against perpetrators who had been granted amnesty. (McDonald:164)

The Amnesty committee received 7127 applications for amnesty in total. (Puuvunen:16) About half of those who applied were in prison at the time. (Sarkin 1998:659) The Amnesty committee has turned down a number of applications, and encouraged the public prosecutor to start a criminal procedure in these cases. In this way the TRC has contributed to the attribution of responsibility and the claim for legal and other measures. (Crocker:105) The Amnesty Committee could request the appropriate authority to postpone court proceedings, if the alleged perpetrator was under scrutiny in the committee. By the end of its term of operation, the TRC had been unable to hear and decide upon all amnesty applications, but the amnesty committee continued its work and considered all the applications it had received. (Vol 1:157) The trials and guilty verdicts on de Kock²⁶ and Motherwell rendered before the deadline for amnesty applications probably encouraged several persons to file their amnesty application. The granting of amnesty to Captain Brian Mitchel for the Trust Feeds massacre in KwaZulu-Natal might also have encouraged some applications. (Sarkin 1998: 659)

ANC took collective responsibility for human rights violations, but the TRC received few statements from ANC leaders. The submission by their ally UDF was also unsatisfactory; it included almost no information or statements. The submission of IFP barely mentioned the violations it had caused, moreover, the party visited party members in prison and tried to persuade them not to apply for amnesty. Such applications would reveal that the IFP was the second biggest perpetrator, the state being the biggest (Vol 5:199-201) Many security police officers handed in amnesty applications with detailed accounts, which revealed a pattern of abuses.

If there had been trials instead of a truth commission in South Africa, there is a strong possibility that the majority of those accused would have been found not guilty, due to lack of evidence and skilful prosecutors. (Boraine 2003:172) One argument is that in courts, the most skilful rather than the most truthful side will win. But it could be argued that it is better to establish at least some personal responsibility than no responsibility at all. (Shriver:68- 72)

The TRC should also contribute to institutional reforms and long-term development. The commission needs to identify the reason for past abuses and take action to reform fundamental institutions, such as the judiciary, the police, and the military. This is an advantage to courts, which can of course not put systems and whole institutions on trial, while truth commissions can bring communities, institutions, and systems to moral judgement. (Shriver:68- 72) The hearings that the TRC held with institutions also aimed at encouraging internal investigations and reforms. (Crocker:107)

The final report contains a wide range of recommendations. On the issue of accountability the TRC recommended that where amnesty has not been sought or been denied, prosecution should be considered. The commission agreed that it would make available information on allegations of human rights violations. Further the TRC recommended that granting of general amnesty should be resisted, and that attention must be paid to prosecution of SADF members who are found to have tortured, assaulted, or killed persons in their care. (Vol 5:309) P. W. Botha's refusal to appear before the TRC led to a criminal charge, and a court found him guilty of failing to attend before the Commission. (Vol 1:197) Hopefully, implementation of

²⁶ S v. Eugene de Kock, 1995-96, Transvaal Supreme Court, CC26/94

the Commission's recommendation on the reform of the South African Police Service may help to restore the trust between SAPS and the majority of South Africans, and thereby contribute to formal justice in the long-term. (Vol.1:122)

3.5 Promoting a human rights culture

A human rights culture could not develop in apartheid South Africa. The system bred intolerance, a culture of violence, and a general lack of respect for human rights. (Sarkin 1998: 628) This section will examine whether the practice of the TRC could help to foster a human rights culture and special attention will be given to the issues of fair trial and impartiality.

Ideally, truth commissions would contribute to the fortification of a new legal culture. (Shriver: 65) In the final report, the TRC recommends that the government should commit itself to regular and fair elections, and open and transparent governance. (Vol 5 :311) Concerning access to justice, the TRC recommends that a code of conduct for prosecutors should be drawn up in order to assist and empower victims. The government must also ensure that a minimum consistent standard of legal repress is extended to accused persons. (Vol 5:322) Further, the TRC emphasis that training of all personnel within the justice system is essential. To improve the representative composition, the imbalance in gender and race in the high court must be addressed. An audit of the courts administrated by chiefs in former homelands is also called for (Vol 5: 326, 327) These are all recommendations which will promote a human rights culture if implemented.

The TRC examined gross violations of human rights and by publicly condemning these acts the value of certain norms could be strengthened. For instance, the prohibition of torture must be seen as an important part of a democracy for those who have followed the work of the commission. In displaying the impact these violations have had on the victims, an understanding of the need for a human rights culture could be enhanced.

3.5.1 Impartiality

In order to fulfil the conditions of a fair trial a court must be impartial, both in a objective and subjective respect. This means that judges should act impartially, but also that there should not be any reason to doubt the impartiality of the court, it should be and be viewed as impartial.

The composition of the commission is a crucial factor when looking at the question of impartiality. As examined earlier, in the establishment of the court, great causation was practiced when selecting the commissioners. In fact, the principle of having a democratic procedure, where overlooked on two occasions in order to get a more politically balanced commission.

The TRC expressed the approach that any group or person inside or outside the state could commit human rights violations²⁷, (vol.1:69) and final report consequently condemned political organisations across the spectrum. Notwithstanding this there has been a lot of opposition against the TRC. Especially the white populations regarded the TRC as bias, and it was said to be loyal to the ANC. The opposition continued after the establishment and some individuals brought an action against the TRC to a Court, and accused it of lack of due process. (Boraine: 153, Jeffery: 85) However, the criticism of bias came from all parts of the society, there were no necessary link between support of the NP and criticising the commission. (Henwood)

The TRC also expressed the view that the acts of apartheid and anti-apartheid activists could not be morally equated. (Jeffery:124) This statement could provoke the perception that the commission was not fully impartial in fulfilling its task. Complaints to the public protector were issued by the Inkatha Freedom Party (IFP), who claimed that the TRC had acted biased against the IFP, and that IFP's constitutional rights had been violated. Former SADF members also claimed that TRC had displayed bias, prejudice, and lack of impartiality towards SADF. (Vol1:196) The National Party wrote a letter to the Commission, demanding an apology from the Chair and vice chair of the Commission for expressing their disappointment at a press conference about the National Party and their evidence presented at the TRC. This accusation of partiality of the TRC was settled at a meeting between Tutu and the new leader of the NP. (Vol1:345-247)

Jeffery lists a series of events not included in the report, most of them concerned attacks on IFP members. (Jeffery: 89-93) For example that the TRC did not examine in depth the abuses that took place in foreign ANC camps, where allegedly torture and inhuman treatment occurred. It must be said here that ANC is the only example of a nongovernmental entity that has established a commission to investigate and publicly report on its own human rights abuses.²⁸ Sarkin points out that the work of the commission should not be controlled or influenced by the government. (Sarkin:1999:231) In 1998 the government passed regulations

²⁷ Among those PAC, IFP, ANC, SAP, SADF

²⁸ In 1991 a group of former detainees of ANC camps, all formerly active ANC members detained under accusation of being agents of the State formed a "Exiles Committee" and forced the ANC to investigate camp abuses by bringing international attention to the issue. In March 1992, Nelson Mandela appointed the "Commission of Enquiry into Complaints by Former ANC Prisoners and Detainees". Two of the three commissioners were ANC members, and it was criticised for its bias. The commission submitted a report to Mandela documenting torture and other abuses regularly inflicted on detainees. The report did not name names of responsible individuals but recommended that urgent attention should be given to identifying and dealing with those responsible for maltreatment of detainees. The report was immediately issued to the public and to the press, although ANC later began questioning the accuracy of the report and refused to distribute it further. Mandela accepted collective responsibility for the leadership of ANC, but insisted that individuals should not be named or held personally accountable. (Hayner:625-626)

Shortly after the first ANC commission, Nelson Mandela named a new commission of inquiry to again look at the alleged abuses in ANC detention camps. The commission structured its proceedings much like formal court hearings. It hired counsel to represent the complainants and a legal defence team to represent the defendants. The commission held public hearings and the accused were given the opportunity to confront and question their accusers. The report reached conclusions similar to the first commission, it was positively met by most observers. The report is concluding with a list of specific individuals who violated the rights of each complainant. The ANC accepted its general conclusions and called for a truth commission to be set up to cover abuses on both sides of the conflict. (Hayner: 632-634)

defining "relatives" and "victims" (Gov. Gazette no. 6154 April 1998, Fernandez:213) This practice could clearly harm the public's view on impartiality of the commission.

The TRC did face severe accusations of impartiality, although the commission officially laid great weight on conducting its investigation in an impartial manner. The composition of the TRC must also be characterised as fulfilling the demands of impartiality.

3.5.2 Naming names and due process

In order to establish the rule of law it is of importance to take into account the principles of fair trial. One of the most vividly discussed questions is whether naming names of offenders should be part of the mandate of truth commissions. Due process requires that individuals accused of crimes must be allowed to defend them but truth commissions do not have the same strict procedures as courts do. Generally they do not have the right to cross-examine witnesses, and the offenders may not be heard in an oral hearing. Further, a right to a legal counsellor seldom exists. Even though they are not judicial bodies, their report is authoritative and the public will probably understand the publications of a person's name as an indication of their guilt. (Freeman, Hayner:135-136, Hayner: 647-648) Even though no sanction is imposed on a perpetrator it is therefore necessary to uphold at least a minimum standard of fair trial. Victims also appear before the Commission, and their rights should also be taken into account. The needs of those who have and are still suffering from grave abuses are not less in a truth commission than in a court room.

Freeman and Hayner argue that it is both unnecessary and undesirable to burden truth commissions with due process requirements equivalent to those of a court. Burdening a commission in this way would seriously undermine its ability to carry out its most essential duties by considerably slowing down the investigation and hearing process, thereby reduce its capacity to gather facts and evidence. (Freeman, Hayner: 136) This argument could result in some serious shortcomings concerning the object to consolidate democracy. The Commission risks, in its efforts to vindicate the human rights of past victims of violence, violate the human rights of the persons it now accuses. (Cassel: 330)

Two contradictory principles could be argued for:

- (1) Due process requires that individuals receive fair treatment and are allowed to defend themselves adequately before being pronounced guilty, due process is violated if a commission report names individuals responsible for certain crimes, without providing the person these rights
- (2) (2) Telling the full truth requires naming persons responsible for human rights crimes when there is absolute evidence of their culpability. Naming names is part of the truth-telling process, even more so when it is clear that the judicial system does not function good enough to expect that they will be prosecuted. (Hayner: 648)

The Act required publications of all names of those who received amnesty.²⁹ The TRC argues that the naming, and thereby the personal injury, to some extent could be justified by the public importance of the Commissions truth-seeking role, the limited outcome of these findings, and the adoption of a fair procedure. (Vol 1:90)

Due process is not an inflexible concept. Less process is due in non-criminal than in criminal case. According to Cassel, truth commissions charged with naming names should not be permitted to bypass normal standards of due process for civil cases, except in situations where the judiciary does not function, and there is no other feasible way to breach official immunity for egregious human rights violations. (Cassel: 331)³⁰ One can exemplify with the practice of plea bargaining in for example the U.S. The defendant is then encouraged to wave certain due process rights and in return the sanctions will be lessened. (Levinsson:224) Thus, there could be different standards of fair trial depending on the circumstances.

The Act did not provide for procedural rules for the public hearings of amnesty applications so the Amnesty Committee set up its own practices. On its discretion, the committee could also allow for cross-examination of anyone giving evidence, but the scope and extent of the cross-examination could be limited. (Coetzee: 188)

The work of the TRC was challenged in Court on a few occasions. In the case of du Preez and van Rensburg v. TRC³¹, the applicant sought to prevent a testimony about them. In the first instance the judge held that the TRC was not obliged to give prior notice, only if the commission was to make a decision after the hearing implicating him, should he be granted an opportunity to submit representation. However, the Appellate court ruled that implicated perpetrators were entitled to timeous notice of allegations against them. This notice should include details by way of witness statements or other document to enable them to identify the person making the allegations, the date and place of the incidents where appropriate. The TRC might also be under a duty to hear rebutting evidence and permit immediate cross-examination of a witness at hearings. The TRC therefore adopted a practice of sending out notices to alleged perpetrators with all the necessary documentation, the ruling also obliged the TRC to give alleged perpetrators a prior view of its findings. (Vol 5: 204-205) This decision raised other concerns such as the risk that the hearings would be to legalistic and formal, and a potential public perception of the TRC as perpetrator friendly.

The rights of victims was not elaborated on in any court case, their right to legal representation and possibility to cross-examine alleged perpetrators were therefore not as complete as one may have wished. Most of the victims had to rely on the TRC's legal

²⁹ Some commissions have not been expressly granted the power to publicly name those individuals found to be responsible for human rights crimes but have effectively identified individual perpetrators by printing direct quotations of witnesses or victims that mention the perpetrators name. Alternatively it have been possible by identifying those who headed particular units or regions where particular violations took place, thereby making perpetrators' identity easily discoverable. In other cases, attribution of individual responsibility has been effected by deliberate or unintentional press leaks. (Freeman, Hayner:135)

³⁰ In El Salvador, Most witnesses requested that their testimony should be treated as confidential. The parties assumed that few Salvadorans would come forward and testify in public in fear of reprisals and the commission realised that these fears were well-founded.(Buergethal:300)

The Commission in El Salvador decided that no single source or witness would be considered sufficiently reliable to establish the truth on any issue of fact needed for the commission to arrive at a finding. Secondary sources, such as reports from national or international bodies did not constitute a sufficient basis on their own for arriving at findings..(Buergethal:301)

³¹ CPD, case no. 4443/96

assistance scheme, since their tariffs were low; the lawyers were also generally less skilled. The former state employees and members of a liberation movement were supported with legal assistance by the state. The state had higher tariffs and better lawyers therefore often supported the amnesty applicants. However, as Boraine stresses, wealthier perpetrators always have access to better legal representation. (Boraine.2003:170)

In the case of *Niewoudt v. TRC*, a former member of the Security Branch in Eastern Cape requested that the TRC should be interdicted from allowing evidence unless he had received notice and copies of all relevant documents. The court held that it was inappropriate to equate the TRC with an administrative hearing, and undesirable to place such obstacles before the TRC. Thus, there was no requirement of prior notice to the alleged perpetrator. The matter was finally set with an agreement, which held that the applicant should be given an appropriate opportunity to submit representations or give evidence. The TRC would also take all reasonable steps to in good faith to provide the applicant with any witness statement in its possession that might implicate him, and give information about when and where such evidence was to be heard. (Sarkin 1996:632, South Eastern Cape Local Division 1136/96)

It could be noted that there were two court decisions not obliging the TRC to give prior notice to a person that might be implicated in a hearing. Notwithstanding this, the TRC adopted a practice that gave alleged perpetrators a fair chance of responding to any accusations. This implies that the due process standard was sufficient in this respect.

Any part to the amnesty process had a right to have legal representation. (Vol 5:114) Moreover, the applicant could ask the High Court to review its decision. (Coetzee: 188) These human rights standards were apparently also respected.

The TRC holds that there were no naming of an individual when the identities were unclear, or when a notice had not been sent to the alleged perpetrator. Institutions, but not individuals, were named when only institutions could be identified. The commission named both institutions and individuals when sufficient evidence was available. (Vol. 1:92)

Here, it must be remembered that in determining a person's culpability the TRC used the balance of probability as a principle. The question to be answered was which version presented is the most likely. (Vol. 1:90) This means that a lower burden of proof than in conventional criminal justice was applied, where the guilt must be proved beyond reasonable doubt. It could thus be questioned whether the evidence was actually sufficient in some cases. The TRC often did not bother to give reasons for its findings, which also makes it difficult to understand how it reached its decisions and how well it performed the balance of probability decision. It is however clear that the TRC on some occasions presented findings conflicting with earlier judicial rulings, and even in the report itself there are some conflicting facts about an incident.³² (Jeffery: 14-15, 129)

The minority position of Malan held that most of the statements concerned violations experienced by others and many of them were hearsay. Further, most victims did not bring any supporting documents or any other evidence. About 90% of the victim statements were not given under oath and very few were tested under cross-examination.³³ Exceptions to the

³² For instance this is the case concerning the reports on the Sebokong shootings in March 1990, where the TRC contradicts a previous investigation.

³³ The amnesty hearings were on the other hand open to cross-examination.

general rule that hearsay evidence must be excluded are relatively few. (Jeffery:8, 31,37). (Vol 5: 441)

Concerning the evidence received from the amnesty process one can note that only 102 of the amnesty applications had proceeded through public hearings and been granted amnesty. The TRC nevertheless assessed relevant material from all amnesty statements. Much of the information in the amnesty application could be labelled as accomplice evidence, the applicant had reason to place the responsibility of the act on his supervisor or accomplice offender. Without doing any independent verification, the names contained in these applications could be publicised. Relying on secret testimony and self-serving allegations of amnesty applicants seeking to escape imprisonment could not be in accordance with established legal principles. (Jeffery: 9) It is clear that the TRC relied on at least some untested data to support its findings. The TRC also used court records as evidence. Jeffery argues that although this source of information could only be considered as reliable if the person was found guilty in the ruling, but the TRC used other court records as well. (Jeffery: 53, 65)

The TRC held that witnesses were not subject to cross-examination unless there were glaring falsehood or inconsistencies in their testimonies. (Vol 1:144) The alleged perpetrator right to cross-examine was not allowed in more than a handful of cases. In general victims and perpetrators were not invited to give evidence at the same hearings. (Jeffery:31)

Wouter Basson, who was the head of the chemical and biological weapons programme, was subpoenaed to witness before the TRC. He brought an application to the TRC where he argued that compelling a witness to testify would amount to a violation of witnesses right to remain silent, and the right against self-incrimination. The Commission ruled that the witness was compelled to testify, and Basson's application to the Cape High Court was dismissed. (Vol 1) It would at least seem questionable to base a finding on the information received from a person not willing to give a testimony, the risk that not the full truth should be revealed in such a hearing must be evident.

There are reasons to believe that the practice in which the information was acquired in order to publicly condemn a perpetrator did not fulfil the normal standards of fair trial. This might be counter-productive to the promotion of a human rights culture which should be an essential part of the object of a truth commission.

3.6 Public criticism of the TRC

The legitimacy and possibility to reach out with the norms and values are of course impeded by public criticism against the TRC. Most of the criticism of the TRC has already been accounted for in previous section. For example, the question of impartiality of the commission evoked a number of accusations. The white community often seemed either indifferent or hostile to the work of the commission. The response of the former state, its leaders, institutions and most civil society at that time was reluctant. (Vol 5: 196) Some NGOs raised critic

against the TRC, arguing that it overemphasised the ideal of reconciliation as forgiveness, not giving attention enough to accountability and compensatory support for victims. (Crocker:112) Accusations of incompetence and racism was a constant theme during the first year. Some of the staff were suspected of being involved in human rights violations themselves. Commissioner Dumisa Ntzeba was also accused of involvement in a massacre in Heidelberg 1993. (Bell:262-264)

The Commission once referred a decision of one of its own bodies, the Amnesty Committee, to the court. A decision of the Amnesty Committee to grant amnesty to 37 ANC members for their collective responsibility was challenged, and the Cape Town High Court granted the Commission's application and referred the matter back to the Amnesty Committee.³⁴ The commissioners were not unanimous in their final findings. One of the commissioners (Malan) issued a minority position, where he heavily criticised the work, and the findings of the TRC. The amnesty committee gave priority to those who were in prison, not to high profile applicants, and this policy was also criticised. (Coetzee:191) Further, the TRC has been criticised for its expenditure on unnecessary items and very high salaries. (Sarkin 1996:660)

A critique against the committee is that the process focused too much on "trigger pullers", and thereby ignored the wider spectrum. (Fullard, Rousseau:203) Applicants were able to refer to a certain context in their applications that satisfied the committee, while in fact there were other causes that triggered the incidents. This resulted in a lack of attention to the context. (Fullard, Rousseau:208)

Although the TRC faced a lot of criticism it is probably safe to suggest that critics of the findings would probably be just as strong if it had been investigated by the judiciary instead. It would be impossible to please all the different views on what, how, and when the past should be accounted for, no matter which type of institution used.

³⁴ 27 of the applicants were not granted amnesty, among those Thabo Mbeki.

4 Public outreach

In order to implement the values and norms represented by the TRC among the public the outreach is of crucial importance. Mainly two means of reaching out to the public can be detected. Firstly, the hearings were often public and could be followed either live at the session, or as televised dramas. Secondly, the report was meant to inform the public about the past atrocities. The public policy of the commission could also itself contribute to the consolidation of democracy. Public trials are usually considered to be a core feature of a fair trial process, and they may also serve to prevent future acts of vengeance and violence. The nature and the extent of a commission's outreach efforts will profoundly affect its access to information, its effectiveness in addressing the needs of victims, and its ability to manage public expectations. Generally the courts are more constrained concerning the public outreach than truth commissions are, and the TRC had a branch working on public relations matters only.

There are persuasive reasons for a commission to hold public hearings. By giving victims and survivors a chance to tell their story before a public audience a commission can formally acknowledge past wrongs. Allowing conflict parties to hear each other suffering may help to build empathy and thereby deterring acts of vengeance. The risk of renewed violence anti-democratic movements would then be reduced. Truth Commissions can provide a public platform for victims, which will also help to educate the public about the individual human impact of past crimes and establish fair and effective definitions and categories of victims. Further, they can catalyse public debate (Freeman, Hayner:126, 134)

However, there may be legitimate reasons not to hold proceedings in public; security risks for commissioners and victims, time and resource constraints, and concerns about judicializing the proceedings. (Freeman, Hayner:134) When fairness and neutrality can be generally assured, then private, confidential investigations may be preferred. Public investigations risk scaring away witnesses that otherwise might testify, or putting in danger those that do. This would of course hamper the fulfilment of the object to reveal the full truth. (Hayner:647) There were certain possibilities for the TRC to hold hearing behind closed doors. (Puvunen: 17) But mostly public hearings were held in the Amnesty committee.

The TRC attempted to have openness to public participation and scrutiny. The Commission televised many of its sessions and the media have reported thoroughly from the investigations. The media helped generate public debate on central aspects of South Africa's' past. (Vol 1.104) Televised statements can likewise open the eyes of people who ignored or justified the old regime and create a democratic culture and reconciliation. (Minow: 62, Freeman: 126). Public perception were formed by what people saw on TV, heard on radio, or read in the newspapers. This made the commission more vulnerable to criticism. It was accused of untested allegations, which was probably due to the inquiries that led to findings were less visible (closed hearings, research, the decision-making process) (vol.1:105) Further, in general it is not clear that public demonstration, such as to receive testimony and interview

witness in public, have not been for political reasons, such as to discredit the past regime, rather than for the purpose of impartiality and full disclosure. Hayner:647)

The TRC made an effort to be accessible for the public. The national office of the TRC was situated in Cape Town, and regional offices were established in Johannesburg, Durban and East London, and satellite offices were also established in Bloemfontein and Port Elizabeth. (vol.1 45-47) However, the size of SA made it difficult to ensure that everyone could access the TRC.³⁵ Vol1:138) It invited victims to make statements, which it took at its offices as well as at hearings held in various communities in the country. (Vol 1:138-140) The majority of the South African population lives in rural areas and most household in remote areas had no TV, radio, access to newspaper or effective means of transport. People were turned away since they had missed the deadline when they wanted to make statements. The list of victims published by the TRC was therefore not complete. (Fernandez:213) Concerning the hearings, it could be noted that less than 1/10 of those who made statements testified in public. The TRC was obliged in prioritising concerning which cases should be presented to the public. (Vol 5:9)

A part from the report it would be favourable if the truth commission published its mandate as well. By doing this, unrealistic expectations of the work and outcome of the commission could be avoided. The TRC actually failed to publicise its mandate, but the NGO Justice in Transition published it. (Sarkin 1996: 639)

Both Albon and Minow stress that the commission's work should be publicised. If the commission is unable to produce a thorough report of the past human rights violations it runs the same legitimacy problem as courts do. The accusation of a bias report is an evident threat to the path to democracy. If the efforts to reconcile the nation with democratic measures fail, people might consider other alternatives. (Albon: 290-291, Minow: 82) Eventually the report will become the main source of information and interpretation of the apartheid era. (Jeffery: 25) It is therefore even more important that the account of the past in the report is as accurate as possible.

The impact of a final report in many ways depends less on its content than on surrounding factors. When and how the report is publicised, how widely it is distributed, how much coverage it receives in the media and whether there are both traditional and alternative presentations of the findings are some of the factors determining the impact. (Freeman, Hayner:135) The report did not create much debate in South Africa, the people did not engage and discussed the outcome, rather the TRC and its objects were considered as a closed chapter. (Henwood)

The TRC put great emphasis on the importance of being accessible and to reach out to the public with its findings, and this will enhance the chances of implementing the norms and values of the commission.

³⁵ 1,2 million Square meters

5 Conclusions and Summary

The last chapter will attempt to summarize the conclusions reached in the thesis. The thesis examines the truth and reconciliation commission in South Africa and its possibilities to act as a vehicle in the process of consolidating democracy. The norms and values that can be found in the principles and practices of the commission are scrutinized, and the means of presenting this norms to the public is also looked into. The issue of how to deal with the human rights violations of a past regime forms the theoretical framework, and the truth commission are compared with the traditional solution of court proceedings. In particular, the question of whether to grant amnesty or not is in focus. Further, the possibilities to strengthen the rule of law, promoting a human rights culture, promoting accountability, and deterring future return to non-democratic governance are examined. In the study both shortcomings and advantages of a truth commission are displayed.

The alternative of addressing the past abuses in court procedures could result in several outcomes. Establishing accountability and rule of law is essential in the process of consolidating democracy, and prosecuting human rights violations is a signal that no individuals are outside the reach of legal accountability. Protecting the individual by punishing offenders is also a way of restoring the rule of law. Further, prosecution can help in the efforts to establish democratic values and encourage the public to believe in them.

Failure to hold criminals accountable for their acts can threaten the position of the new democratic regime. The prosecutions could easily be regarded as arbitrary and as neglecting the due process of the rule of law for a number of reasons. Not all of the perpetrators will be prosecuted and this will raise questions concerning the selection of cases. The trials will never be able to give a neutral and comprehensive overview of the past atrocities. There is also a great risk that the judiciary does not have enough resources to deal with the prosecutions in a fashion that promotes the rule of law.

The impact of a truth commissions is also a complex issue, they to runs the risk of being captured in the hands of political reality. The old regime might disagree with giving the commission a too vast authority and the new regime might want to politicise the structure in their favour. A truth commission is inherently vulnerable to the politically imposed limitations. Its structure, mandate, political support, financial or staff resources, access to information, willingness or ability to take on sensitive cases, and strength of final report will be largely determined by the political realities in which it operates.

In naming the names of perpetrators the commission promoted a form of accountability, even though no formal sanctions were imposed. However, many of those who were publicly viewed as the biggest perpetrators did not apply for amnesty. The recommendation to prosecute those not granted amnesty is of course a direct attempt to collect accountability. Sadly, South Africa seems to be moving away from the recommendation to prosecute instead

of pardoning. In May 2002, the government pardoned 33 ANC and PAC members, of which 20 had been refused amnesty by the TRC. (Sarkin 2003:252) Although the TRC recommended prosecutions, no trials are under way, except the trial of Wouter Basson. (Boraine 2003:178) Basson was acquitted by the Pretoria High Court in April 2002. (Sarkin 2003:249)

In the establishment of the TRC, the idea of having democratic commission was a significant feature. Both the mandate itself, established in the Parliament, and the selection of commissioners encouraged public participation. The very establishment of the TRC could itself promote democracy by showing that institutions could and should function democratically. The terms of reference provided the commission with a broad scope of events to investigate. The mandate did not restrict the violations to examine to only the acts of the former regime, but the TRC was criticised for not looking sufficiently into allegations against the ANC. Further, those human rights violations not regarded as gross violation were not examined.

Generally truth commissions have a better chance than courts to produce an overall picture of the past human rights violations, and this can promote the process of reconciliation and understanding, which diminishes the risk of renewed violence. In order to succeed in making such a compilation, it is not only important to investigate violations performed by different part of the society, but also to have access to the necessary information. The TRC had a variety of means to acquire this information, but due to some impediments, mainly by the groups that did not support the commission, the information, and thereby the accounts of past abuses, may have been less complete than what was expected.

In large, the work of the TRC had a legal basis and did not neglect the rule of law, although some aspects of its practice are more ambiguous in this regard. To promote the rule of law, it would also be fruitful to foster a well functioning judiciary. The practice of having a truth commission instead of court procedures will deprive the judiciary a chance of restoring faith in the legal system, but it is uncertain whether the courts were ready to actually take this chance. By recommending that some amnesty applicants should be prosecuted, the TRC did nevertheless try to reinforce the role of the judiciary and the rule of law.

The TRC shed light on many gross human rights violations and the effect it had on the victims, which is an important task in the promotion of a human rights culture. It could however be concluded that some of the standards of fair trial that forms part of the accepted core of human rights was not applied. This cast a serious shadow over the commissions effort to promote human rights. It could of course be argued that these incompatibilities with human rights norms promoted democracy in other aspects. By not following the established legal principles, like right to cross-examination TRC is acknowledging the needs of victims and enable them to reconcile and prohibit future violations from their side. Further, accusations of impartiality could also have damaged the commission when it comes to enforcing human rights norms.

It has not been my intention to make a complete evaluation of the TRC and its impact on the consolidation of democracy, such a project would not be possible within limited scope in time and size of a Bachelor thesis. The time for that study has probably not arrived yet. Rather, the aim has been to examine the role of truth commission from a theoretical perspective, looking into the possibilities to assist in the consolidation of democracy.

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Mr. Roland Henwood, Department of Political Science, University of Pretoria, 22 April 2005

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