

HISTORY AND THE COMMISSION ON TRUTH AND RECONCILIATION: THE PROBLEM OF COLLECTIVE GUILT

NL Combrink¹

When the New South Africa finally came into place after the April elections in 1994, all South Africans were faced with the question of how they were to come to terms with the past, characterised by strife, conflict, untold suffering and injustice, and how they should build a common future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans.

The foundation for the new history of South Africa has by and large been laid by the Truth and Reconciliation Commission (TRC). Whether by design or chance, our approach to South African history will be strongly influenced by the proceedings and findings of the TRC concerning the serious human rights violations of our recent past. Some academic scholars have already tried to come to grips with this issue.² I have chosen to follow a somewhat different approach. This article is an attempt to debate the theoretical issues and contexts on which an understanding of our mutual responsibility for the liabilities and assets of the recent South African past, can be established, by considering the question of how the polarised historical consciousness of the two main political contenders, the African National Congress and National Party, impacted on the issue of collective historical/moral guilt. Inevitably it also brings into focus the question of how the historian should present the past which will either help us in reconstructing the moral order of society, or contribute to a widening of the gap between the past and the present.

The adoption of the Interim Constitution lay the foundation for the people of South Africa to transcend the divisions and strife of the past and through such a transition build a bridge towards a common future. It is in the final clause of

1 Department of History, University of the Orange Free State.

2 Cf. JCR Liebenberg, "Die Waarheids- en Versoeningskommissie (WVK) in Suid Afrika en die implikasies daarvan vir 'n Suid-Afrikaanse *Historikerstreit* en eietydse geskiedskrywing", *Joernaal vir Eietydse Geskiedenis*, vol. 22, no.1, 1997.

the Constitution that one finds the motivation for the establishment of the Commission on Truth and Reconciliation (TRC)³:

The pursuit of national unity, the well-being of all South African citizens and peace, require reconciliation between the people of South Africa and the reconstruction of society.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.

Some government spokesmen, especially the Minister of Justice, Mr Dullah Omar, felt that the question of amnesty had to be located in a broader context. He argued that government could not just go to Parliament and produce an amnesty law since it ignores the victims of violence entirely - the truth concerning human rights violations of the past could not merely be suppressed or simply forgotten. It was recognised that victims and family of victims could not forgive perpetrators unless an attempt was also made to restore the honour and dignity of the victims and effect was given to reparation. Consequently, these violations had to be investigated, recorded and made known.⁴

The main function of the Commission was formulated as⁵

- conducting inquiries into the nature, causes and extent of gross violations of human rights, including the antecedents, circumstances, factors, context, motives and perspectives which led to such violations;
- identifying all persons, authorities, institutions and organisations involved in such violations;
- facilitating and promoting the granting of amnesty in respect of acts associated with political objectives, by considering applications for amnesty from persons desiring to make a full disclosure of all the relevant facts relating to such acts.

3 D Omar, **Justice in transition**: booklet explaining the role of the TRC <<http://www.truth.org.za/back/justice.htm>> s.a.

4 Ibid.

5 Ibid.

The Commission was instituted by the Promotion of National Unity and Reconciliation Act (Act no. 34 of 1995), but only began with formal hearings in 1996.

Suspicious about the impartiality of the Commission

The new Government's proposal was bound to be controversial. On the one hand the question of amnesty for acts associated with political objectives is, of course, highly questionable, and on the other hand the demand that human rights violations be brought into the open could lead to a "victor's justice" where former political leaders and their supporters would be prosecuted for the crimes of apartheid.

The Commission soon lost a degree of credibility among some of the South African communities and parties, notably among members of the Inkatha Freedom Party, the Afrikaner Freedom Front and the National Party who did not perceive the Commission to be impartial. Not only was the composition seen to be overwhelmingly representative of only one side in the former conflict, but statements and speeches of leading members of the Commission, including those of its chairperson, Archbishop Desmond Tutu, created the impression that they tended to view the conflict of the past from the broad perspective of the ANC and its allies.

During the People's War of 1984 - 1987, Archbishop Desmond Tutu as the Chairperson of the South African Council of Churches, had made a marked impression abroad as the fiery protagonist of sanctions against and foreign disinvestment in South Africa: "Those who invest in South Africa", he warned, "must know that they are supporting a system which I have described as the most vicious since Nazism".⁶ From the outset he imputed the evils that befell South Africa during the apartheid years to the Afrikaners as a group and maintained this position until the termination of the Commission's hearings in July 1998. During the opening of the first session of the committee that had to investigate gross violations of human rights in Durban, Archbishop Tutu said: "I repeat my plea to Afrikaners, if you are only willing to confess, the people will forgive you and then we can all be healed."⁷ And in 1997 during an interview in the United States, Tutu alleged that it was only "logical" that most of the viola-

6 S Rothe, "The Churches and Sanctions", M Orkin (ed.), *Sanctions against Apartheid* (Cape Town, 1988), p. 70.

7 Beeld, 8.5.1996.

tors of human rights would be Afrikaners, "because it was they who maintained the evil system of apartheid".⁸

Tutu's plea to Afrikaners followed in the wake of an earlier statement by Mr Dullah Omar, who was responsible for the promulgation in Parliament of the legislation concerning the TRC. His words set the tone for later pronouncements in similar vein. During a seminar of the Applied Broadcasting Centre early in March 1996, Mr Omar intimated in his paper that the ANC struggle was on a higher moral plane than apartheid and that a moral distinction should be made between the crimes committed in the name of the struggle against apartheid and crimes committed to uphold the system of apartheid. The difference, he said, was that the ANC committed human rights abuses in its attempt to establish a democratic dispensation, whereas human rights abuses by the previous government took place in an attempt to thwart this process and to perpetuate apartheid. In his call for "a new moral order", he equated people who fought against the ANC during the eighties in the same context as the people who fought to uphold Nazi-Germany. The supporters of both these systems were, according to Omar, devoid of all morality and involved in crimes against humanity.⁹

This controversial statement only served to strengthen the doubts among Afrikaner leaders about the competence of a non-judicial truth commission to deal impartially with the South African past. In the highly charged atmosphere of South African politics on the eve of the first amnesty hearings, the idea of a truth commission was readily equated to the model of the Nuremberg Trials in post-war Germany. It was at Nuremberg that the concept of "crimes against humanity" was effectively established in international law.¹⁰

In 1945 the United States, the Soviet Union, the United Kingdom and France agreed to prosecute the major Nazi leaders before an international tribunal for war crimes and for crimes against humanity.¹¹ The Nuremberg

8 Beeld, 17.10.1997.

9 Beeld, 2.3.1996.

10 J Dugard, *International law: A South African perspective* (Johannesburg, 1994), p.199.

11 Ibid. Crimes against humanity were defined in a document, annexed to the agreement, and known as the London Charter, as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated." Herman Gilio mee responded directly to this accusation in his presidential speech before the South African Institute of Race Relations, arguing

Trials had a major impact on international law and provoked a vast number of works that debated the legal aspects of the trial, even though no such international trials were held since. The main significance of the Nuremberg precedent is that national leaders and government officials are no longer able to claim immunity from prosecution for gross human rights violations by appealing to protection of national law or superior orders.

Many whites began to see the TRC as "a witch hunt", a "*dermuitrygery*" (stringing out of intestines) which is self-defeating. They wanted to forget the past, and move ahead. The period after the general election of 1994 had to become one of "collective amnesia"; don't harp on a divisive past, but reap the benefits that international acceptance of a stable democracy and sustained economic growth, can bring to South Africa. History and remembrance are just uncomfortable intrusions that tend to complicate things.

But herein lies the dilemma: the past cannot simply be brushed aside. Reconciliation begins when people deal with the past, rather than simply ignoring it or trying to conceal it. Alex Boraine summed it up eloquently in a booklet that was published following a conference hosted by the Institute for a Democratic South Africa (IDASA), in February 1994, on "Justice in transition: Dealing with the past".¹²

To seek the truth is not of necessity an act of revenge, nor does it need to deteriorate into a witch-hunt. To know the truth is to counter the deceit, the cover-ups, which characterised much of oppression in South Africa. In this sense, truth is the beginning of reconciliation. To perpetuate the living of a lie, makes reconciliation impossible.

Whereas many whites wished to put the past behind them in a kind of collective amnesia, victims of human rights abuses argued that they are willing to forgive, but then they have to know who to forgive and why.¹³

that whereas the deliberate genocide policy of Nazi-regime sought to annihilate the Jewish population of Europe, the apartheid history indicates the opposite. Life expectancy of Blacks in South Africa nearly doubled over the past century, Blacks were freer in 1994 before the outbreak of the People's War than at any time under the Smuts-government before 1948, and the mortality rate of Black babies in Soweto was probably lower than what it was in the erstwhile USSR. Cf. H Giliomee, "Die las van die verlede: ons moet verby apartheid kyk", *Beeld*, 26.3.1996.

12 A Boraine, J Levy and R Scheffer, *Dealing with the past; Truth and reconciliation in South Africa* (Cape Town, 1994), p. 153.

13 *Beeld*, 16.1.1996. The case of Stanza Bopape is an example in point. Stanza disappeared on

A polarised historical consciousness and two different sets of memories by different stakeholders

Two different modes of interpretation characterise the ANC's and the National Party's submissions to the TRC.¹⁴ Both parties accepted the need for a mechanism that can establish the truth about the conflict of the past and that can promote national reconciliation, but that is where the similarities end. The written submissions of both the ANC and the NP to the Truth and Reconciliation Commissions in August 1996, set out their respective parties' views of the historical context within which the conflicts of the past should be considered. Both provide an analysis of the origin of the conflict from their respective points of view and deal with the perceptions that motivated their policies. Both, to a larger and lesser degree, have come to institutionalise their answers to what went wrong and why it went wrong. There are clearly two different political agendas and approaches at stake.

THE VIEW OF THE ANC

The ANC clearly supported Mr Omar's concept of the moral guilt of the Government and the moral righteousness of their struggle. In their comprehensive submission of 320 pages to the TRC in August 1996, they reiterated the arguments propounded by Mr Omar.

12 June 1988, after he had been held in custody by police for two days. According to the official report, he escaped from custody, but he was never again seen since then. His family believes that he was murdered in custody. If Mathew Goniwe "qualified" to be murdered, then Bobape was a candidate too. Why else did he not try to make contact with anyone when it became possible to apply for indemnity and amnesty? And why had the police never bothered to come and look for the "escapist" at his home?

- 14 The ANC and the NP each made two submissions to the TRC, which are available on the Internet. The latter submissions were in response to questions by the TRC arising from their initial submissions. **African National Congress: Statement to the Truth and Reconciliation Commission**, <<http://www.anc.org.za/ancdocs/misc/trcall.htm>> (August 1996); **Further submissions and responses by the African National Congress to questions raised by the Commission for Truth and Reconciliation**, <<http://www.anc.org.za/ancdocs/misc/trc2.htm>> (May 1997); **Submission to the Truth and Reconciliation Commission by Mr F W De Klerk, Leader of the National Party**, <<http://www.natweb.co.za/policy/np-truth.htm>> (August 1996); **Second Submission of the National Party to the Truth and Reconciliation Commission**, <<http://www.natweb.co.za/policy/np2.htm>> (March 1987). The NP submissions have been wiped from the NP web-site, Natweb, but can still be consulted at the TRC web-site, <<http://www.truth.org.za/back/np-truth.htm>> and <<http://www.truth.org.za/back/np2.htm>>.

It would be morally wrong and legally incorrect to equate apartheid with the resistance against it. While the latter was rooted in the principles of human dignity and human rights, the former was an affront to humanity itself.¹⁵

The ANC was at pains to prove that the mass of the people led by the liberation movement waged a just struggle against apartheid, which was designated by the United Nations as a crime against humanity. The ANC fired a number of blank cartridges in an attempt to equate apartheid to Nazism. "Apartheid", it said, "often produced outcomes similar to those of genocide – a practice now proscribed by the international community, leading to criminal sanctions";¹⁶ and that "the ideological underpinning and the programme of apartheid constituted a deliberate and systematic mission of a ruling clique that saw itself as the champion of a 'super-race'".¹⁷ In discussing the social consequences of apartheid, they suggested that "the brute bureaucratic reality of the apartheid era . . . is directly analogous to Hannah Arendt's famous characterisation of the 'banality of evil' in Nazi Germany".¹⁸

In its report, the ANC tends to relativate its share in and responsibility for human rights violations and takes a debatable stance as to what constitutes a "soft target".

At the Kabwe conference held in June 1985, the ANC leadership reached consensus on a number of major questions concerning what they dubbed as the "People's War against the South African regime". The primary perspective that emerged was that the ANC should step up the all-round political and military offensive in a protracted people's war aimed at the destruction of the apartheid state machinery. A general insurrection to make the country ungovernable was seen as the logical culmination of this struggle, necessitating preparation to seize power at the right moment. This would entail building combat forces inside the

15 African National Congress: Statement to the Truth and Reconciliation Commission, 3.3 Just struggle in the international context, <<http://www.anc.org.za/ancdocs/misc/trcall.htm>> [Internet documents are not numbered because page numbers will not be consistent in downloaded documents. It will depend on whether it is downloaded in HTML format or converted directly by means of Adobe Reader or into Word 97 which can translate HTML texts. In the latter case, for example, the converted text will assume the default margins, letter type and sizes used on one's personal computer. Internet quotations and texts are therefore merely done by approximating it under the different sub-headings.]

16 Ibid., 3.5 Apartheid violations of human rights in an international context

17 Ibid., 3. National Party, apartheid and repression.

18 Ibid., 4.3 The institutional violence and social consequences of apartheid

country, ensuring that they link up with the people at all times and draw the masses into the people's war.¹⁹

In a press conference after the Kabwe conference, President Tambo argued that the risk of civilians being caught in the crossfire when such operations took place could no longer be allowed to prevent the urgently needed, all-round intensification of the armed struggle. "The distinction between 'hard' and 'soft' targets", he said, "is going to disappear in an intensified confrontation, in an escalating conflict The question of soft targets was quite out of place during World War II, to mention a big war. Ours will be a small one, but we are fighting the same kind of system. It was Hitler who attacked, it is the apartheid system here which is attacked, and we are fighting that system, our own version of Nazism."²⁰

Under the heading, "6. Did the ANC perpetrate any human rights violations?" the report states,

It was the policy of the ANC - ever since the formation of MK in 1961 - to avoid unnecessary loss of life. The ANC has never permitted random attacks on civilian targets.

The ANC then goes on to cite three examples in which civilian casualties occurred and in which they justify their attacks on so-called "military targets" in which civilians inadvertently came into the line of cross-fire, namely

- the 1983 car bomb attack on *SA Air Force headquarters* in Pretoria;
- the ANC's limited use of *landmines*;
- the *car bomb explosion at the Magoos and Why Not Bars in Durban* on June 14 1986.

In the first example nineteen people were killed in the attack, of which at least eleven were SAAF officers. Over 200 people were injured, of which over 70 were members or employees of the armed forces. The ANC justify their action

¹⁹ Ibid.

²⁰ Ibid., 5.3 Towards People's War and People's Power, 1979-90. The questions of ANC policy towards "soft targets" and "taking the struggle to white areas" arose in the context of the massive increase in confrontation taking place within the country at the time and the fact that Pretoria attacked several homes in Gaborone, Botswana, killing 12 people including Botswana citizens the day before the Kwabe conference opened. Not one shot was fired in self-defence; all those killed were unarmed.

as follows:²¹

Many of those injured may have not been military officers, but were employed by the SAAF, and had thereby directly associated themselves with apartheid military aggression. The location of the HQ of an arm of the SADF responsible for cross-border air raids in a concentrated civilian area was itself a violation of protocols of war.

With reference to the second incident, in which numerous innocent farmers and their families were killed or maimed, the ANC declares:²²

While regretting all loss of life, the ANC notes that the apartheid regime had declared white border farms military zones, with white farmers integrated into the security system and provided with the tools of war, including automatic weapons.

The much-publicised case of the car bomb explosion at the Magoos and Why Not Bars on June 14, 1986 provides another example of an operation in which civilians were "victims in the context of the intensification of the armed struggle". Three civilians were killed, and 69 injured. The operation was carried out by Robert John McBride, an MK operative attached to Special Operations. Once again the ANC did not regard this as a "soft target". The flaws with this line of reasoning are pervasive.

Among the reasons cited by the ANC in its submission to the TRC, was "to commemorate the June 16, 1976 uprising, in which hundreds of schoolchildren were killed by the police" and also because the "attack was in line with the ANC's attempts to take the struggle out of the black ghettos and into the white areas: the Why Not Bar was targeted precisely because it was frequented by off-duty members of the Security Forces".²³

Under the heading 5.4 "Excesses in relation to state agents", the ANC deals with the human rights abuses that occurred at the detention centres like the Quattro and Nova Stallicao camps in Angola. These excesses are detailed in the Motsuenyane and Skweyiya Commission reports, although no names are mentioned. They acknowledge that the leadership of the Security Department

21 Ibid., 5.2 Civilian casualties in armed operations.

22 Ibid.

23 Ibid.

did not take sufficient steps to correct the situation.

What is important in this context is that the Motsuenyane and Skweyiya reports ostensibly negated the need to have these incidents investigated by the TRC, who had largely ignored these incidents of human rights violations.

As far as the excesses and gross human rights violations of the United Democratic Front, the Mass Democratic Movement and mass revolts, were concerned, the ANC once again exonerated themselves from all blame. Their viewpoint in this regard is revealing and needs to be cited fully, because when they indict the National Party government with collective guilt for all the ills that befell South Africa during the apartheid years, they employ all the same kind of principles and assumptions to confer collective guilt on the government that they have used to exonerate themselves from blame for events that they had no direct control over!²⁴

Many participants in the mass uprisings of the 1980s, did not fall within the formal structures and organisational discipline of the ANC, but believed they were acting with the broad parameters outlined by the ANC. The UDF and MDM never shifted from their policy of non-violent forms of struggle. However, given the situation in which they operated, it was impossible for the UDF/MDM to actually control all activities carried out in its name by people and groups who, while supporting the broad aims of these organisations, were not directly linked to the leadership and discipline of the organisations.

The use of extreme methods to neutralise the enemy, which included deterring and punishing collaborators, was perceived by many as an entirely justifiable act of self-defence. Such extreme methods, including the 'necklace' method, were never the policy of the ANC or UDF/MDM.

The ANC contended that as a liberation movement, they were engaged in a just war for national liberation against apartheid, designated by the UN as a crime against humanity. The overwhelming majority of their own actions, they contended, were carried out in the course of this just war of national liberation which did not constitute "gross violations of human rights" as defined in the Act establishing and mandating the TRC.

24 Ibid., 6.5 The Mass Democratic Movement and human rights violations in the context of the mass revolt of the 1980s.

The ANC therefore accepted collective "political and operational responsibility for all operations" and decided "not to make any representation about those activities in its conduct of the struggle for national liberation" which they deemed to constitute legitimate actions carried out during a just and irregular war for national liberation.

Against this background of self-exoneration, the report tries to show why the apartheid government has to bear the weight of the blame for everything that went wrong and why it should be in the centre of the Truth and Reconciliation Commission's investigations into gross violations of human rights.

THE NP'S VIEW

In a much shorter submission to the TRC of approximately 40 pages, De Klerk stressed that although the NP devised the policy of separate development because they were primarily concerned with maintaining their own right to self-determination, it would be a mistake to think that there was not a strong element of idealism in this vision. The NP had thought that they could solve the complex problems that confronted them by giving each of the ten distinguishable Black South African nations self-government and independence within the core areas that they had traditionally occupied. In this way they would create a commonwealth of South African states – each independent, but all co-operating on a confederate basis with one another within an economic common market. The underlying principle of territorial partition to assure self-determination for different peoples living in a common area was widely accepted.

An important by-product of this was that a large number of blacks gained experience in legislative and administrative capacities and an impressive infrastructure was set up in the rural areas of South Africa that would otherwise not have existed. A number of new cities were built in the states that had been identified. Ten Legislative Assemblies came into being, each with its own government buildings and bureaucracy. In some instances the infrastructure was quite impressive. Several modern universities were founded – which were formerly dismissed as "tribal colleges" – but which are now accepted as fully fledged universities. By 1975 some 77 new towns had been established and 130 204 new houses had been built. Between 1952 and 1972 the number of hospital beds in the homelands increased from some 5 000 to 34 689. Decentralised industries were developed and hundreds of millions of Rands were pumped into the traditional areas in an attempt to stem the flood of people to the supposedly "white"

cities. Clearly there were not just liabilities, but assets as well.²⁵

He pointed out that a distinction should also be made between the various National Party administrations between 1948 and 1994. He argued that his and PW Botha's administrations belonged to the reform and transformation periods of the National Party. According to him, they were "primarily concerned with the dismantling of apartheid, the defence of the country against revolution and the search for workable democratic alternatives that would accommodate the political aspirations of all South Africans".²⁶

It is therefore just as important to recognise the role played by the National Party and a wide variety of South Africans in creating the New South Africa as it is to identify those who were responsible for the abuses of human rights.

He also pointed out that despite widespread criticism of the education policies of the former government, the proportion of the total black population attending school rose from 8,05 % in 1950 to 19,8 % in 1975. Since then expenditure on the education of all South Africans has risen dramatically: By 1993/94 it was R27,26 billion, representing 21,4 % of the budget and 7,3 % of GDP – one of the highest figures in the world. 74 % of the school budget was allocated to coloured, Indian and black schools.²⁷

Between 1989 and 1993 black university enrolment increased by 47 %. By 1993 black students represented 32 % of all enrolments – compared with 54 % for Whites. There were 41 342 black technicon students and 41 343 trainee teachers. Despite the disruption of black education and despite the low pass rates, more than 150 000 black scholars passed matric in 1992, compared with 64 000 whites.

At the same time De Klerk admitted the policy was a dismal failure despite the many positive developments.²⁸

Instead of providing a just and workable solution, it led to hardship, suffering and humiliation - to institutionalised discrimination on the

25 FW de Klerk, *Submission to the Truth and Reconciliation Commission*, Historical context, <<http://www.natweb.co.za/policy/np-truth.htm>>.

26 *Ibid.*, Authorship of the submission.

27 *Ibid.*, The role of socio-economic forces.

28 *Ibid.*, Historical context.

basis of race and ethnicity. Instead of promoting peaceful inter-group relations, it precipitated a cycle of widespread resistance and repression in which unacceptable actions were committed by all sides. Instead of providing a solution, it had led to injustice, growing international isolation and to the escalation of the conflict that had been smouldering since the early sixties.

He therefore apologised "for the pain caused by former policies of the National Party".

Finally De Klerk also stressed the importance that the Truth and Reconciliation Commission should continue to investigate all serious abuses perpetrated by all sides in the conflict. Abuses committed by the Security Forces have been widely publicized and are receiving extensive attention from the Commission, from the Attorneys-General and from the Courts. Insufficient attention has, however, been focused on the instigators and perpetrators of the following incidents:²⁹

- "necklacings" that occurred between 1 September 1984 and 31 March 1993 in which 505 people were killed and 36 injured in the most brutal and inhumane manner;
- landmine attacks that occurred between 26 November 1985 and 21 February 1991 in which 25 people were killed and 76 injured;
- limpet mine attacks in which 22 people were killed and 373 injured; car bomb attacks in which 40 people were killed and 548 injured;
- attacks on members of the South African Police, which resulted in the deaths of 1030 policemen between 1973 and 1993.

Many of these deaths can be ascribed directly or indirectly to the actions of the ANC and its allies; and the attacks on the thousands of black South Africans – most of them equally opposed to apartheid – who were murdered, injured or intimidated because they chose to work for change within existing government institutions.

Although I have not tried to compare issues of a divided historical consciousness on a one to one basis, it is clear from the above that different historical memories and consciences prevail with regard to the impact that apartheid had on the lives of South Africans.

²⁹ Ibid., Unconventional actions and reaction.

The problem of collective guilt

The notion of collective historical responsibility (respectively collective moral responsibility), is one of the thorniest issues for historians to deal with. At bottom it is a question of historical cum moral judgement. In a seminal work dealing with the Nazi past, *The Unmasterable Past*, Charles Maier argues that it is difficult enough to assign individual responsibility for judges, biographers and others who must confront personal decisions and action, but it becomes particularly difficult if this has to be applied to agents of bureaucracies or military hierarchies. If this is problematic, it becomes increasingly so when the point of collective responsibility is argued. There is persistent disagreement over the degree to which a national community might be held responsible.³⁰

A proper distinction between individual and collective responsibility is drawn by Prof. Hans Kelsen. According to his definition, international law imposes on the state the obligation to act in a certain way. The specific sanctions of international law – reprisals and war – are directed against the State as such, and that means the subjects of the state, because the acts of state are performed by individual human beings, i.e. the head of state, or members of the cabinet or members of the government bureaucracy, who perform these acts at the command or with the authorisation of the government. In this case, the individual is subject to the sanction not because he has committed the delict (violation of the law) but because he is a member of the group.³¹

The ANC has a very idiosyncratic approach to the problem of collective guilt. Two levels of rhetoric characterise the ANC's arguments in this regard.

On the one hand the ANC tried to show that apartheid was a "crime against humanity", by invoking the General Assembly Resolution 3068 (XXVIII) of 30 November 1973 which denounced apartheid as a crime against humanity in violation of international law. Although the Convention on the Suppression and Punishment of the Crime of Apartheid was adopted by 91 votes, 26 abstentions and 4 negative votes, no Western state was willing to ratify the Convention.³²

30 CS Maier, *The unmasterable past, history, holocaust and German national identity* (Cambridge, 1988), pp. 14–6.

31 Hans Kelsen, "Collective and individual responsibility for acts of state in International Law", *Jewish Yearbook of International Law* (1948), pp. 227–8. A photostat copy of the article was kindly made available to me by Prof. HA Strydom of the Institute for Human Rights Studies, University of the Orange Free State.

32 Dugard, p. 214.

The ANC has consistently tried to show that the apartheid system had certain similarities in common with Nazism and that the historical guilt for the affliction of South Africa lies collectively with the previous National Party government of South Africa and *in extenso*, with the people who supported the party. The method employed, is a typical example of the dubious practice of imputing guilt by association.

By labelling apartheid a crime against humanity, the ANC could justify the contravention of the UN Charter by South Africa's neighbouring states that allowed them to operate from their territories in their struggle to overthrow the apartheid regime. Article 2(4) which is regarded as the "cornerstone of the United Nations system" debars "all members . . . in their international relations from the threat or use of force against the territorial integrity or political independence of a state."³³

Secondly, the ANC had to show that it was fighting a just war against an unjust system. Many of the restrictive rules relating to the use of force have been relaxed in wars of self-determination involving national liberation movements recognised by the United Nations, such as the ANC, PAC, SWAPO and the PLO. Although apartheid was not a form of colonialism, the "crime against humanity" epithet questioned the South African government's legitimacy and thus strengthened the ANC's appeal to the principle of "bellum justum".

The question of accountability

As far as the TRC's historical role was concerned, truth had to be revealed in such a manner that it heals and enhances reconciliation rather than bitterness and division. To a large extent this will be determined by the way in which perpetrators of political violence are brought to account.

The international community has made considerable progress during the last ten to fifteen years towards recognising that the state has an obligation of holding perpetrators of massive human rights abuses accountable.

Considerable disagreement remains, however, as to the content of these obligations and how they should be fulfilled. Over the last twenty years at least fifteen truth commissions have been established, excluding the one in South Africa. South Africa has undoubtedly benefited from the Latin American and

33 Ibid., p. 314.

East European experiences in seeking truth and reconciliation and redressing past wrongs.

In a comparative study, entitled *Fifteen Truth Commissions, 1974–1994*, PS Hayner comes to the conclusion that truth commissions seldom seek legal accountability through the prosecution of individuals responsible for abuse. In most cases there are no trials of any kind, even when the identity of violators and the extent of their atrocities, are widely known.³⁴

Most truth commissions are usually set up immediately after a political transition

- either to demonstrate a break with a past record of human rights abuses;
- or to promote national reconciliation;
- or to obtain or sustain political legitimacy.

In order to sanction its legitimacy, governments have often resorted to the establishment of truth commissions to help provide a fair record of a country's history and to expose the human rights abuses of the previous government. The aim is to lead a society to an acknowledgement of its misdeeds and recognition of truths that have often been long denied. The supposition is that it will allow such a country to learn from its past and thus prevent a repetition of similar violences in future.

As Hayner has pointed out, most truth commissions by definition look at the past rather than the present. It is therefore easy for a new government to justify their not being subject to the investigations of the commission. Any current abuses are therefore also conveniently overlooked by the commissioners. Given this dynamic, he argues, it is not always immediately clear when a government's commission is a political tool or an accurate reflection of change.³⁵ (Example: Was the umpteenth extension of the date for finalising the work of the TRC because of a too heavy workload or an election manoeuvre to embarrass the NP opposition? Mr Mandela can spring that report anytime from November this year up to two weeks from the election next year, depending on what may be regarded as the most opportune moment politically.)

34 PB Hayner, "Fifteen Truth Commissions, 1974–1994." A comparative study. *Human Rights Quarterly*, vol. 16, no. 4, 1994, p.605.

35 *Ibid.*, 606.

Furthermore, although the express intent of most truth commissions is to lessen the likelihood of human rights atrocities recurring again in future, it is certainly not assured that it will deter future abuses.

Examples: Will the cheap amnesty granted to Witwolf Barend du Plessis, Robert MacBride, the Amy Biehl murderers, the APLA assassins³⁶ who mowed down 11 churchgoers because they "received orders" to that effect, or Winnie's single sentence of repentance, "I am sorry, things went horribly wrong", really deter people from repeating such acts? Cheap amnesty only leads to superficial repentance and prevents perpetrators from developing an understanding of the nature and the magnitude of their crimes.

JÉ Mendéz argues that easy amnesties create a climate of impunity, and deny the victims a right to a remedy.³⁷

Justice Richard Goldstone who was the chief prosecutor of the Tribunal on War Crimes in erstwhile Yugoslavia, made an eloquent plea for prosecutions. It is the most effective means of separating collective guilt from individual guilt and thus remove the stigma of historic misdeeds from the innocent members of communities that are collectively blamed for the atrocities committed against other communities. Punishment in the case of individualised legal guilt is meted out to the individual who, by his own conduct, has violated the law or performed the act that constitutes the crime. The problem with collective responsibility, is precisely that it does not address the question of accountability.

In accepting the principle of individual responsibility, one can no longer hide behind the excuse of orders and commands - *Ein Befehl ist ein Befehl* - like the APLA assassins at St. James or Eugene de Kock did. These actions cannot

36 An example in point was the amnesty hearings in Cape Town on 9 and 10 July 1997 in which three APLA applicants were granted amnesty in respect of 11 counts of murder and 58 counts of attempted murder, committed on the 25th July 1993 at the St James Church. The first applicant, Gcinikhaya Makom, testified that he had become a member of an APLA unit a few months before the St. James incident. In compliance with his orders, he used his full R4 magazine of about 31 rounds of ammunition to shoot at the congregation. He testified that he had been trained not to question orders but to obey them at all times and that the slogan "One settler one bullet" meant that "any white person in South Africa was regarded as a settler and if we came across any settlers during our operations, they had to be killed or injured". Amnesty Decision: Gcinikhaya Makom (Am 0164/96); Bassie Mzukisi Mkhumbuzi (Am 6140/97); Tabela Mlambisi (Am 7596/97), <<http://www.truth.org.za/amnesty/48.htm>> 8.6.1998.

37 JÉ Mendéz, "Accountability for past abuses", *Human Rights Quarterly*, vol. 19, no. 2, 1997, p. 259.

be justified in any way whatsoever and no law can authorise or command any person to obey an order that is deemed patently unjust or illegal. According to N Hayson, common law which is consistent with the broad principles of international customary law applies in this regard. It is incorporated into the body of South African law, even though there may be no act of incorporation as such.³⁸ The same principle applies to members of the police force. The two primary grounds upon which the South African Police in the past have sought to justify the killing of another – to protect themselves or another person in life-threatening circumstances – are defined in terms of section 5 of the Police Act (no. 7 of 1958). They are the same grounds for using deadly force which are also available to private citizens. The only difference is that the police have a duty to intervene, whereas citizens may retreat or withdraw from situations that may lead to an attack upon themselves.³⁹

By adhering to the principle of individual legal guilt, extreme human rights offences can be brought to justice; by imputing collective guilt everyone is guilty, but no-one is accountable.

Goldstone feels strongly about the fact that it is not Afrikaners who are in the dock. Collective guilt is a dangerous error of thought that can have dire consequences in a deeply divided country.⁴⁰ Individualising guilt of human rights violations is vital if our society wishes to reconcile itself peacefully to its past, because it allows the victimised communities to distinguish between ordinary members of rival ethnic groups and those who manipulate their fears for political ends.⁴¹

Mendéz sounds this important warning:⁴²

Trials contribute to truth, however, only if they are used for what trials are traditionally intended. Any attempt to turn them into the site of "historic" judgements, or the instrument to settle long-standing political, social or ideological conflict, run the risk of double failure ... In order to serve the purposes of truth, a court must ... restrict its analysis to the principles of criminal law and the law's insistence on individual responsi-

38 N Haysom, "Licence to kill. Part I: The South African Police and the use of deadly force", *South African Journal on Human Rights*, vol. 3, no. 1, March 1987, footnote 37, p. 9.

39 *Ibid.*, p.11.

40 *Die Burger*, 24.3.1997.

41 Mendéz, p. 277.

42 *Ibid.*

bility for each person's conduct. ... It follows that an attempt at sweeping "settlement of accounts", can result in a miscarriage of justice.

The historians' responsibility

Historians should consider the elusive nature of "truth" in an historical context. Perceptions of what is true vary from time to time, from place to place and from party to party according to the questions posed, as well as the affiliations and convictions of those involved. Historians should bear this in mind when considering the motives and actions of those involved in the conflict of the past. They should also try to free themselves from the preconceptions generated over the years by the vitriolic propaganda that was disseminated by all sides during the period of conflict.

In analysing the conflict from both perspectives – the attempts of the ANC to establish what is their birthright, namely to be regarded as citizens with full political rights in a common fatherland, and on the other hand, the steps that the Government took, to defend society against revolution and so to promote a peaceful transition to a new South Africa – we as historians can help to bring a deeper understanding and consolidate the gains that the TRC investigations have produced.

The TRC has put a wealth of information at our disposal for future research. The historian can usually discern what is not true, what does not accord with the evidence and what are prejudicial assumptions. If the official report of the TRC does not bracket the crimes of apartheid out of their historical context and fairly juxtaposition them opposite the crimes of the struggle, it can make a valuable contribution to an active historical discourse among historians about our past in which not only the myths about apartheid are exposed, but repressive institutions of the old dispensation are simultaneously revealed. The TRC has played an important role in exposing the role that specialised, clandestine institutions operating as part of the "third force", played in carrying out a campaign of repression.

By familiarising South Africans with cruel and inhumane deeds perpetrated in the name of divisive ideologies and by fostering an awareness of mutual responsibility for a burdened past, the TRC can raise the level of national vigilance to help prevent us all from repeating the mistakes of the past.