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Designing Emotional and Psychological Support into Truth and Reconciliation Commissions

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DESIGNING EMOTIONAL AND PSYCHOLOGICAL SUPPORT INTO TRUTH AND RECONCILIATION COMMISSIONS

by Verlyn Francis©

*I indeed went there and I found her dead. There were a lot of other children; they were packed as a load of sheep. There were so many bodies there, I couldn't find my child, but I was taken to another room which was separate from this one. I could see one of the children and my daughter was next to that.*¹

*I believe that the most important components of transitional justice must be the rights of victims, which include the right to the truth, the right to acknowledgment, the right to reparations and the obligation to take steps to ensure that the violations will not occur again. In this way impunity will be addressed, provided that the structural causes of the conflict are comprehensively dealt with. Let us never forget that impunity gives rise to gross violations of human rights.*²

I. INTRODUCTION

Designers of dispute resolution processes are taught that they should draw on their life experience – especially what they know about conflict and its resolution, justice, culture, organizations and how they work, interacting with people effectively, law and leadership.³ These life experiences will serve the designer well when they are engaged to design processes that are within their expertise and cultural knowledge. What are designers to do when the dispute is far removed from any life experience they may have?

Few people of Western European origin have experienced living in oppressive regimes such as the non-white peoples of South Africa faced during apartheid. However, when there was the pressure to address the wrongs done by a powerful regime under cover of law – even if the laws are unjust, there is the danger that the process will not be designed by people who are wronged, and emotional and psychological support will either not be included or, if included, will be culturally inappropriate. “As always in our history, the elegance and generosity when it is a matter of reconciliation comes largely from the indigenous side, from those who have been wronged”.⁴

In South Africa, a truth and reconciliation commission was deemed the most effective way to move to democracy from systemic brutality used by the minority white state and ruling authorities to subdue the majority people of other cultures and races. Of course, in some truth and reconciliation commissions, issues of race are not always

¹ Theodora Nosisi Tiyo [on her search at the Port Elizabeth mortuary for her 11-year old daughter, Zolisa Florence Tiyo, shot by South Africa security forces on her way home from school], Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report*, (28 October 1998)[hereinafter TRC Report] vol 3 at 59-60 <http://www.justice.gov.za/trc/report>.

² Yasmin Sooka, Foreword, Max du Plessis & Stephen Peté, *Repairing the Past: International Perspectives on Reparations for Gross Human Rights Abuses* (Oxford: Intersentia Antwerpen, 2007) at vii.

³ Nancy Rogers, et al, *Designing Systems and Processes for Managing Disputes* (New York: Wolters Kluwer, 2013), 10.

⁴ John Ralston Saul, *A Fair Country: Telling Truths About Canada* (Toronto: Viking Canada, 2008), 98-99.

present in internal state conflicts as, for example, in Chile under Pinochet, Sierra Leone, and Rwanda.

This paper will evaluate the effectiveness of the Truth and Reconciliation Commission of South Africa (TRC) by examining whether the TRC accomplished the goals that were set for it.⁵ In carrying out this evaluation, two points will be analysed: (a) the importance of having all the stakeholders at the table when designing the process, and (b) designing into the process culturally appropriate emotional and psychological support during and after the hearing to ensure participants who had suffered trauma during the conflict will not be re-victimized by truth-telling at the hearing.

II. TRUTH-TELLING AND RECONCILIATION

1. What are Truth and Reconciliation Commissions?

Truth and Reconciliation Commissions usually take place because the apparatus of justice in a country, if it existed, failed a large number of people and there is a desire to reconcile the people in order to make a political transition.

There are three broad types of political transition: overthrow, reform or compromise. Being overthrown is the fate of a regime that has refused to reform: opposition forces become stronger and finally topple the old order. When reform is undertaken, the old government plays the critical role in the shift to democracy as, initially at least, the opposition is weak. In countries where change is the result of compromise, the existing regime and opposing forces are equally matched and cannot make the transition to democracy or universal human rights without the participation of each other.⁶

Where a regime is overthrown, there might be calls for retribution which could involve summary justice or criminal prosecutions such as Nuremburg trials for crimes against humanity that took place after the defeat of Germany in World War II. Where neither side is defeated, however, there is a need for compromise to transition to a fairer political system. This transition can still take the form of criminal trials as retribution for human rights violations or transition can also be achieved through truth and reconciliation commissions -- truth-telling to build and strengthen processes of development, reparation, reconciliation and healing of painful memories.⁷ The debate continues as to whether, in the process of reconciling and healing the country by having victims publicly recount painful memories of abuses they suffered, TRCs are promoting healing of the country at the expense of the individual victim.⁸ Judith Herman, for one, takes the view that “remembering and telling the truth about terrible events are

⁵ Naomi Bussin, “Evaluating ADR Programs: The Ends Determine the Means” (2000), 22 *Advocates’ Q* 460.

⁶ Jeremy Sarkin, “The Trials and Tribulations of South Africa’s Truth and Reconciliation Commission” (1996) 12 *SAJHR* 617.

⁷ Mary Burton, “Custodians of Memory: South Africa’s Truth and Reconciliation Commission” (2004) 32:2 *Int’l J Legal Info* 417.

⁸ Janine Natalya Clark, “Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship” (2011) 11 *Int’l Crim L Rev* 241.

prerequisites both for the restoration of the social order and for the healing of individual victims”.⁹ To consider this issue, I will review the circumstances that brought about South Africa’s TRC.

2. The Conflict – Apartheid v. Democracy in South Africa

At the beginning of the period between 1960 and 1994, “the system of government in the country was undoubtedly an unjust and discriminatory one, but it was still essentially a system of laws, albeit unjust laws. In the course of the first two decades of the period, the rule of law was steadily eroded and the system of public administration purged of its remaining democratic substance. By the time President Botha took power, the system was characterized by severe repression. It had not yet, however, adopted a policy of killing its opponents. The period during which the South African state ventured into the realm of criminal misconduct stretches from P W Botha’s accession to power in 1978 into the early 1990s, including a part of the period in which his successor held office. This view is criticized by authors such as Mahmood Mamdani who argue that apartheid as a system started before this time and was aided and abetted by the erosion of the rule of law. The result was that white and black South Africans had not lived under a single rule of law up to that time.”¹⁰

Race was the framework used by all parties to the South African conflict. White South Africans were told by their parents, the media and many churches that black people were different and at a lower stage of development; whites were South Africans and blacks were foreigners. Black South Africans were told that the settler colonial regime was the enemy of liberation and apartheid meant white domination, not leadership, but control and supremacy.¹¹

What was clear, however, was the horrendous brutality of the system. “The story of apartheid is, amongst other things, the story of the systematic elimination of thousands of voices that should have been part of the nation’s memory. The elimination of memory took place through censorship, confiscation of materials, bannings, incarceration, assassination and a range of related actions.”¹²

The various freedom groups were beginning to win international sympathy and more and more countries were imposing economic sanctions against South Africa’s apartheid government and companies, especially the gold and diamond mines on which it was so dependent. With both sides hurting and neither able to defeat the other, it was necessary to look at the alternatives. As Mahmood Mamdani said, “the Truth and Reconciliation Commission of South Africa was the fruit of a political compromise. The terms of the compromise both made possible the Commission and set the limits within

⁹ Judith Herman, *Trauma and Recovery* (New York: Basic Books, 1994), 1.

¹⁰ TRC Report, *supra* note 1, vol 5 at 213.

¹¹ TRC Report, *supra* note 1, vol 2 at 6.

¹² *Ibid* note 1, vol 1 at 201.

which it would work. These limits, in turn, defined the space available to the Commission to interpret its terms of reference and define its agenda.”¹³

South Africa’s TRC is held up as standard for countries transitioning to democracy but it is also criticized for permitting those who carried out gross human rights violations and those who benefitted therefrom to continue under the new regime without facing justice.

3. Designing the Process – South Africa’s TRC

Following Howard Gadlin’s argument,¹⁴ in designing the process during the secret negotiations, the facilitator should have packaged a process geared to the needs and interests of all the stakeholders in South Africa. In designing a system to manage the conflict arising out of apartheid, two of Cathy Costantino’s questions on systems design must be asked: (1) who owns the design process; and (2) should the designer be impartial.¹⁵

(a) Design Ownership and Designer Impartiality

After the 1985 Sharpeville riots in South Africa where six people were killed and thousands of police searched houses in Sebokeng Township, there were concerns that further riots would follow. With growing criticism and economic sanctions increasing around the world, in 1986, Alex Boraine [Christian minister and corporate executive who would later become the Vice-Chair of the TRC] and Frederick van Zyl Slabbert resigned from South Africa’s Parliament and established the Institute for a Democratic Alternative for South Africa (IDASA) to explore methods to manage negotiations from apartheid to democracy.

In 1987, IDASA organized a conference to examine the effect of democracy on South African society. In 1987 and 1990, IDASA organized meetings in Dakar, Senegal, between white South Africans and representatives of the African National Congress (ANC). In 1990, the ban was lifted on political organizations and 26 political parties and organizations started the process to transition to democracy through a series of conferences organized by IDASA and Justice in Transition.¹⁶

¹³ Mahmood Mamdani, “Amnesty or Impunity: A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)” in Max du Plessis & Stephen Peté, eds *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (Oxford: Intersentia Antwerpen, 2007) 83.

¹⁴ Howard Gadlin, “Bargaining in the Shadow of Management: Integrated Conflict Management Systems”, in Michael L. Moffitt & Robert C. Bordone, eds, *The Handbook of Dispute Resolution* (San Francisco: Jossey-Bass, 2005) 371 at 380.

¹⁵ Cathy A. Costantino, “Second Generation Organizational Conflict Management Systems Design: A Practitioner’s Perspective on Emerging Issues” (2009) 14 Harv Negot L Rev 81 at 85.

¹⁶ Peggy Maisel, “Greensboro and Beyond: Remediating the Structural Sexism in Truth and Reconciliation Processes and Determining the Potential Impact and Benefits of Truth Processes in the United States” in Martha Albertson Fineman & Estelle Zinsstag, eds, *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice* (Cambridge: Intersentia, 2013) at 224-225.

At the same time, Oliver Tambo of the ANC opened secret talks with the South African government facilitated by Michael Young, former advisor to the British Foreign Secretary on Africa, and then head of communications for Consolidated Gold Fields, a British mining company in South Africa.¹⁷

From these secret processes, the *Constitution of the Republic of South Africa Act, 1993*¹⁸ (Interim Constitution) was created and it was left to the newly elected African National Congress government under Nelson Mandela to decide what system would be used to determine the truth about human rights abuses under apartheid, what amnesty would be granted, and what reparations would be made to the victims. The final clause of the Interim Constitution envisioned some method of promoting national unity through reconciliation, reconstruction and amnesty.¹⁹

It is noteworthy that the Interim Constitution, the blueprint of what would later become the TRC, mentions reparations only in passing and there is no explicit acknowledgment that there should be psychological or emotional assistance for the individual victims of apartheid, the majority of whom were black or “coloured”. References to peaceful co-existence and recognition of human rights with the advent of democracy appear to be a means of keeping the black portion of the population from exacting vengeance while maintaining the status quo that would overly benefit the economically advantaged and powerful white portion of the population.

¹⁷ Michael Young, “The South African Talks: A Template for Peace” *The Huffington Post* (20 October 2009) online: The Huffington Post http://www.huffingtonpost.com/michael-young/the-south-african-talks-a_b_327316.html and “The Secret Talks that Led to the Fall of Apartheid” *Program Negotiation at Harvard Law School* (23 February 2012) <http://www.pon.harvard.edu/events/the-secret-talks-that-led-to-the-fall-of-apartheid/>

¹⁸ Act No. 200 of 1993.

¹⁹ *Ibid* at s. 252 – “This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

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.

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

These can be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for Ubuntu [*see definition below*] but not for victimisation.

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. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.”

Ubuntu refers to a ‘culture which places some emphasis on community, and on the interdependence of the members of the community. It recognizes a person’s status as a human being entitled to unconditional respect, dignity, value and acceptance from members of the community such persons happen to be part of. It also entails the converse – the person has the corresponding duty to give the same respect, dignity, value and acceptance to each member of the community. Don Foster “The TRC’s unfinished business: healing” in Charles Villa-Vicencio & Fanie du Toit, eds, *Truth and Reconciliation in South Africa: 10 Years On* (Claremont, South Africa: David Philip, 2006) at 89.

In answering the ownership question, one can take the financial (the process is owned by representative groups whose members may not be monolithic) or functional (the system is owned by the designer because they create, maintain and shape the process) approach. “Whatever the approach, ownership colors all aspects of the design process. Because of its tremendous implications for rank, power, and privilege the topic of ownership is one that we as a discipline need to explore and address in a more direct and transparent manner, both in research and in practice.”²⁰

In South Africa at the time of the negotiations to transition to democracy, whites had the vast majority of the wealth and education. Most of the country’s wealth was in mining and farming that were almost exclusively white owned with laws and arms in place to maintain the status quo. There was a small number of Blacks and coloured in the middle class, with the majority of Blacks performing the menial labour. Even with world opinion weighing against apartheid and economic sanctions beginning to take hold, there was no doubt that Black South Africans were no match for the apartheid system which was still being supported by the British Government under Margaret Thatcher and the American Government under Ronald Regan.

In conflicts like this where the power imbalance is so great, a process designer must heed Costantino’s admonition: “As designers, we sometimes lose sight not only of the ownership issue, but also of the role and importance of the *individual* stakeholder; we sometimes focus our efforts on the *institutional* stakeholder. During the design process, there can be tendency for the designer to focus on the implications of the new or revised system for the organization, rather than for the actual end-users of the processes or procedures.”²¹ As will be shown later, the designers of the South Africa TRC disregarded this sage advice and focused the majority of their efforts on reconstruction and reconciliation of the country while giving too little attention to the emotional and psychological damage suffered by the individual victims of apartheid.

The second question to be considered is the impartiality of the designer of the process. In this regard, the designer should “adhere to certain ‘best practices’ design principles — make suggestions with regarding how to conduct organizational assessment, how to involve stakeholders (including those who may feel disempowered in the process) ... and how to build in appropriate rewards and incentives.... (E)ach designer brings a different orientation to the designer process... For example, some designers may be ‘transformative’ and focus on relationship, growth and the healing components of systems design. Others may be ‘facilitative’ by identifying stakeholder interests and focusing on both relationship and outcome. Some may be more ‘evaluative’ and prescriptive in their approach, focusing on outcome and acting as experts.”²²

One of the biggest flaws in the secret negotiations leading to the South Africa TRC is that the most vulnerable and disempowered stakeholders, the African citizens who felt most of the brutality and trauma of apartheid, were not included in the design process. Since they were not at the table, there was little focus on the need for a healing

²⁰ Costantino, *supra* note 15 at 85.

²¹ *Ibid.*

²² *Ibid* at 90 - 91.

component to the system design, even though there is mention in the Interim Constitution that the society was “characterised by strife, conflict, untold suffering and injustice”.

(b) Stakeholders at the Negotiation Table

The designer must also consider impartiality with regard to the design participants. Was one group favoured over others? Did some groups receive more attention than others? Was the design process itself fair to all the stakeholders? Were all the stakeholders at the table?²³ As discussed above, this paper argues that not all the stakeholders were at the table. With sufficient research and knowledge of the South African conflict and its effects, a more inclusive table of the stakeholders in the TRC design process would resemble Figure 1 below.

Each of the groups at the table below are important stakeholders who had a direct interest in the outcome of the negotiations, could block the outcome, would be part of the implementation of any outcome, would be respected by the community, or had ideas or expertise that would be beneficial to the process.²⁴ The addition of the community leaders, social scientists and mental health experts would have foreseen the benefits of including culturally appropriate emotional and psychological supports for trauma victims during and after their testimony. Provision could also have been made in the agreement to include customary and traditional practices.²⁵

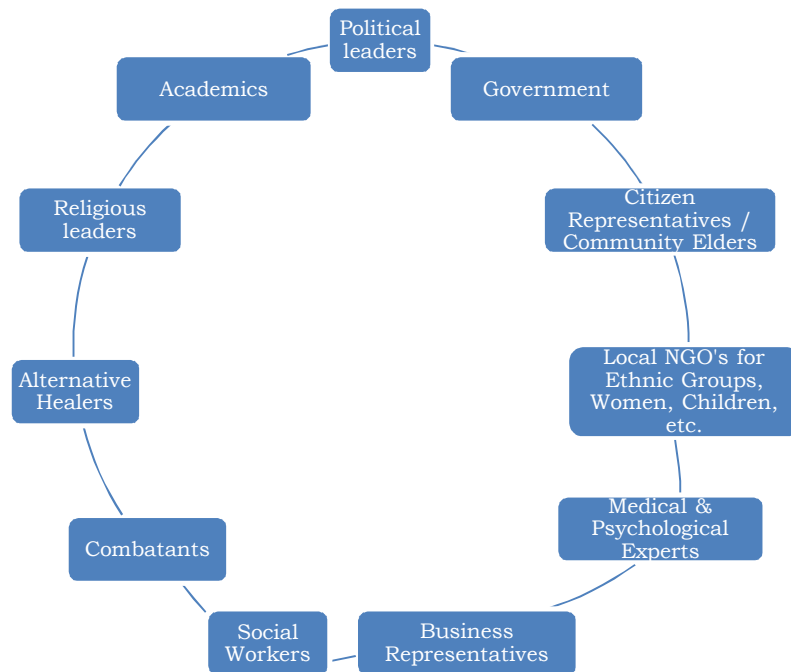


Figure 1: Proposed Representative Stakeholders at TRC Design Table

²³ *Ibid.*

²⁴ TRC Report, *supra* note 1, vol 6 at 373.

²⁵ Mark Sanders, “Ambiguities of Mourning: Law, Custom, Literature and Women before South Africa’s Truth and Reconciliation Commission” (1998) 4 *Law Test Culture* 105.

Most importantly, the designers failed to recognize that “ideas concerning the conciliatory and therapeutic efficacy of truth telling are the product of a Western culture of memory deriving from North American and European historical processes. Nations, however, do not have psyches that can be healed. Nor can it be assumed that truth telling is healing on a personal level: truth commissions do not constitute therapy.”²⁶ By carrying out the negotiations in secret, the designers failed to establish popular support for the proposed process which would affect all South Africans.

4. South Africa’s TRC at Work

In accordance with the Interim Constitution, the new African National Congress Government of Nelson Mandela passed the *Promotion of National Unity and Reconciliation Act*²⁷ establishing the Truth and Reconciliation Commission to investigate gross human rights committed during the period from 1 March 1960 (the Sharpsville massacre) to 1994 (the inauguration of Nelson Mandela as President). The TRC was divided into three committees: the Committee for Human Rights Violations, the Amnesty Committee and the Committee on Reparation and Rehabilitation. The section of the Act setting out the Function of the Commission provides at section 4(g) that it would make recommendations to the President with regard to:

“... the policy which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims.”

This would prove to be one of the most vexing sections of the legislation. “From the secret negotiations that resulted in the *Interim Constitutional Act*, the agreement was that there would be amnesty for perpetrators, truth for the society and acknowledgment and reparations for the victims. In defining its mandate as not being either impunity or vengeance, the TRC would determine who is ‘victim’ and ‘perpetrator’. If a victim was so acknowledged, the [identified] victim would have to give up the right to prosecute perpetrators in courts of law and perpetrators could apply for amnesty. These initial decisions would ultimately determine the findings of the TRC.”²⁸ They would also result in the greatest amount of criticism of the TRC and its recommendations.

The Commission sat for three years and received over 21,000 statements from individuals alleging they were victims of human rights abuses. Statements were received from 7,124 people requesting amnesty for acts they committed, authorised or failed to prevent. In addition, court records and press reports were reviewed. Finally, the 13-member Commission, chaired by Archbishop Desmond Tutu, presented its five-volume report dated 29 October 1998 to the President.²⁹

The South African TRC found that during its mandate period, 1960 – 1994, there were 28,750 victims and 33,713 gross human rights violations (killings, torture, severe

²⁶ Rosalind Shaw, “Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone” (Washington: United States Institute of Peace, 2005) at 1.

²⁷ Act 34 of 1995.

²⁸ Mamdani, *supra* note 13 at 84-87.

²⁹ TRC Report, *supra* note 1, vol 2 at 1.

ill treatment and abductions) in Cape Town, Durban, East London and Johannesburg. However, not included in those numbers were the majority of gross human rights violations which were committed on victims residing outside South Africa in countries such as Mozambique, Namibia and Angola. The perpetrators of these gross human rights violations were the South African Defence Force (SADF), South African National Defence Force (SANDF), South African Police (SAF), South African Police Services (SAPS); and to a lesser degree, African National Congress (ANC), South West African People's Organisation (SWAPO), Azanian People's Liberation Army (APLA) and other liberation groups and individuals.³⁰ The Commission found there was no doubt that the majority of the gross human rights violations were carried out by forces acting on behalf of the state. In addition, before the new government was inaugurated and the TRC could begin its work, "the former government deliberately and systematically destroyed a huge body of state records and documentation in an attempt to remove incriminating evidence and thereby sanitize the history of oppressive rule... It is clear that the main purpose of purging the records of the NIS (National Intelligence Service) was to deny a new government access to records documenting state action against the opponents of apartheid."³¹

Even before it completed its work, the Commission was criticised for its treatment of victims and perpetrators. The criticism was severe enough for the Chair, Archbishop Desmond Tutu, in the foreword to the Report to acknowledge the divisions among the commissioners. He said:

This report has been constrained by a number of factors – not the least by the extent the Commission's mandate and a number of legal provisions contained in the Act. It was, at the same time, driven by a dual responsibility. It had to provide the space within which victims could share the story of their trauma with the nation; and it had to recognise the importance of the due process of law that ensures the rights of alleged perpetrators. Several court rulings emphasised the importance of the latter. Obviously, the Commission respected these judgments. They did, however, sometimes make our efforts to obtain information about the past more difficult.³²

The way the Commission interpreted its mandate meant that the majority of the worst perpetrators did not seek amnesty and were not prosecuted for their violations of human rights. Archbishop Tutu argued that Nuremberg-type criminal trials for violations of human rights could not occur because,

In South Africa, where we had a military stalemate, that was clearly an impossible option. Neither side in the struggle (the state nor the liberation movements) had defeated the other and hence nobody was in a position to enforce so-called victor's justice.

However, there were even more compelling reasons for avoiding the Nuremberg option. There is no doubt that members of the security

³⁰ *Ibid* at 1-6

³¹ *Ibid*, vol 1 at 201- 220.

³² *Ibid* vol 1 at 2.

establishment would have scuppered the negotiated settlement had they thought they were going to run the gauntlet of trials for their involvement in past violations. It is certain that we would not, in such circumstances, have experienced a reasonably peaceful transition from repression to democracy. We need to bear this in mind when we criticise the amnesty provisions in the Commission's founding act. We have the luxury of being able to complain because we are now reaping the benefits of a stable democratic dispensation. Had the miracle of the negotiated settlement not occurred, we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa.....

It would have been counterproductive to devote years to hearing about events that, by their nature, arouse very strong feelings. It would have rocked the boat massively and for too long.³³

Even Judge Mohamed, then Deputy President of the Constitution Court but Chief Justice by the time the Commission's Report was written, on ruling on *AZAPO et al v. Truth and Reconciliation Commission*, quoted with approval Judge Marvin Frankel's *Out of the Shadows of the Night: The Struggle for International Human Rights* as follows:

A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else, and they may be very powerful and dangerous. If the army and police have been the agencies of terror, the soldiers and the cops aren't going to turn overnight into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain significant facts of life.... The soldiers and police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathisers in the population at large. If they are treated too harshly – or if the net of punishment is cast too widely – there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget.³⁴

It is obvious, therefore, that the fear of the perpetrators dictated not only the provisions of the secret agreement but directed how the Commission would give effect to its mandate on amnesty and reparations. Some of the victims had been living for over thirty years with the memories of horrendous crimes perpetrated against them, their families and communities. They would not only have to continue to carry those painful memories but would also have to live alongside the perpetrators to whom amnesty rather than justice had been meted out. It appears that the answer to these criticisms was that it was the expectation that the victims would be healed by truth-telling — telling their traumatic stories in public, hearing the perpetrators acknowledge and seek forgiveness for their actions in public, and forgiving those perpetrators.

³³ *Ibid* at 5.

³⁴ *Ibid* at 6.

Given the contents of the secret agreement, not surprisingly, the most egregious perpetrators did not appear in large numbers before the Commission to seek public forgiveness. As Archbishop Tutu later reported:

It is something of a pity that, by and large, the white community failed to take advantage of the Truth and Reconciliation process. They were badly let down by their leadership. Many of them carry a burden of a guilt which would have been assuaged had they actively embraced the opportunities offered by the Commission; those who do not consciously acknowledge any sense of guilt are in a sense worse off than those who do. Apart from the hurt that it causes to those who suffered, the denial by so many white South Africans even that they benefitted from apartheid is a crippling, self-inflicted blow to their capacity to enjoy and appropriate the fruits of change.³⁵

Looking back at the provisions of the secret agreement that were included in the Interim Constitution, it is not surprising that the army and most white South Africans (including P.W. Botha under whose regime most of the violations took place) would see no gain in appearing before the Commission. Truth-telling and pleas for forgiveness from the worst perpetrators would not be fully available to heal the victims.

5. Reparations and Rehabilitation

The composition of the TRC emphasized the focus of its work would be truth-telling and amnesty rather than reparation for the victims. Five of the seventeen members of the Commission were affiliated with Christian religions, while three members had backgrounds in psychology: Ms. Hlengiwe Mkhize, clinical psychologist and Chair of the Reparation and Rehabilitation Committee (RRC); Dr. Wendy Orr, surgeon; Ms. Glenda Wildschut, a psychiatric nurse; and Mapule Ramashala, who held a master's degree in clinical psychology, served as a member of the RRC. Interestingly, regarding the two Afrikaners appointed to the TRC, Chris de Jager resigned after the Commission took P.W. Botha to court for refusing to appear before the Commission; and Wynand Malan submitted a minority report defending apartheid.³⁶

The inferior status of the RRC in the TRC was demonstrated in the Act itself. "The task of this Committee is to deal with the applications for reparation and rehabilitation by victims of gross violations of human rights. The Committee will have the duty of considering all the matters referred to it by the Commission, the Committee of Human Rights Violations and the Committee of Amnesty and must then make recommendations to the government. While doing its work, the Committee must, among others ... deal with applications in a way that is speedy, inexpensive [*my emphasis*], fair and accessible...."³⁷

³⁵ *Ibid* vol 6, Foreword.

³⁶ Antjie Krog, *Country of my Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa* (New York: Three Rivers Press, 2000) at 377.

³⁷ Truth and Reconciliation Commission, "Explanatory Memorandum to the Parliamentary Bill", on line, <http://www.justice.gov.za/trc/legal/bill.htm> at 4.

There was general knowledge of the horrendous crimes that had been committed during apartheid. Whether it was the foreboding of what was to come, the emphasis on forgiveness, or the heavy emphasis on religion in the appointment of commissioners, the Commission opened the first day of hearing in East London with the Commissioner Rev. Bongani Finca leading the singing of the Xhosa hymn: “*Lizalise indinga lakho*” [The forgiveness of sins makes a person whole]. Archbishop Tutu followed with a prayer:

We long to put behind us the pain and division of apartheid, together with all the violence which ravaged our communities in its name. And so we ask you to bless this Truth and Reconciliation Commission with your wisdom and guidance as a body which seeks to redress the wounds in the minds and the bodies of those who suffered.³⁸

Then the victims of apartheid started to give their evidence before the Commission in public and sometimes broadcast live to the country. The following are some excerpts from the testimony of victims:

“I was trying to see my child. Just when he was about to open the police van at the back, I heard a voice shouting, saying: ‘No, don’t show her anything ... [‘Keep the *kaffir* (nigger³⁹) girl away from there] But I managed ... I pulled a green curtain.... I saw ... my child ... sleeping among tires ... and he was foaming in the mouth and he was ... already dead Then they pulled him out and threw him on the ground. And I looked at him ... And he was dying ... and they won’t allow me to hold him....”

“They held me ... they said, ‘Please don’t go in there ...’ I just skipped through their legs and went in ... I found Bheki ... he was in pieces ... he was hanging on pieces ... He was all over ... pieces of him and brain was scattered all around ... that was the end of Bheki.”

“Barnard was a frightful man – the cop we couldn’t kill. He always drove this red Valiant and wore this red *doek*. Rambo of the Western Cape, he called himself. Whenever his car appeared on the shimmering horizon leading the yellow Casspirs, we knew: someone dies today. We will remember the man with the red scarf who shot dead our sons.”

“This was the last thing I saw: Barnard standing next to his car. He spoke Xhosa like Xhosa. He pointed his firearm at me. I felt something hitting my cheek. I felt my eyes itching. I was scratching my eyes and yelling for help. Since then, I’ve been blind ... and unemployed ... and alone and homeless. But today ... it feels as if I can nearly see ...”

“My husband was still at his desk busy with the accounts of our business ... ‘I am going to make tea,’ I said ... While I poured water on the tea bags, I heard this devastating noise. Six men stormed into our study and blew his head off. My five-year-old daughter was present ...

³⁸ Krog, *supra* note 36 at 37.

³⁹ Gabeba Baderoon, “The Provenance of the term ‘Kafir’ in South Africa and the notion of Beginning, on line http://www.uct.ac.za/depts/religion/document/ARISA/2004_MS4.pdf

That Christmas I found a letter on his desk: ‘Dear Father Christmas, please bring me a soft teddy bear with friendly eyes ... My daddy is dead. If he was here, I would not have bothered you.’ I put her in a boarding school. The morning we drove there, we had a flat tire. ‘You see, she said, ‘Daddy does not want me to go there ... He wants me to stay with you ... I have watched him die, I must be there when you die ...’ She is now a teenager and has tried twice to commit suicide.”

“I heard shots ... I ran ... slipped and fell ... I crawled out at the front door ... On the steps, my son sat ... with his father’s face in his hands ... He was covered in blood ... He cried over and over: ‘Daddy talk to me ...’ Today he is twenty-one years old. I am still woken at night by his cries: ‘Wipe the blood ... wipe the blood from my father’s face.’”

“This inside me ... fights my tongue. It is ... unshareable. It destroys ... words. Before he was blown up, they cut off his hands so he could not be fingerprinted ... So how do I say this? – this terrible ... I want his hands back.”⁴⁰

Antjie Krog, an Afrikaner journalist and poet, would later write of the hearings, “Week after week, voice after voice, account after account. It is not so much the deaths, and the names of the dead, but the web of infinite sorrow woven around them. It keeps on coming and coming. A wide, barren, disconsolate landscape where the horizon keeps on dropping away”.⁴¹

Dr. Sean Kaliski of Valkenberg Hospital Psychiatric Unit, an Afrikaner, would explain that the perpetrators carried out these extreme forms of violence because a normative structure was created to legitimize the killings. He explained that it was not a fear of Communism that formed the basis of the actions:

“We believed black people were not human; they were a threat, they were going to kill us all and then waste away the country until it was nothing but another African disaster area ... While some men were out killing black people, many whites were busy dreaming of a life without black people: separate laws, separate amenities, separate churches, separate homes, separate towns, separate countries.”⁴²

Even listening to the testimony of the victims and perpetrators would have a traumatic effect. After 244 days of public hearings, Archbishop Tutu described the emotional impact on the Commission members and staff as follows:

“It has been a gruelling job of work that has taken a physical, mental and psychological toll. We have borne a heavy burden as we have taken onto ourselves the anguish, the awfulness, and the sheer evil of it all. The interpreters have, for instance, had the trauma of not just hearing

⁴⁰ Krog, *supra* note 36 at 35-42.

⁴¹ *Ibid* at 45.

⁴² *Ibid* at 118.

or reading about the atrocities, but have had to speak in the first person as either a victim or the perpetrator...

The chief of the section that typed the transcripts of the hearings told me, ‘As you type, you don’t know you are crying until you feel and see the tears falling on your hands.’

... Some of us have already experienced something of a post-traumatic stress and have become more and more aware of just how deeply wounded we have all been; how wounded and broken we all are. Apartheid has affected us at a very deep level, more than we ever suspected.”⁴³

With the public airing of the trauma suffered by the victims, the Reparation and Rehabilitation Committee (RRC), invoking section 25(b)(1)⁴⁴ of the Act, made an appeal to the President for urgent interim reparation (UIR) measures and Regulations were enacted by Parliament in April 1998.⁴⁵ Only two criteria would justify granting UIR: (1) the seriousness of an individual victim’s suffering; and (2) the need to shorten the time to implement service provision. To receive UIR, a victim or the family of a victim had to testify before and be declared a victim by the TRC. The victim then had to make application to the RRC and have physical injury, mental injury, emotional suffering, pecuniary loss or substantial impairment of human rights. The five categories to be used by the RRC to measure UIR were (1) emotional suffering and pain; (2) medical care and assistance; (3) material or financial need and limitations; (4) access to and continuation of education; and (5) the duty and obligation to remember.⁴⁶

It was unfortunate that long after perpetrators received amnesty, the Commission, on 21 March 2003 in a Codicil to its 1998 Report, was beseeching the Government with international human rights law to provide for reparations for the victims.⁴⁷ This was especially cruel because, once amnesty was granted, the victims of the amnesty could not seek civil or criminal redress against the perpetrator. Finally, in November 2003 – eight years after the TRC started its work – the government passed Regulations 1660 which entitled each identified victim to a paltry “once-off reparation grant in the amount of R30 000 [US\$200] as final reparation”.⁴⁸

III. EMOTIONAL AND PSYCHOLOGICAL TRAUMA OF TRUTH-TELLING

In his Foreword to the TRC Report, the Chair commented on the mental and psychological toll the evidence of victims and perpetrators had on Commission members

⁴³ TRC Report, *supra* note 1, vol 1 at 21 – 22.

⁴⁴ “the Committee may make recommendations to the President which may include urgent interim measures ... as to appropriate measures for reparation to victims.”

⁴⁵ GN R545 in GG18822 of 3 April 1998.

⁴⁶ Truth and Reconciliation Commission of South Africa, “Policy Framework for Urgent Interim Reparation Measures, on line <http://www.justice.gov.za/trc/reparations/policy.htm> .

⁴⁷ TRC Report, *supra* note 1, vol 6, s. 2.

⁴⁸ GN R1660 in GG25695 of 12 November 2003.

and staff. In note 43 above, he likened the effect on them to post-traumatic stress. Since all the stakeholders were not around the design table, the designers failed to appreciate the evil that was apartheid and the trauma that it had wreaked on tens of thousands of South Africans. As a result, psychological and emotional support for the victims during testimony was not designed into the process. Effective consultations and the presence of all the stakeholders at the design table would have revealed the need for psychological support during graphic, gruesome evidence recalling traumatic episodes during apartheid. In short, the designers should have foreseen that some witnesses were suffering or would suffer from post-traumatic stress disorder (PTSD).

PTSD is a recognized condition in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5)⁴⁹ and is defined as stemming from an event in which one is exposed to serious threat of injury or death and then experiences extreme fear, helplessness, or horror. Importantly, persons who suffer from PTSD do not have to be physically hurt; they can be afflicted after seeing or learning of the traumatic exposure of loved ones or family members to serious injuries, assaults or learning details of their unnatural death. The symptoms of PTSD include: recurrent and intrusive recollections and dreams of the event with the re-experiencing including flashbacks of at least a portion of the trauma. Symptoms can also include hyper-arousal characterized by enhanced startle reaction and difficulty sleeping, concentrating, and controlling anger as well as hyper-vigilance for danger and a sense of foreshortened future. PTSD also includes extreme distress and avoidance of cues or reminders of the trauma, as well as an inability to remember aspects of the event. Additional avoidance symptoms include emotional numbing, described as an inability to feel any positive emotions, such as love, contentment, satisfaction, or happiness. PTSD can afflict children as well as adults and is universal across cultures, languages and races.⁵⁰

Applying this definition of PTSD to some of the evidence quoted above and those set out in Volumes 2, 3, 4 of the TRC Report, it is safe to say that it was highly probable that many of the victims and some perpetrators were suffering from PTSD at the time they attended before the Commission. In March 2003, Archbishop Tutu wrote about the irony of the great gift they had given their country and the terrible cost they were paying:

We are also deeply grateful to those thousands of South Africans who came to the Commission to tell us their stories. They have won our country the admiration of the world: wherever one goes, South Africa's peaceful transition to democracy, culminating in the Truth and Reconciliation process, is spoken of almost in reverent tones, as a phenomenon that is unique in the annals of history, one to be

⁴⁹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Washington, DC: American Psychiatric Association, 2013).

⁵⁰ Terence M. Keane, Brian P. Marx & Denise M. Sloan, "Post Traumatic Stress Disorder: Definition, Prevalence and Risk Factors" in Priyattam J. Shiromani, Terence M. Keane & Joseph E. LeDoux, eds, *Post-Traumatic Stress Disorder: Basic Science and Clinical Practice* (New York: Humana Press, 2009) 1 at 2. Dan J. Stein, Matthew J. Friedman & Carlos Blanco, *Post-traumatic Stress Disorder* (Oxford: Wiley-Blackwell, 2011). National Institute of Mental Health, *Post-Traumatic Stress Disorder* (Bethesda, MD: National Institutes of Health) on line www.nimh.gov. National Centre for War-Related PTSD, *Post Traumatic Stress Disorder (PTSD) and War-Related Stress* (Ottawa: Department of Veterans Affairs, 2006) on line www.vac-acc.gc.ca.

commended as a new way of living for human kind. Other countries have had truth commissions, and many more are following our example, but ours is regarded as the most ambitious, a kind of benchmark against which the rest are measured.

We hope that the completion of the Commission’s Report brings a measure of closure to the process. I regret that at the time of writing we owe so much by way of reparations to those who have been declared victims. *The healing of those who came to us does hinge on their receiving more substantial reparations* [my emphasis] and I would be very deeply distressed if our country were to let down those who had the magnanimity and generosity of spirit to reveal their pain in public.⁵¹

There are high interpersonal, psychological, physical health and societal costs from PTSD. People with PTSD are more likely to divorce, report trouble raising their children, engage in intimate partner aggression, experience depression and other psychological problems, report poorer life satisfaction and physical health problems, become involved with the legal system, earn less, and change jobs frequently.⁵² In other words, the victims of apartheid who suffer from PTSD will be a major societal and public health challenge for South Africa. This tragedy is already being observed. Annette Blum reported that, since the TRC, “many conditions have deteriorated for women, in particular their subjection to physical violence, with the prevalence of rape, for example, being amongst the highest in the world.” Quoting Albertyn, she noted, “There are several explanations for the high levels of male violence in South Africa. Most of them trace the origins of violence to colonial and apartheid policies that shaped a racially unequal society and damaged the social fabric of all communities, but where the heaviest burden was felt in African communities.”⁵³

It was not until after amnesty had been granted that the RRC, in 2001, finally recommended to the Government of South Africa that there should be mental health interventions provided to the identified victims who had testified between 1995 and 1998 of the trauma they suffered. It would be another two years and entreaties from the Commission to convince the government to pay reparations. “The experience of the victims did indeed become part of the national psyche and part of ... acknowledged history for the very first time. But, in terms of repairing and healing the trauma of the victims, the TRC itself was the first to declare that this was, singularly, its biggest failure.”⁵⁴ South Africa had democracy but the victims continue to pay a terrible price.

IV. CONCLUSION

The South African TRC was the product of a dispute resolution design process which did not include all the stakeholders who would be affected by the outcome of the negotiations. The designers did not consider the strife, conflict, untold suffering and

⁵¹ *Supra* note 1, vol 6, Foreword.

⁵² *Supra* note 50, Keane et al.

⁵³ Annette Blum, *Public Memory, Private Truths: Voices of Women and Visual Narrative in Post-Apartheid South Africa* (MA Thesis, York University, 2010) (Ottawa: Heritage Branch) at 1.

⁵⁴ Krog, *supra* note 36 at 385.

injustice of apartheid, the system of government they were seeking to replace. The result of that failure of very basic tenet of process design was that there were no experts at the design table to advise on the effect of excluding psychological support for trauma victims who are asked to testify in public about intensely painful incidents in their lives. This failure to provide emotional and psychological support re-victimized the victims.

The objective of the process was to reconcile a divided nation and prevent repetition of human rights violations through truth-telling. It failed. Surveys have found more segregation and inequality than ever. The country is besieged by crime. There are no debates or discussions of the TRC recommendations in South Africa.⁵⁵ By not including the representatives of the communities that were unjustly treated under apartheid, while preserving the privileges and forgiving the misdeeds of the white community who benefitted from apartheid, the designers created a conflict resolution system which allowed the beneficiaries under the impugned system to continue without acknowledging they benefitted. The majority who suffered injustice under apartheid will receive little recompense. It is difficult to see how this outcome can be called reconciliation.

If all stakeholders had been invited to the initial negotiation table, the suffering of the victims would have revealed the need for emotional and psychological support during and after their testimony, and explicit provisions would have been included in the legislation setting up the TRC. That fatal design flaw has left South Africa with grave societal problems – the consequences of psychological damage wreaked first by unjust laws under apartheid and then by the public testimony of victims of the TRC. This outcome resulted from the process designers' lack of knowledge of the conflict, justice, culture, how the country worked, and effective interaction with all the people, law and leadership.

⁵⁵ *Ibid* at 385. Charles Villa-Vincencio & Fanie du Toit, eds. *Truth & Reconciliation in South Africa: 10 Years On* (Claremont, SA: David Philip, 2006) at 32, 85, 201.