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Perpetrator Findings as Artificial Even-handedness? The TRC's Contested Judgements of Moral and Political Accountability for Gross Human Rights Violations [1]

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Introduction

On 25 February 1999 the South African parliament held a special debate in a joint session on the Report of the Truth and Reconciliation Commission (TRC). In his opening address President Nelson Mandela welcomed the report as a "critical milestone" in South Africa's democratic transition and an essential contribution to the ongoing project of national reconciliation. Mandela's welcome was notably guarded. It was inevitable, he said, that a task of such magnitude as that which the TRC had attempted -- nothing less than to deal with the political atrocities of apartheid and the violent conflicts involved in the transition to democracy -- would suffer various limitations. "As we anticipated", Mandela continued, questions had arisen in particular about "an *artificial even-handedness* that seemed to place those fighting a just war alongside those who they opposed and who defended an inhuman system".[1] Deputy President Thabo Mbeki elaborated further on this theme. Speaking as president of the ANC he noted that the ANC had originally called for and pioneered the establishment of the TRC. But the main thrust of his speech was highly critical of the TRC Report. Locating it in the broad historical context of colonial conquest and apartheid Mbeki contended that the TRC's findings were based on an erroneous conception of gross violations of human rights in the context of irregular war. The net effect of the TRC's findings, and more especially of those findings which held the ANC itself accountable for certain gross violations of human rights, was "to deligitimise or criminalise a significant part of the struggle of our people for liberation". The ANC could not accept these findings of the TRC: "National unity and reconciliation in our country cannot be based on the denunciation of important parts of our struggle"[2] Mandela and Mbeki's words in February were relatively restrained compared to the ANC's initial reactions when the TRC Report had been submitted three months earlier. At the time the ANC, like former president F.W.de Klerk, had sought a court injunction to prevent the TRC from publishing its findings. ANC Secretary-General Kgalema Motlanthe issued a press statement that the TRC had "grossly misdirected itself" in its findings on the ANC [3]. Indeed, a sense of betrayal dominated the ANC's responses to the TRC Report. The Report brought together the results of the multiple hearings and investigative labours of the Commission since the beginning of 1995 as a comprehensive documentation in 5 volumes and almost 3000 pages; its main thrust was to provide a devastating indictment of the apartheid regime, holding it morally and politically accountable for the many political atrocities overtly and covertly committed by its security forces. But the ANC's primary concern was with the TRC's findings against aspects of its own conduct of the armed struggle. This was a strange outcome to a remarkable process which had riveted public consciousness and drawn international attention in its quest for truth and reconciliation.

This conflict is strange, but it was not entirely unexpected or even new. All along the ANC and the TRC had had a complicated relationship. Both freely admit to the ANC's role in launching the idea and process of a truth commission in the South African context. The ANC also played a major part in the parliamentary fashioning of the TRC Act, and the majority of the Commission were individuals widely perceived to be broadly sympathetic to the ANC. Indeed, many of the Commission's (rightwing) critics saw it as a partisan instrument of the ANC. From the outset, though, the ANC had been deeply concerned that the TRC process might issue in a "*moral equation*" of its liberation struggle with apartheid . Unlike the Latin American models

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[1] This is a highly condensed version of a longer, fully documented paper. Copies of the complete draft paper is available on request.

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for the TRC which posited moral even-handedness and political impartiality as a sine qua non for the task of a truth commission, the ANC saw this in a very different light as the danger of a possible "moral equation" of what was done in the course of the liberation struggle with the atrocities committed in defence of apartheid deemed a "crime against humanity".

For its part the TRC consistently insisted on moral even-handedness as a matter of principle as well as a requirement of its legal mandate in the TRC Act (Report I:1,55; V:7,59-60). The Commission's "primary finding" was that the predominant portion of the gross violations of human rights was committed by the apartheid state and its security forces (Report V:6,77). But, insisting on the distinction between a 'just war' and 'just means', this did not prevent the Commission from making an "overall finding" that both the ANC and PAC -- even while engaged in legitimate struggles -- also committed gross violations of human rights for which they are morally and politically accountable (Report II:4,2). The Commission took pains to stress that this did *not* mean that it subscribed to any moral equation between the apartheid state and the liberation struggle (Report I:4,68, 70); it also made special efforts to provide a detailed motivation for endorsing the view that apartheid is a "crime against humanity" (Report I:4 Appendix). But it did make certain findings of gross human rights violations against the ANC for which it holds the its leadership morally responsible and politically accountable. And it is to these findings of accountability for gross violations of human rights that Mandela, Mbeki and the ANC object as "*artificial even-handedness*".

Taken together this poses a problem: it is not clear why the ANC and the TRC should so persistently and fundamentally disagree. Is it possible that the ANC just never grasped or accepted the implications of the most basic principles of justice in war as applied to its own conduct in the armed struggle? Or is it possible that the TRC had indeed "misdirected itself" and had somehow not properly grasped the evident moral differences between atrocities committed in defence of apartheid and actions undertaken in the justified cause of the liberation struggle? Why, if these differences in perspective had already been posted quite early on in the TRC process, were they not resolved long before submission of the TRC Report?

It should already be clear that we are actually confronted by a set of distinct but inter-related issues. Not all of these will be the concern of this paper. Thus the "inner history" of the relationship between the ANC and the TRC will not be the focus of the present paper. Similarly, this paper will not specifically address the legal issues concerned. The first section of the paper will have two main tasks: first it will set out to identify and reconstruct the underlying issues in the ANC's pre-emptive concern with the dangers of a possible "moral equation" with apartheid in the TRC process, comparing this with the Argentinean and Chilean cases. And secondly it will assess the eventual TRC Report in this light. It will be argued that the TRC Report did in fact meet the ANC's general concerns in this regard. But this raises the puzzle once more: if the TRC in its Report did not in fact make the mistake of that "moral equation" between the atrocities of apartheid and the liberation struggle, why then does the ANC so vehemently object to its doing just that?

The second main section of the paper will argue that, instead, the roots of the confrontation is to be sought elsewhere, i.e. in the TRC's distinctive interpretation of its mandate as a commitment to make "*perpetrator findings*" in cases of gross human rights violations. These "perpetrator findings" is a distinctive feature of the TRC report. The second part of the paper will thus investigate the assumptions, procedures and implications of the TRC's methodology for systematic "perpetrator findings". It will be argued that this moral logic in its perpetrator findings enabled the TRC to produce a devastating indictment of the NP-government and the apartheid state. But this approach also meant that, if the TRC had to make perpetrator findings at all, then it had to make similar perpetrator findings with regard to the ANC and its official leadership as well. This is the rub of the "artificial even-handedness" in the TRC report which Mandela, Mbeki and the ANC have found so difficult to stomach.

Part 1: Even-handedness as moral equation?

Prima facie it would appear uncontroversial that even-handedness should be a constitutive principle for a truth commission process. Yet matters may not be quite as simple and obvious as this might suggest. Archbishop Tutu signals as much in his Chairperson's Foreword to the TRC Report: "We have sought to carry out our work to the best of our ability, without bias. *I cannot, however, be asked to be neutral about apartheid. It is an intrinsically evil system*" (Report I:1,56). This suggests that even and especially for a truth commission there is a limit to moral even-handedness: it cannot require neutrality between evil and good. This section will attempt to identify and reconstruct the key issues in the ANC's concern with the dangers of "moral equation" in the TRC process, and then assess how the TRC Report actually dealt with these very issues. But first we need to take a brief look at the role of moral even-handedness in truth commissions more generally.

Unsurprisingly a commitment to moral even-handedness played a central role in the Latin American models for the TRC. A central feature of the Chilean truth commission, and a key to its relative success, was its composition of an equal number of opponents and supporters of the military regime. Evidently this was concerned with ensuring the commission's political credibility, but it was not understood as compromising its moral credentials. Carlos Nino similarly cites as a major achievement of the Argentinian National Commission on the Disappeared (CONADEP) that, despite its internal differences, "all in all, the work of CONADEP was extraordinary in its impartiality and thoroughness"[4]. He argues that in authoritarian cultures there is a connection between *epistemic moral elitism*, characteristic of the claims of those who are convinced of the rightness of what they are doing, and the commission of massive human rights violations: As against this Nino poses the different and *democratic moral epistemology* required and fostered by processes of inclusive and public deliberation on political atrocities. Nino links this directly with the general objective in contexts of transitional justice of introducing a culture of rights and ensuring democratic consolidation.[5]

1.1 Dullah Omar and Kader Asmal on the problem of "moral equation"

This high valuation of moral even-handedness as a sine qua non for any truth commission process was conspicuously absent from the ANC's approach to the TRC. Already at the earliest stages of the Commission's work key ANC figures began to warn against the dangers of a "moral equation" with apartheid. No one less than Mr. Dullah Omar, the ANC Minister of Justice, who perhaps more than anyone else had been in a position to influence the legislative fashioning of the TRC Act, warned in October 1995, even before the actual appointment of the Commission, that "in forgiving what has happened, in putting the past behind us, let us not throw morality out" Though everybody applying for amnesty should be treated equally in terms of the TRC Act, it was essential that the Commission should "recognize the morality, the legitimacy of the freedom struggle, and the immorality of the apartheid order."[6] The most elaborate statement of this view can be found in the Asmals' co-authored 1996 book Reconciliation Through Truth. Its main author, Kader Asmal, is also a cabinet minister and had been one of the main protagonists of a truth commission in the ANC. The book is very much a political and polemical intervention. Surprisingly, the first actual mention of the TRC in the book is immediately followed by a dire warning that the TRC may well go horribly wrong: The fatal misapprehension of the TRC's task against which they so emphatically warn is the "perverse doctrine of (moral) indifferentism", "the idea that the Act somehow binds the Commission to set aside their basic human faculties of moral judgement" and that it is "bound by an Act which makes no distinction between apartheid and its opposite"[7] This misapprehension is not specifically attributed to the Commission itself, and the Asmals did not spell out just who their polemical targets or intended audience were. Let us consider their main argument more closely.

In the course of Reconciliation through Truth the main theme of the dangers of "moral equation" posed by the

TRC process is developed in a number of different variations. These include some rethorical and polemical overstatements, while any number of straw men are also demolished. But the core argument is a serious one, and in different versions it restates and reconfirms the moral incommensurability of apartheid and its defence with the ANC's liberation struggle. The United Nations' declaration of apartheid as a crime against humanity serves as one of the major points of reference for this view; time and again it is invoked, not just as a relevant historical fact, but as a touchstone of political morality. The proper task for the TRC, then, should not be to avoid moral judgement on apartheid and its crimes in a perverse moral indifferentism; on the contrary, a proper moral judgement on apartheid would confirm its status as a crime against humanity while, well understood, "an evenhanded approach to the past requires a decriminalisation, a statutory destigmatisation of the South African resistance."[8] The Asmals' main point is that infringements committed by the resistance morally cannot and should not be put on the same plane as "the systematic atrocity that was apartheid"[9] Does this mean that acts of terror or abuse committed in the course of the resistance against apartheid should not be judged as gross violations of human rights at all? On this point there is some ambivalence in the book. The Asmals get into difficulties especially when they turn to a discussion of particular cases such as the well-known case of the bombing of the Magoo Bar in Durban by ANC and MK operative Robert McBride in 1986 in which three people were killed and 69 injured. On the face of it this appears to have the hallmarks of a "terror' attack on civilian targets, but not on the Asmals' view. They could have conceded that this was a regrettable "abberation", that McBride had acted contrary to ANC policy and instructions, or even that the ANC's position had been open to unfortunate misinterpretations. Instead they insisted both that the bombing was no mistake and directly in line with ANC instructions and policy which in turn is linked into international law. Their position appears to involve a deliberate escalation of the moral stakes, so that it becomes impossible to make an adverse moral judgement on a particular case like the Magoo Bar bombing without questioning the moral status of the ANC and the liberation struggle as such.

It is difficult to know what we must make of this difference in moral perspectives. There does not appear to be any substantive difference on the relevant principles of the morality of war. Even if they come to different conclusions on particular cases, the Asmals, too, accept that it *would have been* a gross violation of human rights for the ANC to target civilians in terror attacks. They also concede that in practice there were occasional infringements of these strict principles by the ANC. On this score the disagreement would appear to come down to the facts of the matter in particular cases. Here the ANC would seem to have every reason to be confident in the strength of its case: even if closer investigation by the TRC would disclose more actual cases of gross violations by the liberation movements in the course of the armed struggle these are not likely to be on anything like the scale or extent as those committed by the apartheid forces. The Asmals' main argument, though, is not concerned with any *quantitative* difference in the number of injuries and deaths on both sides, but with the *qualitative* difference between the just cause of the liberation struggle and the moral abomination of apartheid. Strictly speaking they are objecting against any investigation by the TRC that would even *begin* to make a comparative investigation of the gross violations on both sides of the conflict. It is a matter of insisting on the primacy of a particular moral perspective, i.e. a version of what Carlos Nino termed *epistemic moral elitism*.If Kader Asmal had changed his mind in the course of the negotiated political settlement and was now prepared to accept that the killers and torturers of apartheid may be granted amnesty instead of insisting on Nuremberg Trials, it was another matter to accept that the ANC too might be held responsible for gross violations in the liberation struggle against apartheid. This would require the ANC to submit itself, as well as its moral perspective on the liberation struggle, to a democratic process of deliberation and judgement.

1.2 The ANC submission to the TRC

The Asmals' book, though a significant expression of ANC views in this regard, was no official document. For a more authoritative account we can turn to the ANC submission to the TRC's Political Party Hearings in

August 1996. Unlike the NP's flimsy and rather ad hoc submission the ANC prepared a substantial submission. Overall the ANC submission was evidently designed to provide a general framework, in the form of a particular interpretation of the just war tradition, for the TRC's approach to transitional justice and the morality of war. As such the ANC submission was marked by a significant ambivalence. On the one hand it spelled out what it clearly regarded as the true and correct moral framework for the TRC's work; on the other hand, by making this submission and participating in the TRC process, it was subjecting itself to the Commission's investigation and assessment. From the thrust of the submission itself it is clear that this was not a step which came easily to the ANC leadership and that considerable thought had been given to how this matter should be framed and addressed so that the dangers of "moral equation" inherent in the TRC process might be avoided.

The ANC submission affirms that it supports the work and campaigned actively for the TRC while respecting the independence of the Commission and the integrity of the commissioners. (ANC Submission, 2,15-16). Even so, it at once proceeds to warn against the perceived dangers of moral equation. The submission proposes the concepts of just and unjust war as the proper framework for discussion: "What this speaks to is an unjust cause on one side and a just cause on the other" (ANC Submission, 16). The submission explicitly proposes this as the "theoretical base" or "foundation" from which the TRC should proceed (ANC Submission, 17) Taken together this could amount to the strong position that *as a just cause* the ANC's armed struggle was *not* subject to the TRC's investigations of gross violations of human rights in the same way that the NP government and security forces' defence of apartheid as an unjust cause certainly were. In short, on this strong view of the armed struggle as a just cause, the ANC's conduct, unlike the political atrocities committed in defence of immoral apartheid, could *not* be subject to the TRC's investigations of gross violations of human rights. Elsewhere, though, the submission takes the different and weaker position that, even if just war theory provides the correct moral framework for the TRC, then this does not preclude a critical assessment of its conduct of the armed struggle in terms of just these norms and criteria (ANC Submission,77). In fact, despite its initial announcement that it will not be making any representations to the TRC on the conduct of what it considered a just war, substantial sections of the ANC submission were concerned with a survey of its conduct of the armed struggle and an explicit discussion of whether this involved any gross violations of human rights. At this stage, then, the ANC's relation to the TRC remained one of basic and unreolved ambivalence.

In different ways similar ambivalences also characterise the ANC submission itself. Already in the historical account of the stages of the armed struggle and ANC policy formation from 1960 to 1994 we can trace an unmistakable slippage in the ANC's approach to the morality of war in terms of just war theory. To begin with, issues of moral principle are central and clearcut in the account given of the initial turn to violence following Sharpville and the formation of Umkhonto we Sizwe (MK) in 1961. The turn to the armed struggle evidently represented a moral watershed, with an almost symbolic significance, in ANC political thought far beyond its actual effects at the time. For almost two decades after its inception the "armed struggle" had very little, if any, actual impact on the apartheid state. (It was only from the late 1970s, following the exodus of large numbers of post-Soweto 1976 young black activists, that this would change). Accordingly some critics argued forcefully that, despite the provocations of Sharpville and the escalation af apartheid oppression by the 1960s, the turn to the armed struggle had been a *strategic* mistake.[10] However, any concern with such strategic or other political aspects of the turn to politial violence are conspicuously absent from this account which is exclusively concerned with its moral significance. Over time, though, it became increasingly difficult to maintain this "highly disciplined and restrained approach to the use of violence" (ANC Submission, 69) especially in the changing contexts of the 1980s and 1990s; indeed, in this respect the ANC submission provides telling evidence of the slippage in its principled commitment.

The slippage primarily occurred in two specific contexts, first that of the dramatic escalation of internal violent popular insurrection in the mid-1980s, and secondly that of the creation of semi-autonomous Self Defence

Units (SDUs) based in local communities in the early 1990s.The upsurge in popular resistance and the spread of more violent confontations in townships throughout South Africa from 1984 evidently provided the exiled ANC leadership with a major opportunity to regain the political leadership of the liberation movement by fusing this with its own plans for urban guerilla warfare; at the same time, it was hardly in a position where it could afford to repudiate the more radical and violent actions undertaken by local popular insurgents even. if it would want to do that. The ANC submission recounts how, in these circumstances, the ANC in exile considered the need for certain adaptations in its principled commitment to the conduct of the armed struggle. It was a difficult, ambivalent and inconclusive discussion marked by an increasingly *political* definition of "legitimate" targets in stead of the strict distinction between combatants and non-combatants central to the just war tradition. This ties into a further ambivalence following from the converse association between "soft" or civilian targets and the strategic option of "taking the struggle to white areas" (ANC Submission, 71). In short, in this context the notion of "soft targets" became a highly charged as well as uncertain category in ANC discussions on possible adaptations of the conduct of the armed struggle. These various slippages and ambivalences came to a head around the ANC's Consultative Conference at Kabwe in June 1985 One of the resolutions of the Kabwe Conference, at this crucial juncture, concerned precisely the issue of the ANC's position on the distinction between "hard" and "soft" targets in the conduct of the armed struggle (ANC Submission, 71). The Kabwe resolution and subsequent statements by Chairman Tambo stopped short of explicitly renouncing the ANC's principled commitment to traditional just war principles, but they also no longer accorded this any special priority. This was certainly a long way removed from the special stress, to the point of over-valuation, on these principles which had characterised the ANC position in previous decades. The uncertainties with regard to the ANC's policy following Kabwe were of considerable consequence. The ANC submission records that it was precisely during this time that "attacks on certain targets with no directly apparent connection to the apartheid state took place" and that in the circumstances these may well have been based on understandable "misinterpretations" of ANC policy (ANC Submission, 73). It must be said that the Kabwe resolution amounted to a temporary lapse. The ANC submission also documents how in subsequent years the ANC's leadership moved to recover the moral high ground considered strategically essential to the success of the liberation struggle, and by the beginning of 1987 it reasserted the principled policy of avoiding civilian targets (ANC Submission,73-74). Similarly the ANC leadership now issued clearer statements in condemnation of the brutal practice of "necklacing" which had alarmingly proliferated during this period and on which its initial position had been somewhat muted and ambiguous, to say the least (ANC Submission,109).

The second context in which significant slippages occurred -- compared to its initial principled commitment -- was that of the formation of semi-autonomous SDUs from the early 1990s. In this case the slippage concerned the issue of the "primacy of the political", i.e. of asserting tight political control and direction over the operations of armed formations. As the ANC submission stresses, this had been a fundamental principle in the earlier decades, in the ANC's relation to MK as its armed wing but also in relation to other groupings (ANC Submission, 67). In the different contexts of the 1980s and 1990s this principle would no longer quite apply in the ANC's relationship to SDU's. At the ANC's National Conference of 1991 the formation of SDU's was endorsed. As ANC President Mandela stressed the need for linkage with MK, but effectively the ANC accepted that the communally based SDU's would operate semi-autonomously (ANC Submission, 90). The ANC was no longer insisting on the securing of effective political direction as a precondition for setting up armed formations; this would have significant consequences when the SDUs subsquently became deeply involved in ongoing political violence. On this front too, then, the ANC submission itself documents a significant slippage from the ANC's earlier principled commitments to the conduct of the armed struggle.

If the ANC submission to the TRC thus faithfully documents the slippages as well as the partial recovery of the ANC's principled commitment to the conduct of the armed struggle, how does it now critically assess this troubled history in retrospect? The answer is that, though it professes the need for critical self-examination

(ANC Submission, 77), the ANC -- at least on the evidence of its submission -- does not recognise that any slippage occurred in its own position; instead, the submission tends to reproduce this very slippage in its self-assesment and/or to suggest that the later recovery means that no slippage ever took place (ANC Submission, 77). This is not to say that according to the ANC submission no mistakes were ever made. On the contrary, the submission explicitly concludes its section on this historical period with the admission that "we do acknowledge that some incidents not entirely consistent with ANC policy did take place" (ANC Submission, 75) Note, however, that this applies to actual incidents, not to the (unwavering) principled approach of the ANC. At the policy level, the submission maintains, "The ANC has *never* permitted random attacks on civilian targets" (ANC Submission, 77). Even the admission of some incidents as abberations or infringements of just war principles are heavily qualified (ANC Submission, 80-83).

Likewise, with respect to the issue of political responsibility, the review of the politico-military chain of command concludes that "*all* these changes represented increasing assertion of political leadership over armed struggle" (ANC Submission, 79), giving no recognition that with respect to the SDUs the ANC's previous insistence on the primacy of political direction had indeed been relaxed. Taken together this has significant implications for the crucial issue of the nature and extent of its political responsibility and accountability. The submission confirms that the "political and operational leadership of the movement accepts collective responsibility for all operations of its properly constituted offensive structures" (ANC Submission, 22). The force of this must depend precisely on whether it is claimed that the leadership consistently followed a principled approach, or not, and whether it consistently insisted on the primacy of political direction of armed formations, or not. The ANC submission documents in its historical survey that slippages in the ANC position occurred on both fronts; its self-assessment, though, insists that despite every difficulty the principled approach was maintained at all times. It follows, on the latter version, that the collective responsibility of the leadership does not extend to the regrettable lapses and infringements which did occur in practice in the same way as would be the case if the slippages in the principled approach were in fact acknowledged as such.

In sum, the ANC submission to the TRC was marked by a number of profound ambivalences: it set out to provide the framework of just war theory as the theoretical basis for the TRC's investigations, but also participated in and subjected itself to the TRC process by appearing before the Commission; it announced that as a just cause the ANC's armed struggle was not subject to the TRC's investigation and its conduct could not constitute gross violations of human rights, but then itself proceeded to provide a review and discussion in just those terms; it claimed that the ANC consistently maintained a principled approach to the conduct of the armed struggle while providing ample evidence of the slippages in this principled commitment occurring at certaincrucial junctures; it admitted that mistakes were made but in its discussion of such cases essentially attempted to rationalise these. In part this reflects a confusion between the notions of *jus ad bellum* (the justice *of* war) and that of *jus in bello* (justice *in* war) when this is taken in the strong sense that in a just cause all measures are supposed to be justified and no part of its conduct would constitute a gross violation of human rights. For the most part, though, the ANC understands its own principled approach to the armed struggle in terms of the principles of justice *in* war including the basic prohibition on targeting civilian non-combatants. At another level this ambivalence is due to a tendency to that *epistemic moral elitism* which Carlos Nino identified as an authoritarian legacy to be expected in contexts of transitional justice. Once again, though, the ANC submission does not actually sustain the elitist presumptions it announces, but enters into an extended deliberation on the ANC's conduct of the armed struggle in terms of shared norms which implicitly allow for others, certainly including the TRC, to come to different critical conclusions. The threat of *moral equation*, supposedly inherent in the TRC process, appears most clearly on the assumptions of epistemic moral elitism combined with the strong version of the armed struggle as a just cause. On such an approach, indeed, the ANC both cannot subject the morality of its conduct of the armed struggle to the judgement of others (such as the TRC) while as a just cause the armed struggle also, by definition, could not have involved any gross violations

of human rights However, on both counts the ANC submission itself did not sustain this approach but adopted a mode of moral deliberation compatible with a TRC process leaving room for critical and democratic disagreement. Accordingly it would appear that there may be sufficient common ground between the ANC and the TRC so that the anticipated problems of *moral equation* could be resolved without too much difficulty.

1.3 Archbishop Tutu's stand on Even-handedness

As it turned out the tensions between the TRC and the ANC were by no means resolved during the first round of the Party Political Hearings in August 1996. In response to their initial submissions the TRC developed sets of questions for further clarification by the political parties to serve as basis for more intensive discussion with the representatives of each political party at the recall hearings. The incipient tensions between the TRC and the ANC came to a head, however, long before the recall hearings in May 1997 with the events leading to Archbishop Tutu's threat to resign as chairperson of the TRC. The immediate cause for this confrontation was the matter of amnesty applications by ANC and MK members. With the initial deadline for such amnesty applications by the end of 1996 fast approaching, the relative paucity of new amnesty applications in general, and of ANC applications in particular, posed a serious threat to the credibility of the TRC process. In October 1996 Matthews Phosa, premier of Mpumalanga province and legal adviser of the ANC, was reported to have said that ANC members would not apply for amnesty. Stressing that the ANC's liberation struggle could not be equated with apartheid and implicitly relying on the strong view of the armed struggle as a just cause, Phosa explained that "attacks ordered by the ANC were actions of war for which amnesty need not be requested".[11] In response Archbishop Tutu went to see Mandela and threatened to resign since their could be no point in having a TRC process "if one side thinks it can grant itself amnesty". Implicitly rejecting the strong version of the ANC's armed struggle as a just cause Tutu insisted that "I do not accept the argument that they will not apply for amnesty in respect of military actions"[12] This led to a meeting between TRC and ANC delegations on Sunday 10 November 1996 at Johannesburg International Airport in an attempt to resolve the conflict. The ANC NEC's statement on amnesty prepared for this meeting provides perhaps the most authoritative statement of how it saw the problem of "moral equation" in relation to the TRC process. The statement recalled that the ANC had been the initiator of the TRC process and once again confirmed that the ANC remained committed to this process. It then proceeded to make a distinction regarding the ways in which the notion of even-handedness applied to different aspects of the TRC's work, and more specifically between its application to the amnesty process and to the Committee on Human Rights Violations. "The process in the Amnesty Committee is a legal process", the NEC statement noted, and continued that "even-handed treatment is implicit in this process" (NEC Statement, 1). It followed that the TRC's commitment to the principle of even-handedness need not be a problem -- at least as far as amnesty was concerned. Following the meeting ANC general secretary Cheryl Carolus announced that the organisation would encourage its members to apply for amnesty before the cut-off date[13]

However, the NEC statement continued that with regard to the work of the Committee on Human Rights Violations, which did not involve a legal process, matters were different. However, with due respect for what was evidently in some sense a moral and political *cri de coeur* it cannot be said that the NEC statement clarified the issues at stake. To some extent the statement provided a somewhat inchoate recapitulation of the tendencies towards the strong notion of the armed struggle as a just cause and the epistemic moral elitism identified in the ANC's TRC submission. Thus the NEC statement claims that "in the case of the ANC, neither it (as a liberation movement) nor *any* of its members were *ever* involved in any crime against humanity. On the contrary, the ANC was involved in a just and heroic struggle. However, where during the course of that struggle violations of human rights did occur, these must be acknowledged" (NEC Statement, 2). The latter statement does not follow from the former assertions: if the ANC's armed struggle was a just cause and none of its members were involved in gross violations of human rights, then there would be no such violations to

acknowledge. Indeed, on this view, which we can recognise as the strong view of the armed struggle as a just cause, there should be no need for any ANC member to apply for amnesty in terms of the TRC process. But that is precisely the issue supposed to be resolved by this meeeting -- as indicated in the conclusion of the NEC statement that "the ANC itself accepts responsibility for acts committed during the course of the struggle and will assist inividual members in their (amnesty) applications" (NEC Statement, 2). We must conclude form this that, if the public confrontation between Archbishop Tutu and the ANC was avoided, the ambivalences in the ANC's own position remained unresolved.

In his statement following the meeting Archbishop Tutu said that he was satisfied that the independence, autonomy and integrity of the Commission had been recognised and accepted that the ANC was not about to grant itself amnesty. While agreeing with the ANC's general contention that the TRC process must be based on relevant moral judgements, Tutu's statement was carefully worded to undercut any claims to epistemic moral elitism. There could be no question of the TRC accepting a moral framework for its work leaving the ANC's claims about the just cause of the liberation struggle critically unexamined.

We may also note a passing comment in the ANC NEC statement prepared for this meeting. In noting the different status of the Committee on Human Right Violations' work from that of the Amnesty Committee the NEC statement observed that "the processes envisaged are different from those of the Amnesty Committee. *They do not have the same legal consequences* as in the case of the Amnesty Committee" (NEC Statement, 1). From this it is clear that the ANC did not expect the TRC, apart from the Amnesty Committee, to issue in "findings", legal or otherwise, which might have serious consequences for those concerned. In the event it later turned out to be a central objective for the TRC, in its determination of gross violations of human rights, to make *perpetrator findings*, which could apply to the ANC as well.

1.4 The ANC in the TRC Recall Hearings

Meanwhile it appeared that, in the aftermath of the confrontation over the amnesty issue, some kind of working understanding had been achieved between the ANC and the TRC. Along with the other political parties the ANC participated in the second round of the Party Political Hearings in May 1997. In the case of the NP these led to a major confrontation and the subsequent breakdown of the NP's relation to the commission. By comparison the ANC's recall hearing proceeded in a non-confrontational, even "comradely", atmosphere[14]. Unlike de Klerk, who represented the NP as sole leader, the ANC delegation set out to demonstrate the principles and practice of collective responsibility with Thabo Mbeki merely the first among equals. But these hearings also proceeded very much on the TRC's terms.

The difference in the ANC approach had already been evident in the "Further Submissions and Responses" prepared for the recall hearings in response to the TRC's written questions for clarification. This time round the ANC submission did not even try to take up the earlier challenge to the TRC in terms of "moral equation". Instead it was now prepared to concede that in the mid-1980s the ANC had for a time placed less emphasis on avoiding civilian casualties at all costs.(ANC Further Submissions, 15-16). Much the same spirit characterised the actual proceedings during the two days of the ANC recall hearings itself. This is how Antjie Krog describes the setting: "This time there will be no opportunity to claim the moral high ground or sketch the broad frameworks. The Commission has questions and it wants answers. Mbeki's first words are: 'Can we take our jackets off/ It's a bit hot.' A perfectly simple request carrying two messages: today you are the boss, we will ask your permission to do things; and secondly, we're here to work."[15] In deed as much as in words, the ANC had accommodated itself to the TRC process.

This was borne out by the actual exchanges during the two days of the recall hearings. In his opening remarks

Thabo Mbeki restated the ANC's concerns in terms of just war notions, but in muted and defensive terms (Transcript ANC Recall, 7). Implicitly his observations took it for granted that the ANC's conduct of the armed struggle could involve gross violations in particular cases; Mbeki's concern was that this should not be taken too far. The strong version of the armed struggle as a just cause is also explicitly repudiated: "We have not attempted to argue that because our struggle was just, this fact justified resort to unacceptable methods of struggle" (Transcript, 8) And, in restating the ANC's commitment to the principles of justice *in* war such as the prohibition on civilan targets, this is now combined with a readiness to admit, when pressed by the Commission, that there had been lapses and slippages in the ANC's principled position (Transcript, 50, 51). Over the two days the ANC were questioned closely on a range of relevant issues: the blurring of the distinction between "hard" and "soft" targets, the delays in the condemnation of "necklacing", the use of landmines, lack of political control and direction in setting up SDUs as armed formations, the targeting of political enemies such as collaborators, informers and the bombing of civilian settings etc. In reply members of the delegation explained the difficulties inherent in the conduct of guerilla or irregular war, failures in communication and control lines, the ANC's sustained commitment to humanitarian principles under trying circumstances. Significantly, the TRC did not simply accept such professions of principled commitment at face value, but wanted to know what practical measures had actually been taken to give effect to these. Equally significantly, the ANC delegation never questioned the right of the Commission to call them to account in this way. Perhaps the defining moment of the recall hearings occurred late on the second day when Archbishop Tutu intervened wih a general comment to underline that "a characteristic of what happened here yesterday and with your submission ... is the fact that there has actually been very little self-justification. ... What I am trying to say is it would be a very good thing to continue to point out that you aren't infallible" (Transcript, 60). What Tutu was underlining here was the absence of that epistemic moral elitism which had been one component of the initial ANC approach complicating its participation in an even-handed TRC process. In his concluding comments Thabo Mbeki concurred that it was important that "we should not resort to self-justification. I thought that was an important remark to make" (Transcript, 87). It also followed, in line with the tenor of these exchanges, that the ANC now accepted that the TRC could and would make critical findings on aspects of its conduct of the armed struggle, provided only that due recognition was given both to the general legitimacy of the liberation struggle and that the relevant practical complications were taken into account. By and large that is also what happened in the TRC Report.

1.5 The TRC Report: Even-handedness Without Moral Equation?

Some 15 months intervened between the ANC recall hearings in May 1997 and the submission of the TRC Report at the end of October 1998. During that time a number of things happened affecting the relation between the ANC and the TRC, including a complicated legal saga in which the collective application for amnesty by 37 ANC leaders was first granted by the Amnesty Committee and then appealed on technical grounds by the TRC itself, the TRC held some special hearings on the ANC camps, a further Party Political Hearing was held in May 1998 involving the leadership of the former United Democratic Front, etc. We cannot go into these here; suffice it to say that none of these need have changed the terms of the basic accommodation and understanding between the ANC and TRC as discussed above.

Unsurprisingly the TRC Report sets out to adopt an even-handed approach, stressing that this is both a legal and moral requirement (Report I:4, 60). As far as perpetrators are concerned, the TRC Act insisted on their legal equivalence. In Archbishop Tutu's words: "A gross violation is a gross violation, whoever commits it and for whatever reason. There is thus legal equivalence between all perpetrators. Their political affiliation is irrelevant. If an ANC member tortures someone, that is a gross violation of the victim's rights. If a National Party member or a police officer tortures a prisoner, then that is a gross violation of the prisoner's rights" (Report I:1,52). However, this by no means precluded the need to make relevant moral judgements or to

recognise the moral differences involved in the conflicts around apartheid (Report I:4, 61; I:1,56). In other words, if it was committed to even-handedness, the Commission also problematised this notion itself. In particular it was prepared to recognise that there could be no equivalence between the violence of the powerful and the powerless (Report V;7, 56). Accordingly the Commission arrived at a notably nuanced understanding of what moral judgements involved in this context, explicitly spelled out its statement on the issue of "even-handedness" (Report V:7, 60). On this basis, even-handedness thus need not involve any "moral equation" between the political violence of those who struggled against apartheid with that by the agents and defeneders of the apartheid state (Report I:4, 70). A substantial section of the chapter on "The Mandate" in the TRC Report is devoted to a discussion of the relevance and implications of this distinction between justice *of* war and justice *in* war. The strong version of the liberation struggle as a just cause is explicitly rejected (Report I:4, 74-75). It follows that it would be consistent with recognition of the liberation struggle as a just cause to require that, even so, its actual conduct should be assessed in terms of the principles for justice *in* war. In this way the Commission claims that it could resolve the dilemma of even-handedness without "moral equation": "By using these criteria the Commission was able to take clear positions on the evils of apartheid, while also evaluating the actions of those who opposed it" (Report I:4, 64; cf I:1, 54).

This general approach informed the Commission's more specific interpretation of its mandate as well as its application to a range of cases involving combatants and non-combatants. Even if apartheid was a crime against humanity, it was still "possible for acts carried out by any of the parties to the conflicts of the past to be classified as human rights violations" (Report I:4, 76-77). In other words, the agents of the apartheid state did not have any monopoly on the commission of gross violations of human rights to be investigated by the TRC, nor could members of the ANC be exempted from this. More difficulty was experienced with the implications of the distinction between combatants and non-combatants in the context of irregular or unconventional wars. Its eventual determinations (Report I:4, 91), in line with the Geneva Convention and the general approach to justice in war including the principled distinction between the moral status of combatants and non-combatants, did have some controversial implications. Specifically it meant that MK combatants killed in direct combat could not be regarded as victims of gross violations of human rights, and conversely, that in such combat situations SADF agents were not to be regarded as perpetrators of violations of gross violations of human rights. Prima facie such conclusions might seem to raise some concerns about forced "moral equation", but the Commission held that this amounted to nothing more than the basic principle of just war theory "that combatants have the right to participate directly in hostilities. ... Combatants who comply with the restrictions imposed by the laws of war are not, therefore, personally liable for the consequences of their acts" (Report I:4, 97). Only on the strong version of the liberation struggle as a just cause, involving a basic confusion of the *jus ad bellum* with the *jus in bello* could this be seen as a "moral equation".

It is fair to conclude that the approach taken by the TRC in the Report was not only entirely consistent with its position during its earlier interactions with the ANC, but also went to considerable lengths to accommodate the latter's concerns about the issue of "moral equation". If its adoption of just war theory as moral framework did not extend to that of the strong version of the liberation struggle as a just cause, then it may be noted that the ANC itself did not consistently sustain this strong version even in its initial submission to the TRC and abandoned it in subsequent interactions. The TRC also took pains to problematise and qualify its commitment to even-handedness: due regard for legal equality did not preclude moral judgements on the legitimacy of the liberation struggle as against the inherent evil of apartheid. More generally the TRC explicitly recognised the need for an even-handed approach to take into account inequalities in power relations as well as the practical and moral complications involved in conducting irregular and inconventional wars. On all these counts it is difficult to see what more could have been expected from the TRC within the general parameters of its basic commitment to an even-handed approach.

1.6 The TRC's Findings on the ANC

If this sets out the considered principles informing the TRC's general approach, what about its actual findings with regard to the ANC? It must be said that the TRC most definitely practiced what it preached in terms of an even-handed approach in its investigations of gross violations of human rights and that, along with its major findings on the political atrocities committed by the apartheid state and its functionaries, the TRC did not spare the ANC either in general terms or in specific cases. The Commissions's "*primary finding*" was that "the predominant portion of gross violations of human rights was committed by the former state through its security and law-enforcement agencies" (Report V:6, 77) and this is then systematically spelled out with regard to the State Security Council, former Presidents Botha and de Klerk, the homeland governments, the IFP etc. But it also made a number of "secondary" but definite findings on gross violations of human rights committed in the course of the armed struggle, by the ANC in exile, by the ANC after its unbanning as well as in regard to Mrs Winnie Madikizela-Mandela and the UDF (Report V:6 136-138, 141-144). Elsewhere in the Report the Commission makes the following "*overall finding*" with regard to violations by the liberation movements:

> *"In reviewing the activities of the African National Congress (ANC) and the Pan-Africanist Congress (PAC), the Commission endorsed the position in international law that the policy of apartheid was a crime against humanity and that both the ANC and the PAC were internationally recognised liberation movements conducting legitimate struggles against the former South African government and its policy of apartheid. Nonetheless, the Commission drew a distinction between a 'just war' and 'just means' and has found that, in terms of international conventions, both the ANC, its organs the National Executive Council (NEC), the National Working Committee (NWC), the Revolutionary Council (RC), the Secretariat and its armed wing Umkhonto weSizwe (MK), and the PAC and its armed formations Poqo and the Azanian People's Liberation Army (APLA), committed gross violations of human rights in the course of their political activities and armed struggles, acts for which they are morally and politically accountable" (Report II:4, 2)*

More specifically the Commissions's findings on the ANC included the following as gross violations of human rights: cases of targeting civilians in the course of the armed struggle; unplanned military operations by members of MK resulting in civilian injury; civilian injuries and deaths resulting from MK operations going awry due to poor intelligence and reconnaissance; civilian deaths due to the ANC's landmine campaign of 1985-87; extra-judicial killings of those labelled as informers or collaborators; abuses of suspected enemy agents and mutineers in ANC camps in the early 1980s; contributing to the spiral of violence and killing of political opponents in the 1990-94 period; systematic killings of Inkatha office-bearers. Similar findings of accountability for gross human rights violations by adherents and supporters were also made with respect to the UDF, and more generally the Mass Democratic Movement (MDM). Finally, there were also findings with respect to Mrs Winnie Madikizela-Mandela and the Mandela Football Club (Report V:6, 136-138, 141-144)

Taken individually or together these findings constituted a sharp indictment of key elements of the ANC's conduct of the armed struggle. Even if in the context of the TRC's findings they were of a "secondary" nature and of a much lesser order than the "primary" findings concerning the systematic political atrocities of the apartheid state and its functionaries, these findings still amounted to a substantial and detailed verdict attributing gross violations of human rights to the ANC itself. While in principle giving due recognition to the legitimacy of the liberation struggle, and while taking into account the many practical difficulties of fighting an unequal and unconventional war, the Commission nevertheless held the ANC and its leadership morally and politically accountable (Report V:6, 137). This is not a conclusion that any political leadership would easily accept, more especially if it involved responsibility for a substantial listing of gross violations.

But, given the nature of the preceding process, did the ANC have reason to be outraged by the TRC's findings and to charge that the Commission had "grossly misdirected itself" in the interpretation of its mandate? More specifically, could it be argued that by making such findings of gross violations concerning the ANC and its

conduct of the armed struggle next to its "primary" findings on the political atrocities committed by the apartheid state and its functionaries, the TRC in following its even-handed approach had in the end made the fatal error of a "*moral equation*" between the inherent evils of apartheid and the just cause of the liberation struggle? On the basis of the process analysed in the previous pages, the answer must clearly be no. In committing itself to the TRC process the ANC had started out on a path which logically and morally led to this outcome. In its initial submissions to the TRC the ANC had attempted to propose an approach that might remove its conduct of the armed struggle from the purview of the TRC. But it had not been able to sustain this strong (and erroneous) version of the liberation struggle as a just cause which by definition could not involve gross violations, and by the time of the recall hearings it had implicitly and explicitly accepted the even-handed approach adopted by the TRC, provided due recognition was given to the moral differences between apartheid and the liberation struggle as well as to the practical complications of fighting an unconventional war. The TRC Report made a point of accommodating these principled concerns of the ANC as the frame for its findings on that organisation. Moreover, the specific topics addressed in these findings -- the blurring of the distinction between "hard" and "soft" targets, the ANC's landmine campaign, the abuses in the ANC camps, the lack of political control over the SDU's, the delays in public condemnation of "necklacing: etc -- were the very same issues on which the ANC leadership had already been called to account during the recall hearings. Yet at the time they had found this quite acceptable. One could even argue that, difficult as it might be for the ANC leadership to stomach the TRC's verdict, it was very much in its own interest, as well as that of the TRC process, to do so since that would enable it to take the moral high ground and focus the attention squarely on the TRC's "primary" findings as a devastating and systematic indictment of the apartheid state.

But this was no to be. As we saw, the ANC responded in outrage, attempted to obtain a judicial interdict to stop the submission of the TRC Report, and harshly condemned the overall thrust of the TRC's findings. What had gone wrong? It will be the contention of this paper that the explanations for the dramatic twist in the ANC's relation to the TRC should not be sought only within the ANC. A large and perhaps decisive part of the explanations is to be found in the particular approach and methodology developed by the TRC in coming to its "perpetrator findings" This is the other side of the story which will be explored in Part 2.

Part 2: Perpetrator Findings

Introduction

In trying to understand what is at issue in the unexpected and unfortunate stand-off between the ANC and the TRC it is relevant to note that this specifically came to the fore in the context of the submission of the TRC Report. As we have seen in the foregoing account the relationship between the ANC and the Commission during the TRC process had not been uncomplicated or untroubled. On the whole, though, the relationship was never seriously threatened and did not erupt in major public confrontations -- until the submission of the TRC Report. This is the more surprising if we reflect that comparatively speaking the TRC report, because of the public nature of so much of the TRC process over the previous years, was bound to be less of an unknown factor and could hardly have the dramatic impact of similar reports elsewhere. When the Argentinian truth commission, CONADEP, for instance, went public with a two-hour program on television on July 4, 1984, this had an enormous public impact and could only happen after President Alfonsin personally authorised it. The report itself, delivered to the President two months later, became an enduring bestseller in Argentina with foreign language versions published abroad.[16] But these were also the main ways in which the work of CONADEP became known in the first place. By the end of 1998 the TRC, in contrast, had been conducting public hearings of various kinds for over two years; during this period it had been one of the most prominent and controversial features of public life, extensively covered by the media and the object of much commentary and analysis. With the TRC, in short, the relation between process and product was quite different than with

other truth commissions; in many ways the TRC process itself was bound to have the greater impact and significance compared to the eventual report. Accordingly it was perhaps assumed that the TRC report would also be an extension or summation of the by now well established features of the TRC process. As it turned out, this was not the case. On closer analysis it appears that the public hearings, and in particular the victim hearings which tended to dominate public perceptions of the TRC had been increasingly subordinated to other objectives associated with the production of the final report. These other objectives included the Commission's findings, and it was these -- and more specifically its "perpetrator findings" -- which led to the confrontations with both former president de Klerk and the ANC when the TRC Report was submitted.

But if the shift in the TRC's objectives may explain how the strange and unexpected confrontation with the ANC came about, it also raises more general questions regarding the nature and objectives of truth commissions in general and the TRC in particular. I will argue that, more generally, the underlying problem here involves key questions regarding the very nature and function of truth commissions as distinct from criminal prosecution or tribunals. This part of the paper is thus concerned more with the general problem of the TRC's interpretation of its mandate as this appears from the nature of the TRC Report.

2.1 The TRC Report and the TRC Process

Few who followed the TRC process could have any doubt that it was an extraordinarily complex enterprise which functioned at different levels and in various contexts. The Commission had a complex structure consisting of three main main committees with the Amnesty Committee operating on a semi-autonomous basis; it had a decentralised management with a head office in Cape Town and a number of regional offices; it had an Investigative Unit, a Research Department; it held different types of hearings etc. Yet for many the victim hearings, and to a lesser extent the proceedings of the Amnesty Committee, came to represent what the TRC process was about. Up to a point this view was shared by the Commission itself (Report I:6, 36). Yet only up to a point: it is one of the surprises of the TRC Report to discover that the Commission came to see the victim hearings as only one stage in the overall process and one which increasingly had to be subordinated to other objectives and priorities. Let us consider the TRC's own account of this more closely.

The Commission is quite candid that it wrestled long and hard as to how it should go about its main functions and objectives. To begin with it gave central stage to the victim hearings (Report I:4,34). However, this changed during the course of the TRC process, and its latter stages were driven by different priorities: "During the second half of the Commission's life the Commission shifted its focus from the stories of individual victims to an attempt to ... establish the political and moral accountability of individuals, organisations and institutions" Report I:4, 35). This later stage was also more closely connected with the perpetrator findings needed for the TRC Report. More specifically the Report, in its overview of the Commission's work, distinguishes three broad and partly overlapping phases (Report I:6, 59). During the *hearings phase*, in the year following the initial hearing in East London in April 1996, a large proportion of the time, energy and resources of the Commission was devoted to this activity. However, the initial prioritisation of victim hearings gave way to other imperatives from mid-1997 during the *statements phase*. The Commission recognised that this brought about a major reorientation in the nature and function of its work (Report I:6, 63).

Finally, the *amnesty phase*, was characterised by legal and quasi-legal proceedings in a more adversarial and perpetrator-oriented context. The latter two phases predominated during the last year of the Commission's activities: "By 1998, the Commission devoted virtually all of its resources to ensuring that statements were properly processed and corroborated so that findings could be made, and that amnesty applications were dealt with as expeditiously as possible" (Report I:6, 66). Broadly speaking, and apart from the Amnesty Committee, the TRC process thus moved from victim hearings to the making of findings linked to the Report.

2.2 The TRC's Commitment to Perpetrator Findings

Commissions are required to report their findings and to make recommendations. Depending on the nature of the commission and its mandate, such findings may be of different kinds. Judicial commissions or tribunals may be authorised to make determinations with legal standing while commissions of enquiry can make findings of fact, also as a basis for policy recommendations. The TRC was charged with the investigation of gross violations of human rights associated with the political conflicts during its mandate period (1960-1994). From its Report it appears that two kinds of findings came to be of particular significance for the Commission: victim and perpetrator findings (the Commission also made a range of further findings).

The case for the TRC making *victim findings* of some kind appears straightforward: evidently any policies or measures of reparation to individual victims or their relatives and associates would require setting up the necessary criteria and procedures so as to identify who might qualify for these, or not. This was also in line with the victim-orientation of the TRC process during the initial hearing phase. As it turns out, the Commission was not able to complete this process in ime for the publication of its Report. The final volume includes 80 pages with the names of victims of gross violations of human rights as determined in the course of the TRC's investigations, but this is confined to a mere alphabetical (and still incomplete) listing. A more complete listing, to include "not only names, but a brief summary of the finding made in every case" is to be published in an addendum to the Report at a later date (Report V:2, 26). Unfortunately the list of victims does not include cross references of any kind to the places elsewhere in the Report where their cases are dealt with. Since the TRC Report also does not (yet!?) have any kind of index, this makes it very difficult indeed to locate or check any further particulars beyond the victims' names. One can only conclude that the publication of its victim findings was not an absolute priority for the Commission.

The TRC's commitment to the making of *perpetrator findings*, which do figure extensively in the Report, requires closer consideration. The naming of the names of perpetrators is, of course, very much part and parcel of the amnesty process. There is no general amnesty, but amnesty is based on individual application and is conditional on full disclosure. Moreover the Act required the publication of the names of those who received amnesty in the Government Gazette (Report I:4,152). In lieu of criminal prosecution and punishment of the perpetrators this provided, as Archbishop Tutu observes in his Chairperson's Foreword, some measure of accountability: "Public disclosure results in public shaming" (Report I:1, 35). However, perpetrator findings concerning those who did *not* apply for amnesty is a different matter. Perpetrator findings meant that the Commission had to "resolve which of the *other* perpetrators identified in the course of its work should be named in accordance with its mandate" (Report I:4, 152). In fact, the commitment to making perpetrator findings of this kind amounted to a reorientation of the Commission's work away from that victim-orientation which had characterised the initial hearings phase. It meant that the Commission turned its primary attention from the victims to the perpetrators. That involved a different kind of process, driven by different imperatives and based on a different methodology (Report I:6, 63).

2.3 Naming Names as a Contested Objective of Truth Commissions

For obvious reasons naming the names of perpetrators frequently becomes one of the most contested issues for truth commissions. It is important to see that this comes about for two quite different sets of reasons. On the one hand the political forces associated with the former regime, and all parties who have an interest in covering up the atrocities, tend to use whatever means they can (including, ironically, their legal rights in terms of due process) to prevent the actual naming of perpetrators. This is in line with the various arguments for social and political "forgetting"; it is also one of the main functions of a general amnesty. As such it is opposed to the main thrust of truth commissions. Truth commission are intended to disclose the truth concerning

perpetrators which surely must include naming them. On the other hand, though, and perhaps less obviously, there are serious questions whether truth commissions, as such, are suited to sit in judgement on perpetrators.. To some extent this depends on just what is involved in naming the names of the perpetrators. This could range from, on the one hand, making relevant information concerning the atrocities and those involved freely available as part of the public record without making any "findings" concerning these to, on the other hand, judicial verdicts based on rigorous procedures and properly authorised determinations. At the very least "naming " amounts to a kind of public shaming or stigmatising, while formal "perpetrator findings" may also have further adverse legal and social consequences. For these reasons it may be questioned whether truth commissions, as non-judicial bodies and not following legal procedures, are properly qualified to make such (quasi-legal?) determinations. Strictly speaking "perpetrator findings" is not their business but that of the courts or other qualified institutions.

In this connection it is thus of significance that no other major truth commission has so far taken "perpetrator findings" on as a main task. In fact, in various other cases the issue of naming the names of the perpetrators was raised but rejected by some of the truth commissions on which the TRC is modelled. In the case of Argentine CONADEP, which did not have subpoena powers or the ability to compel testimony, was designed to act as an ancillary for the courts and the criminal justice system: "if it uncovered evidence of the commission of crimes, it was supposed to provide the information to the relevant courts."[17] This did not mean that the question of naming the names of the perpetrators did not become a major issue for CONADEP. According to Carlos Nino, "there was considerable dispute within CONADEP regarding the publication of the names of members of the military identified in the testimony as perpetrators of human rights violations. In the end, CONADEP decided not to publish the list, to avoid any appearance of acting as a court."[18] Similarly the Uruguayan *Nunca Mas* report made a point of avoiding actual perpetrator findings, though this did not preclude it from publishing the names of perpetrators where these were part of the record.[19] In part this approach was based on the practical difficulties facing a commission lacking the powers and resources needed for rigorous determination of the identities of perpetrators, but also in view of the grave moral questions involved in attributions of responsibility and accountability.[20] In these circumstances the Uruguyan truth commission came to see its proper function not in terms of making perpetrator findings but simply in terms of letting the facts speak for themselves[21]

In some ways the position of the Rettig Commission in Chile was more complicated in that its terms of reference was limited by the general amnesty granted to the security forces. More generally it had to reckon with the major factor that Genl.Pinochet and the military was determined not to allow any such perpetrator findings. Nevertheless, it is significant that the Rettig Commission came to similar conclusions not only as a forced and pragmatic compromise but on grounds of principle.[22] The principled nature of this approach was also strongly defended by Jose Zalaquett, a key member of the Rettig Commission, as required by the principles of natural justice and due process: According to him not naming the names of the perpetrators was not a compromise forced on the Commission but a "self-imposed limit": "naming culprits through an official commission appointed by the executive, which did not have subpoena powers and could not conduct trials, would have been analogous to publicly indicting individuals without due process"[23] This did not mean that Zalaquett was opposed to perpetrator findings, in the sense of individual attributions of responsibility and accountability for gross violations of human rights; his concern was that the actual making of such findings did not properly belong to the work of truth commissions, even if they might contribute to it, but to the courts.

More generally this view, that a broader investigative mandate for a commission might impair subsequent criminal procedures, has also been shared by other commentators: "The drawback of vesting such commissions of inquiry with greater investigative authority is the confusion which results when criminal prosecutions of individual perpetrators are subsequently launched."[24] In short, the fundamental concern is that truth

commissions do not have the legal standing or powers required to make perpetrator findings consistent with due process and the criminal justice system.

Of particular relevance and a partial exception is the case of El Salvador. The United Nations Truth Commission for El Salvador interpreted its mandate to mean that it was to identify the individuals responsible for serious acts of violence. The Peace Agreements under which it acted required that the "complete truth be made known". In its report the Commission held that

> "the whole truth cannot be told without naming names. After all the Commission was not asked to write an academic report on El Salvador, it was asked to investigate and describe exceptionally important acts of violence ... Not to names would be to reinforce the very impunity to which the Parties instructed the Commission to put an end"[25]

In fact the Commission had come under strong political pressure not to name the names of perpetrators, including that of high military officials who had been instrumental in bringing about the Peace Agreements, since this could lead to a new military coup and/or make national reconciliation very difficult. Despite this the Commission persisted in publishing a strongly worded report including the names of over forty individuals found to be responsible for human rights crimes. Within days the Salvadorean legislature responded by passing a blanket amnesty law preventing further action against those named in the report.[26] In fact, the Commission had taken this measure only due to the exceptional circumstances..Thomas Buergenthal, one of the three international commissioners, indicate that it was a cause of serious concern that the Commission had to rely on confidential information and was unable to afford those accused the protection of due process. He argues that the Commission was justified in naming the names of the perpetrators, the more so since the effective collapse of the criminal justice system in El Salvador at the time meant that the proper remedy to be provided by the courts was not available[27] In an assessment of the El Salvadorian Truth Commission Douglass W. Cassel Jr pointed out that "by naming names, it imposed the moral punishment of exposure on the perpetrators. ... The Commission's report did significantly affect legally recognized interests, such as honor, reputation and continuation in public and military office."[28] This raised serious questions of due process, and even whether the Salvadorean Truth Commission, in its efforts to vindicate the human rights of past victims of violence had violated the human rights of the alleged perpetrators. The Commission "made no pretense of affording all the usual elements of due process of law" while "no value is more fundamental to justice than fairness to persons accused of crimes"[29] In the event Cassel concludes that the Commission's decision to go ahead with naming the names of the perpetrators could be justified in the particular circumstances obtaining in El Salvador, but not more generally.[30] In short, given their nature as non-judicial bodies, it was only in exceptional circumstances that truth commissions themselves could engage in perpetrator findings.

2.4 The TRC's Interpretation of its Mandate to Make Perpetrator Findings

Against this background we may now consider the TRC's commitment to make perpetrator findings. In the TRC Report the Commission explicitly and repeatedly bases this interpretation of its mandate on specific provisions of the TRC Act. The technical validity of this interpretation will not be a particular concern of this paper. Rather, against the background of the positions taken in this regard by other truth commissions, it will be concerned with the underlying issues and more general considerations involved in perpetrator findings.

The Commission's account of its interpretation of its mandate can be found in Chapter 4 of Volume 1 of the TRC Report. It is explicitly based on certain provisions of sections 3 and 4 of the TRC Act. Section 3 sets out the *objectives* of the Commission (Report I:4, 31). Section 4 sets out the functions of the Commission to achieve its objectives, including that it shall make inquiries into, inter alia, "the identity of all persons, authorities, institutions and organisations involved in such violations" and their "accountability, political or otherwise, for any such violation" (Report I:4, 31). On this basis the Commission then concluded that it was

given four major tasks, of which the first was the following:

> "a) analysing and describing the "causes, nature and extent" of gross violations of human rights that occurred between 1 March 1960 and 10 May 1994, *including the identification of the individuals and organisations responsible for such violations* ..." (Report I:4, 32).

It is this latter aspect of the task, involving the identification of perpetrators responsible for gross violations of human rights which, in the Commission's view, constitute its mandate for having to make perpetrator findings. In interpreting its mandate the Commission recognised that this was only one of its tasks, and that it could not carry out all the tasks required simultaneously. But having first given attention to the task of restoring the human and civil dignity of victims through the victim hearings it shifted its focus during the second half of its life and "attempted to establish the political and moral accountability of individuals, organisations and institutions" (Report I:4, 35).

How did the Commission, on this interpretation of its mandate, view the nature and status of such perpetrator findings? The TRC Report states that a perpetrator finding was "*not a finding of (legal) guilt, but of responsibility for the commission of a gross violation of human rights*" (Report I:4, 157d). But this raises even as many questions: How would such determinations of responsibility for gross violations of human rights relate, on the one hand, to the TRC's other main objectives in terms of truth and reconciliation and, on the other hand, to the requirements of due process and the criminal justice system? The Commission was well aware of the need to observe the basic requirements of due process as well as to develop appropriate procedures and rules of evidence for its investigative findings. Indeed, section 30 of the TRC Act stipulated the need for due process, and specifically for observation of the *audi alterem partem* principle, so as to protect the rights of anyone who might be adversely implicated in the course of the Commission's hearings or by its findings.[11] Accordingly the Commission accepted the legal requirement of giving advance notification to all alleged perpetrators who might become the subject of adverse findings (Report I:4, 156c). In addition the Commission decided that the appropriate burden of proof for its perpetrator findings was that of the balance of probabilities utilised in civil actions rather than the proof beyond a reaonable doubt required in criminal prosecurions (Report I:4, 154c). To this end the Commission developed an elaborate methodology for the corroboration of statements as a basis for making perpetrator findings which will be considered below.

More generally the underlying issue at stake here is that of the status and functions of the TRC as an investigative body, or *a commission of enquiry*, and not a legal body or tribunal. Compared to other truth commissions the TRC had significant powers vested in it beyond any of its predecessors. The Report notes that the TRC was the first to combine the "quasi-judicial power" of granting amnesty "with the investigative tasks of a truth-seeking body" (Report I:4, 25). Uniquely, it also had the power to compel testimony by subpoena as well as powers of search and seizure (Report I:4, 26). Even so, the Commission recognised that it was not a legal body authorised to make legally binding determinations: "the Commission is not a court with the power to punish those identified; legal rights and obligations are not finally determined by the process." (Report I:4, 154b). Similarly, with respect to perpetrator findings the Report states that "the point to note here is that the Commission is not a court of law. It was set up as a commission of enquiry .... Its conclusions are therefore findings rather than judicial verdicts." (Report V:6, 64). Conversely, though, perpetrator findings in the sense of attributions of responsibility and accountability for gross violations of human rights, are hardly the sort of findings one would expect from a body that is "essentially a commission of enquiry".

There are some indications that the Commission did not consider its perpetrator findings to become the basis for further legal actions (Report V:8, 17-19, 65). It certainly seems unlikely that the Commission regarded the perpetrator findings against the ANC to become the basis for further legal action. In general the Commission did recommend that "where amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation", and it indicated that

it would make available information in its possession concerning serious allegations against individuals to the appropriate authorities. (Report V:8, 16). But it is notable that the Commission did *not* include any more specific statement or recommendation regarding the status of its own perpetrator findings in this regard. With regard to the crucial case, in the context of this paper, of the ANC the Commission recommended only that "the liberation movements issue a clear and unequivocal apology to each victim of human rights abuses in exile" (though apparently not to other victims of human rights abuses by the liberation movements) (Report V:8, 111). And as far as prosecutions for apartheid as a crime against humanity is concerned the Commissions did not recommend this either. (Report V:8, 114). This seems to imply that in the Commission's view its work, including its perpetrator findings, should not so much serve as a basis for possible further legal actions, but as a substitute for that. In short, the TRC's perpetrator findings are both analogous to other legal determinations but also insulated from the broader legal system.

2.5 The TRC's Methodology for Perpetrator Findings

Prior to the publication of the TRC Report few if any outside observers realised to what extent the TRC process had come to be driven by the Commission's commitment to making perpetrator findings. To this end it accumulated a massive database; it developed an elaborate methodology for the corroboration of statements; and this also became the organising principle for the structuring of the Report itself. From the outset the Commission gave understandable priority to the development of an adequate database as well as an effective information management system. Given the massive scope of the TRC enterprise and its many logistical complications this was nothing less than essential. A database of this kind can be organised on different principles, though, depending on the uses envisaged for it. From the Report it becomes clear that the imperative increasingly driving the TRC process was that of its commitment to make perpetrator findings.

The rationale for, and the structure of, this process is set out in Chapter 6 of Volume 1 of the Report on *Methodology and Process*. Technically seven major steps were involved: (1) statement taking, (2) registration, (3) data processing, (4) data capture, (5) corroboration, (6) regional pre-findings and (7) national findings (Report I:6, 14). More broadly we may distinguish three main stages, that of *statment taking and data processing*, that of *corroboration* and that of *making findings*. Let us briefly review each of these stages.

The first stage, that of *statement taking*, involved the processing of the many and diverse statements received from victims and other deponents into a uniform format. For this purpose the Commission developed a specific *protocol*, utilised as a basis for specially trained statement takers operating in standard ways. The Report describes the rationale for this protocol in general and neutral terms (Report I:6, 9). However, on closer analysis it becomes clear that this was not such a neutral or straightforward matter at all; it involved the interpretation of gross violations of human rights as even so many *discrete events* for which determinations of accountability and responsibility, i.e. perpetrator findings, had to be made (Report V:1, 48; I:4, 85). From this perspective the *narrative form* typical of victim statements, though appropriate to the forum of victim hearings, constituted a major problem: it obscured what the Report terms "the structural complexity of human rights violations"; a single narrative account may involve multiple victims, multiple violations and multiple perpetrators (Report I:6 Appendix, 5). In order to be captured on the database, however, a complex narrative account of this kind had to be deconstructed into the various discrete violations of human rights mentioned in them and then reconstructed in standard forms (Report I:6, 18-19). There can be no doubt that the validity, reliability and precision at issue in this process was *not* primarily geared to ensuring the *narrative* integrity of the original statements; at best they might amount to accepting a reduced version of a complex story. In many ways this constituted a major shift in priorities and orientation from that of the victim hearings which had informed the Commission's work during the initial phase of the victim hearings (Report I:6, 63).

With this shift towards the objective of making perpetrator findings the second stage of the TRC's methodology, that of *corroboration*, became that much more important. The Commission recognised that victims' statements of themselves could not provide an adequate basis for that purpose (Report I:6, 22). Precisely those aspects of the victim hearings which were designed to make these into "a positive and affirming experience" (Report I:6, 28) for the participants meant that the data generated in this way could not be relied on to provide evidence for adverse findings. The quest for *corroboration* as such involved a shift to the different moral logic of legal and quasi-legal procedures. In practice this meant that once victim and other statements had been coded in terms of the standard protocol and eentered onto the database, "it was the task of a team of investigators to corroborate the basic facts of each matter according to a standard list of corroborative pointers" (Report I:6,21). It is not clear to what extent this involved the development of an active *hermeneutics of suspicion*, otherwise so crucial to critical investigative practices, or whether the TRC's notion of corroboration somehow attempted to maintain a more positive approach looking only for confirmation rather than seeking to query or even to refute. What is clear is that to the extent that it did *not* do so, the evidential basis for possible adverse findings would necessarily be that much weaker. In short, as the Report itself notes, the Commission's efforts "to be both therapeutic in its processes and rigorous in its findings" actually pulled it in different directions (Report I:6 Appendix1, 19).

The final stage, that of *making findings*, involved a dedicated bureaucratic process in which the products of the TRC's increasingly sophisticated data-processing and information management, the work of statement-takers, data-processors, corroborating investigators and other staff, were fed into decision-making by the Commission itself. Technically this consisted in a sequence proceeding from *pre-findings* at regional levels, which were then coordinated by a National Findings Task Group, to the eventual *national findings* by the full Commission itself (Report I:6, 25-29; V:1, 58f). Practically it meant that the complex and multifaceted activities of the Commission, and the many different kinds of information generated by these, were systematically funnelled in service of the over-riding objective of making findings. The *findings* required a structured process of decision-making and the approval of the full Commission. The first step in this process was that of *regional pre-findings* (Report V:1, 58). These prepared the way both for *victim findings* and for *perpetrator findings*. It was the latter which more especially involved considerations of due process: "Findings emerging at this level of enquiry may have grave implications and impinge upon the fundamental rights of alleged perpetrators." (Report I:4, 85). For that reason the Commission had to conform to the principles of *audi alterem partem* and send legal notifications to those implicated concerning the allegations made against them (Report I:6, 26). A special Notification Unit was established for this purpose. The final stage was that of making *national findings*, both concerning victims and perpetrators, by the Commission (Report I:6, 26). These consisted of many hundreds of particular findings covering the period and extent of the TRC mandate; in the final volume of the TRC Report they were brought together in a number of summary findings around some of the main themes of the Commission's work, including a "primary finding" on the predominant role of the apartheid state and its security agencies in the commitment of gross violations of human rights.

2.6 The Structure of the TRC Report

In many ways the TRC Report represents the outcome of the Commission's commitment to making perpetrator findings, the results of the elaborate methodology it developed for this purpose. The centrality of the findings is evident from the structure of the Report. It is by no means the case that the findings are to be found only in the single chapter in the final volume headed "Findings" (Vol.5 Ch.6). This chapter brings together the findings from the various other volumes and chapters More specifically Volumes 2, 3 and 4 contain the main body of the substantive reports and particular findings in the different areas covered by the Commission's work. The special status of these findings are indicated in the text of the Report by being printed in bold capitals. In a very real sense the entire Report and its quite complex structure has been designed around the findings..

The vast amount of data reported in the three main substantive volumes of the Report is *not* presented primarily within a narrative or chronological framework as might perhaps have been expected. Indeed, for those of the TRC's critics who were concerned that its Report might well attempt to provide some kind of "master narrative" as an authoritative (authoritarian?!) version of the "real" history of recent political conflicts it must come as a surprise that the Report actually lacks any kind of overall narrative frame. At the outset of Volume 1 there is a chapter on the historical context (Ch.2) and Volume 2 begins with a "national overview" (Ch.1) but these are both functional introductions and do not provide anything like an overall framework. The material has been structured in terms of different kinds of partially overlapping thematic categories as well as a combination of national overviews and regional profiles. This leads to some actual duplications and overlaps, while in many other instances events dealt with as part of a regional profile might as well have appeared in the national review, or vice versa. It is especially with regard to Volumes 2 and 3 where the complications involved in the large number of overlaps and duplications are many and significant (these volumes are not made more accessible by the lack of a detailed analyical table of contents)..

What, then, is the rationale for adopting this complicated structure of presentation? On closer analysis it appears that there are two distinct organising principles. One of the organising principles informing this complex structure is that of dealing separately with the different parties or agencies involved in these political conflicts, i.e. with the different groupings who may be held accountable for gross violations of human rights. Thus in Volume 2 the different chapters is divided between the state and the liberation movements, while in Volume 3 the same practice is followed within each of the regional chapters. The second main organising principle becomes clear when we consider the internal or micro-structure of the chapters in the national review and the various regional profiles. Though some of these have a chronological element they are actually structured as far as possible according to the different *categories* of gross violations of human rights investigated by the Commission in relation to the different groupings actively involved in the political conflicts. In any particular section or sub-section what links the different cases dealt with are thus not primarily their chronological, causal or even contextual connections but that they pertain to a particular political grouping (e.g. the state or the liberation movements) and can be subsumed under a certain category of gross violations of human rights (e.g. deaths in detention or extra-judicial killings).

It needs to be stressed that this complicated structure of the Report has a number of significant consequences. Above all it greatly reduces the overall accessibility of the Report for general readers and researchers alike. For the uninitiated there is no ready guide to locate where any particular case is likely to be dealt with in the Report; in principle any given case might as well be dealt with as part of the national review in Vol.2 or in a regional profile in Vol.3 etc. In many cases the same incidents are actually dealt with in more than one place. More generally, it must be said that in these circumstances the absence of an index constitutes an almost insuperable barrier to all but the most dedicated readersl. No doubt a proper index will in time be provided, but it is quite inexcusable for the Report to be published without this vital tool to assist the reader.

The complicated structure of the Report is more than a matter of practical inconvenience. It also has a direct bearing on the conceptual and normative framework informing the Commission's attributions of reponsibility and accountability for gross violations of human rights, i.e. its perpetrator findings. The absence of a general chronological framework as well as of more particular contextual accounts means that individual cases are distributed according to the general categories of gross violations of human rights. This leads to an analytical "deconstruction" of causally (or otherwise) related events. In effect this amounts to an active decontextualisation of these events -- in order that they may be considered under some general category of gross violations of human rights. This applies both to victim findings as well as to perpetrator findings. As far as the consideration of victims are concerned the Report claims that its methodology "provided the basis for a powerful and sophisticated analysis of the data gathered" and that "this analytic capacity greatly enhanced

the quality of the final report" (Report I:6, 19). But it needs to be stressed that this comes at the price of a systematic decontextualisation, in effect a methodical "deconstruction" and "reconstruction", of these events in terms of the imperatives of data-processing for the purposes of making perpetrator findings. Much the same applies also to the consideration of the events in which perpetrators were involved. Part of the rationale for the methodology of data-processing adopted by the Commission is that it would greatly enhance its ability to identify and track perpetrators mentioned in victim statements derived from many different times and places. No doubt this was done, but the structure of the Report does not allow accounts following the activities of individual or groupings of perpetrators in any sustained way.

2.7 The TRC's Practice of Perpetrator Findings

With this we may then turn to the Commission's actual practice of perpetrator findings. We will be especially concerned with the moral logic of these perpetrator findings as attributions of responsibility and accountability for gross violations of human rights. It must at once be said that by no means all the Commission's findings are victim or perpetrator findings. The main thrust of the Commission's findings, though, involved three kinds of findings: 1) determinations of gross violations of human rights; 2) victim findings; and 3) perpetrator findings. We may consider 1) and 2) briefly, before turning to 3) as our main concern.

First, then, some of the Commission's findings consisted in *determining* either a particular event or a certain kind of event *as a gross violation of human rights* (Report I:4, 83, 85). Instances of the determination of certain kinds of events as gross violations of human rights include:

-- a finding that *judicial executions for politically motivated offences* constitute a gross violation of human rights (Report III:5, 53; II:3.37);

-- a finding that as severe ill treatment *bannings and banishments* constitute gross human rights violations (Report II:3, 20);

-- a finding that *deaths and injuries in the context of public order policing* could constitute gross violations of human rights (Report II:3, 67).

A basic consideration with regard to such determinations of gross violations of human rights was whether an action that could be justified in law might still be deemed a gross violation of human rights (this would apply to all three instances just cited: they could all be justified under apartheid law). The Commission held that the notion of unlawfulness was *not* implicit in the definition of gross violations of human rights (Report I:4, 87, 88). Accordingly the Commission could make determinations of gross violations of human rights concerning events or practices whether or not these were covered under apartheid and security legislation at the time.

Secondly the Commission made *victim findings,* in the sense of identifying the individuals who had been the subjects of such gross violations of human rights (Report I:4, 83, 84).This is logically tied in with the determinations of gross violations of human rights: if it is established that there had been a gross violation of human rights then then this must also involve a victim or victims. In practice there may, of course, be difficulties in actually *identifying* the victim(s) concerned.The Final Volume contains a separate listing of all the victims who had been identified (Vol.5 Ch.2). However, it provides nothing more than a mere listing of the names of the victims only while it is indicated that a complete list of the victim findings including brief summaries will be provided later. To this extent it must thus be considered that the Commission did not complete the process of making victim findings.

Thirdly, then we come to the making of *perpetrator findings* (Report I:4, 83, 85). Perpetrator findings in the sense of attributions of responsibility and accountability for gross violations of human rights involve additional considerations of legal and moral justification. It follows that not every gross violation will lead to a perpetrator finding (I:4, 87). There are also other and even more significant complications in the Commission's practice

of perpetrator findings. From the way in which the Report describes the basic inquiry involved in perpetrator findings ("What was the *identity* of those involved in such violations and what was their accountability for such violations?" (Report I:4, 83)) we might well expect perpetrator findings to be concerned first and foremost with the identification of *individual* perpetrators. There are indeed a number of such individual perpetrator findings. However, the number of individual perpetrator findings is much less than one might expect and the majority of perpetrator findings take rather different forms. In particular they tend to take the form of 1) findings on "systematic patterns of abuse" and on those responsible for these; and 2) "comprehensive findings" for certain categories of gross violations. Let us briefly consider each of these, before returning to the matter of individual perpetrator findings.

Section 4a) of the TRC Act stipulated that the Commission shall make inquiries into "(i) gross violations of human rights, including *violations which were part of a systematic pattern of abuse*" as well as "(iv) the question whether such violations were the result of deliberate planning ..." Accordingly one of the evident objectives of the Commission had been to establish relevant *patterns* of systematic abuse in the vast amount of the material generated by its hearings and investigations. Characteristic findings of this kind are, e.g., the Commission's finding on the unconventional military operations, including cross-border raids, abductions, entrapment killings etc,.by the SADF and SAP during the period 1983-1989 that these "constituted a systematic pattern of abuse which entailed deliberate planning on the part of the former cabinet, the SSC and the leadership of the SAP and SADF" (Report II:2, 376); or its finding that ANC-related killings of IFP office-bearers "constitute gross violations of human rights amounting to a systematic pattern of abuse, entailing deliberate planning." (Report II:4, 88).

A second type of non-individual perpetrator finding by the Commission is that of "comprehensive findings" on a whole category of violations. An example of such a comprehensive finding is that on "extra-judicial killings" (Report II:3, 509). Another such comprehensive finding concerns the systematic use of torture especially by the Security Branch and deaths in detention (Report II:3, 220). It will be clear that such comprehensive findings are closely linked with attributions of responsibilty and accountability not just to the individual agents or operatives involved in particular cases of gross violations, but in relation to the structures and institutions relevant to systematic abuses in certain general categories of violations. With this we come to the crucial question of the relation between individual perpetrator findings and official or collective responsibility.

2.8 The Moral Logic of the TRC's Perpetrator Findings: Attributions of Accountability to Individuals and in Official Capacities

A perhaps surprising feature of the Commission's perpetrator findings is that these do *not* typically take the form of individual perpetrator findings, i.e. of attributions of responsibility and accountability for gross violations of human rights to specifically named individuals. A list of specifically named individuals (which is *not* provided) would not be very long. Perpetrator findings are typically couched, instead, with reference to the official positions or institutional functions of those who are held responsible and accountable, in many cases without naming any specific names (though these may be provided elsewhere in special appendices). The actual practice of the Commission's perpetrator findings is more concerned with *official, institutional* and *collective* responsibility and accountability for gross violations of human rights. .

The report does contain a number of straighlforward perpetrator findings in which certain individuals are identified and named as responsible and accountable for particular gross violations of human rights. Some notorious or high profile figures in the state security forces are even the subject of repeated individual perpetrator findings of this kind, e.g. Major "Rooi Rus" Swanepoel. In a few cases individual perpetrator

findings are also made with regard to ANC and MK-operatives. However, the majority of the Commission's perpetrator findings do not name specific individuals in this way. As a rule the Commission's findings are more concerned with official positions and institutional or organisational functions than with individuals as such. A number of findings are explicitly concerned with the accountability of individuals *in* their official capacities (cf. e.g. Report II:2, 499; III:3,390 etc). In many other cases perpetrator findings do not identify any named individuals but refer only to the relevant official positions and/or organisational structures (cf e.g. Report II:3, 509). It is almost the standard form of such perpetrator findings that, whether or not named individuals are also identified, those in the relevant *official positions* are held accountable for specific gross violations of human rights or, in comprehensive findings, for a general class of such violations (cf e.g. Report III:6, 198). The net effect is that a range of official positions in the apartheid state, with or without their named incumbents, are systematically implicated as accountable for gross violations of human rights.

What is the significance of this stress in the Commission's practice of perpetrator findings on official positions and organisational functions? It is not clear in what sense an official position, rather than its incumbents, can be held responsible or accountable for a gross violation of human rights. Should the reference to such official positions in the Commission's various perpetrator findings thus be taken as a shorthand for the respective individual incumbents at the relevant times? With the help of the Appendix to Vol.2. Ch.3 it may indeed be possible to identify the particular individuals covered by these perpetrator findings but this does not appear to be the intention..

In various ways the relation between individual incumbents and official positions for the Commission's perpetrator findings is not only unclear but also problematic. A key issue concerns what difference the actual conduct of individual incumbents might make. A relevant case here is the Commission's comprehensive finding on a number of cross-border military raids in the 1980s during which a total of 82 persons, including a number of civilians, were killed (Report II:2, 463). The problem is that the Commission's comprehensive perpetrator finding applies in an undifferentiated way to some cases in which, e.g., Mr Pik Botha as Foreign Minister had been directly involved in the official authorisation for a cross-border raid and to other cases where he had *not* been involved and his personal and official roles had been of a different and even contrary nature. This suggests that such "institutional naming" in perpetrator findings are not necessarily based on the actual roles and conduct of individual incumbents.

Other problems with "institutional naming" as the form taken by the Commission's perpetrator findings may appear from its treatment of the judiciary, as well as of individual judges and magistrates, in this regard. There appears to be a general tendency to avoid identification of the judiciary in relevant perpetrator findings, while individual judges and magistrates are not named in perpetrator findings even where they had specifically figured in the corresponding accounts in the Report. As far as I was able to establish there is not a single case in which the judiciary or individual judges are named by the Commission as directly or indirectly accountable for gross violations of human rights in its perperator findings. Since they were individually and institutionally involved in what the Commission has determined as gross violations of human rights -- judicial killings for political offences and the refusal of evidence in court of evidence on the torture by the police of political detainees -- this is a notable omission. Compared to the numerous perpetrator findings by the Commission concerning other branches of the apartheid state this is a striking anomaly.

Let us consider the specific senses of *responsibility* and *accountability* for gross violations of human rights relevant to the Commission's practice of perpetrator findings. Until now we have been using the terms "responsibility" and "accountability" rather loosely in this context, without making any particular attempts either to distinguish between them or to explicate their relevant senses in more specific terms. In large part this is because the Commission's own usage and terminology is not especially precise or consistent. Broadly

speaking the Report is clear enough that the Commission's perpetrator findings are not concerned with issues of *legal* responsibility (Report I:4, 157d). There also does not appear to be any specific interest in what might be termed matters of *administrative* or *bureaucratic* responsibility. In general, the Commission's findings are concerned with *moral* and *political* responsibility and accountability. But how are these defined more specifically? How are findings of *reponsibility* for gross violations of human rights distinguished from findings of *accountability* for these? And what is involved in *moral* responsibility/accountability as distinct from *political* responsibility/accountability for gross violations of human rights? In some instances the Commission appears to be introducing a definite and coherent set of distinctions in its terminological usage, making findings of *responsibility* regarding (individual) operatives directly involved in the commission of particular gross human rights violations while making findings of (political) *accountability* regarding their superiors or those in positions of leadership who authorised or initiated these activities (cf. e.g. Report III:6, 726; II:2, 125). This may well be a helpful distinction -- i.e. attributing *responsibility* to the individual perpetrators directly involved in the actual commission of gross human rights violations while attributing *accountability* to those who authorised these operations or were in positions of oversight -- but the Commission does not employ it consistently and its usages in other places outs across this in various ways. In short, the Commission's own terminological usage cannot be said to be fully coherent or consistent. But this does not mean that we cannot reconstruct the main senses of responsibility and accountability relevant to its practice of perpetrator findings.

2.9 Critical Analysis: The Meaning and Status of Perpetrator Findings

How should the TRC's practice of perpetrator findings be assessed? What is the meaning and implications of these perpetrator findings? In what ways did the Commission's commitment to making such perpetrator findings prove problematical, and how are these related to the confrontation over "even-handedness" with the ANC? First, we need to analyse the relevant senses of the main types of perpetrator findings with somewhat more precision. Then we need to consider the rather problematic status of these perpetrator findings in three different contexts, i.e. in relation to the TRC report, in relation to the amnesty process, and in relation to the courts.

Analysing the spectrum: responsibility and accountability:

For analytical purposes it may be helpful to represent the Commission's varied and complicated practice of perpetrator findings on a spectrum ranging from those specifically concerned with individual perpetrators at one end to those primarily concerned with official positions or organisational structures at the opposite end. Consider, first, cases of *individual perpetrator findings*. As we have seen, these can pertain both to the individuals who were directly involved as operatives or agents in committing such gross violations as extra-judicial killings, torture or abductions as well as to those individuals, removed from the actual scene of these events, who initiated or authorised these operations or were in positions of leadership or oversight. We may perhaps distinguish between such individuals as *direct and indirect perpetrators*, where the relations between them will typically involve some specific chain of instruction, command or authorisation. Consider, next, cases of perpetrator findings with regard to official positions, structures or organisational roles which do not specify individuals in particular. We may term these *institutional perpetrator findings*. These are based not so much on chains of command or authorisation involving specific individuals as on comprehensive findings establishing systematic patterns of abuse for categories of violations. What are the relevant senses of moral and political *responsibility* and *accountability* in each of these kinds of perpetrator findings?

Taking our cue from the Commission's own usage we may distinguish between attributions of (moral) *responsibility* for gross human rights violations to individuals as direct perpetrators and attributions of (political) *accountability* to those in superior offices or positions of leadership. The latter may also be subject

to attributions of responsibility for gross violations of human rights but then this will be as indirect perpetrators. Conversely, individuals as direct perpetrators are not normally subject to attributions of accountability[32] (except in the sense in which they are answerable to their superiors).

Either way individual perpetrator findings will have consequences for the specific individuals concerned, but these differ for attributions of responsibility from those for attributions of accountability. An attribution of "responsibility" for a gross human rights violation to an individual agent or operative *directly* involved in its commission asserts that as the relevant agent the perpetrator is guilty of this violation and is subject to appropriate strictures and sanctions. Such responsibility and guilt should certainly be taken in a general *moral* sense and, absent specific provision for amnesty or indemnity, there is a strong presumption of liability for criminal prosecution and civil action against individuals held directly responsible for gross human rights violations. *Indirect perpetrators* may also have such individual "responsibility" for gross human rights violations, though in practice this would very much depend on the extent to which specific causal or intentional linkages can be established.

As against this an attribution of "accountability" for gross human rights violations typically applies to individuals in positions of leadership or authority relating to the policies, projects or struggles in which these atrocities occurred and asserts that, as such, they are answerable for these violations to some specific or more general constituency. Such answerability should certainly be taken in a basic *political* sense and implies possible political sanctions, demotion or removal of these individuals from the positions of leadership and authority concerned. Accountability in this sense, even for gross human rights violations, does not necessarily imply liability for criminal prosecution or civil actions for such individuals in relation to particular atrocities. *Indirect perpetrators* may also share such accountability in so far as they have subsidiary roles in political leadership or participate in processes of collective decision-making.

We may conclude that individual perpetrator findings thus tend to be more concerned with attributions of (moral and possibly criminal) *responsibility* for gross human rights violations to *direct* perpetrators while *indirect* perpetrators will rather tend to be subject to findings of (political) *accountability*. One way or another all *individual perpetrator findings*, as attributions of responsibility and accountability for gross human rights violations to direct or indirect perpetrators, will have consequences for those individuals who are "named" in this way. As against this *institutional perpetrator findings* are less likely to have consequences for any particular individuals even if they could be identified as the incumbents of the relevant official positions etc. What senses of responsibility or accountability for gross human rights violations are involved in "institutional naming"? When "the state", "the cabinet" or some other structure or official position is held *accountable* for gross human rights violations then this may be taken as identifying the institutional locus (or terminus) of the applicable arrangements for answerability. Institutional attributions of accountability do not automaticaly apply to individual incumbents whose political fate may be differentiated from the positions and structures in which they serve. They may, of course, have consequences for the official position or structure itself in so far as such institutional perpetrator findings indicate a need for reform or restructuring. Since the majority of such findings in the TRC Report concern structures or official positions of "the former state" they can, however, no longer have any particular consequences for these apart from those of historical stigmatisation.. (It may be different where the structure or position concerned is still current as with the Commission's perpetrator findings concerning the political leadership of the ANC).

Problems of Individual and Institutional Perpetrator Findings:

The foregoing analysis points to different ways in which the Commission's commitment to perpetrator findings may in practice prove to be problematic. First, the problem in the case of individual perpetrator findings

obviously relates to the adverse consequences which attributions of (moral or possibly criminal) *responsibility* for gross human rights violations may have for those so identified as direct or indirect perpetrators. There may be less of a problem in the case of attributions of (political) *accountability* to direct or indirect perpetrators precisely because the consequences are not necessarily so serious. But considerations of due process must come into play in cases where individual perpetrator findings open individuals up not only to general moral sanctions and strictures but, absent specific amnesty provisions, also to criminal prosecution and punishment. Here the problem thus concern the mandate and standing of the Commission, i.e. whether it is authorised to make adverse determinations of this kind, and whether its procedures comply with the requirements of due process and natural justice. The problem is that the TRC is *not* a legal tribunal, but that individual perpetrator findings of responsibility for gross human rights violations must draw it into the adversarial ambit of the courts.

The problem with regard to institutional perpetrator findings, secondly, is of a different nature. In so far as such "institutional naming" does not have adverse consquences for specific individuals considerations of due process do not come into play in the same way. Here the problem rather is the rationale for such "institutional naming" at all, especially where these concern structures or institutions which are no longer current. In the case of current political arrangements such institutional perpetrator findings may well serve important functions in highlighting the need for remedial action and reform. But when it concerns accountability for past gross human rights violations then institutional perpetrator findings may amount to a form of historical stigmatising.

Thirdly, there are the various intermediate positions on our spectrum where "institutional naming" may also have consequences for individual incumbents implicated as perpetrators responsible and accountable for gross human rights violations. Here the problem is the linkages required between specific events and individuals, on the one hand, and the general institutional roles and functions, on the other hand. In principle it may be possible to establish adequate linkages of this kind, as in the Commission's finding on the KTC attacks in May and June 1986 (Report II:3, 594). In many other instances, though, adequately specified linkages are not provided while the perpetrator findings do combine institutional and individual naming in various direct and indirect ways (cf e.g. Report III:6, 86 etc).

Reporting, Concluding, Making Perpetrator Findings:

It is important to clarify to what extent these problems are tied up specifically with the form and status of the Commission's perpetrator *findings* or pertains more generally to the contents and quality of the TRC Report. As we have seen the issue of "naming" the perpetrators has been a controversial issue for truth commissions.[33] However, a truth commission which entirely or largely avoids naming the names of the perpetrators would be self-defeating. On the other hand, truth commissions have themselves deliberately refrained from making actual perpetrator findings so as to avoid confusion with the function of the courts (above 2.3). It is thus not merely a question of naming or not naming the perpetrators; much depends on the specificity and the mode of naming appropriate to truth commissions. There are significant differences between *reporting* and even coming to *conclusions* on gross human rights violations, on the one hand, and making perpetrator *findings* regarding them, on the other hand. Naming of perpetrators may occur in all three modes -- that of reporting, of concluding and of making findings -- but its significance and consequences will be different in each case.

For the most part the TRC Report clearly indicates the distinction between its reporting sections and the Commission's formal findings (with the latter printed separately, in capitals and bold face). The reporting sections provide accounts of individual cases of gross human rights violations including the relevant particulars established by the TRC's investigations. For the most part such accounts do not merely convey the testimony or allegations provided by others but are presented in the form of factual statements as part of the Commission's own report. The relation between such accounts in the reporting sections and the Commission's

findings is *not* simply that of premises to conclusions. Rather, the reporting sections may include *conclusions*, both specific and general, which are distinguished from the Commission's formal *findings*. It is the status and function of these formal perpetrator findings, rather than the naming of perpetrators which occurs in the course of, or even as the conclusions of, reporting sections which are primarily at issue.

The significance of the Commission's formal perpetrator findings is not primarily a function of their informational specificity. These perpetrator findings are by no means the only ways in which perpetrators of gross human rights violations are "named." On the contrary, many more perpetrators are identified in one way or another in the course of the reporting sections. If the Report had been published without the formal perpetrator findings the public would not have been denied any specific information regarding them. Conversely, if only the formal perpetrator findings had been published without the corresponding reporting sections, then not only would a great deal of informational specificity have been lost, but many more perpetrators would not have been identified or "named" in any way at all. In short, the extent of "naming" by means of individual perpetrator findings cover significantly less ground compared to the "naming" of perpetrators which occur in one way or another in the reporting sections.

What, then, is the special significance of these formal perpetrator findings? Procedurally they are quite distinct. While the Commission approved the Report as a whole, including the contents of the reporting sections,[34] its perpetrator findings required a special procedure moving from regional pre-findings to national findings by the full Commission including legal notification. It is not clear to what extent direct and indirect perpetrators "named" in the reporting sections but *not* the subject of formal perpetrator findings were also notified. It is likely that there is a close correlation between notifications and perpetrator findings. In short, it is these formal perpetrator findings of the Commission which are meant to have a special weight and significance. But it is not clear just what the standing of these findings are. From our previous discussion it appears that there is a double problem involved, depending on whether we are concerned with the *individual* or with the *institutional* perpetrator findings. Let us briefly consider the former in relation to the amnesty process and to the courts.

Individual Perpetrator Findings and the Amnesty Process:

The Commission's individual perpetrator findings pose serious problems in relation to the amnesty process at two different levels. There are significant complications at a practical and procedural level; there are also serious confusions regarding their objectives in relation to those of the amnesty process.

Firstly, the practical and procedural problems involved with individual perpetrator findings arise from the lack of coordination between the TRC process in general and the semi-autonomous amnesty process itself especially as this affected the publication of the TRC Report. Due to the large number of amnesty cases still pending by the time that the TRC's own (already extended) mandate period ran out, the Amnesty Committee's own brief was extended beyond the effective end of the Commission's main activities in mid-1998. This posed a number of serious complications for the finalisation of the Commission's process of perpetrator findings and the publication of the Report. It meant that the Commission could not make formal perpetrator findings with respect to all individuals whose amnesty applications were still pending. However, the problem was actually much more serious than that. In practice amnesty applications constituted a major and indispensable source for the data-basis on which the Commission's perpetrator findings relied. Not only were the amnesty applications vital to the corroboration of victim statements, but individually and collectively they provided a large part of the new information regarding gross human rights violations generated in the course of the TRC process. The disjunction between the completion of the Commission's work and the incomplete state of the ongoing amnesty process thus posed a major dilemma for the TRC Report in general. Even if the data from the pending amnesty applications were available for the purposes of the Report these still had to be tested in

the actual amnesty hearings and it could not be anticipated which particulars might be effectively challenged. Strictly speaking publication of the Report thus would have to be postponed until the amnesty process, too, had run its course. In practical terms, though, it is difficult to conceive how the TRC staff and the Commission itself could be expected to reconvene after a lapse of some years in order to complete the process of perpetrator findings and the publication of the Report.

In the circumstances the Commission decided to go ahead with the Report and its own perpetrator findings even if the amnesty process remained incomplete. This is an understandable choice but also highly problematic. The problems are by no means adequately addressed merely by the Commission not making individual perperator findings in pending amnesty cases or indicating that these will eventually be provided in a "codicil" to the TRC Report. The fact of the matter is that the Report made extensive use of data derived from these applications and also rely heavily on these for making general and institutional perpetrator findings. However, strictly speaking all such data should be considered as subject to further review.

This problem is compounded by the highly unsatisfactory nature of the Amnesty Committeee's contributions to the TRC Report. These consist of a brief administrative report in Volume 1 and an "Interim Report" in Volume 5. In substantive terms the latter is virtually a non-report: it deals exclusively with the formation, procedures and challenges to the Amnesty Committee. An Appendix provides a mere listing of the names of the 122 applicants granted amnesty at the time of reporting. According to this Interim Report "the Committee gives reasoned decisions on each application. The Commission publishes these decisions" (Report V:3, 28). But no reasons or any substantive particulars concerning the amnesties granted are provided at all in the Amnesty Committee's Interim Report. Neither are any particulars, not even a listing of the names, provided for the almost 4000 cases in which amnesty had been refused.[35] According to the Amnesty Committee's Interim Report this "will be followed by a more detailed report which covers the rest of the period and will contain a full list of *all* matters decided by the Committee" (Report V:3, 3). For the time being, though, nothing like this is provided even for those cases which the Amnesty Committee had already dealt with.

The fact of the matter is that in practice the data derived from the amnesty process have been utilised in two different and independent processes, by the Amnesty Committee itself for the purposes of the amnesty process, and by the Commission for making its perpetrator findings. Though the Commission can hardly be blamed for the delays of the amnesty process or the unsatisfactoriness of the Amnesty Committee's Interim Report, the gaps and anomalies which resulted from this have in practice seriously undermined the possible integrity of the Commission's enterprise of making perpetrator findings.

However, the Commision's commitment to perpetrator findings did not only encounter practical complications of this kind in relation to the amnesty process; there are also serious questions whether the objectives of the two processes are in principle compatible with each other. The Commission's statements that it cannot make perpetrator findings on individuals whose amnesty applications are still pending strongly suggests that this is a practical difficulty only and that such findings are to be expected once these amnesty cases have been decided. On closer analysis, though, the position is less clear.[36] What about those amnesty applications which had already been decided? Due to the absence of particulars provided by the Interim Report of the Amnesty Committee, as well as the lack of specific cross-references or an index for the Report itself, it is no easy task to establish whether the Commission did or did not make individual perpetrator findings in such cases. However, in some cases where it has been possible to check this, it turns out that the Commission did *not* make individual perpetrator findings concerning such cases as the assassination of Griffiths Mxenge in 1982 (for which Dirk Coetzee and Albert Nofomela were granted amnesty), the killing of Amy Biehl in August 1993 (for which Mongezi Manqina and two others were granted amnesty), the Heidelberg Tavern attack in December 1993 (for which Luyanda Gqomfa and two others were granted amnesty) etc. This does not appear

to be an accidental oversight. On further reflection it becomes clear that it would indeed be anomalous for the Commission to make individual perpetrator findings regarding individuals who have been granted amnesty for gross human rights violations.

In a sense the amnesty process itself amounts to nothing less than a procedure for voluntary submission to perpetrator findings and being held responsible for these. Amnesty applicants are required to make full disclosure of the gross human rights violations for which they seek to be indemnified; if amnesty is granted, their names and the relevant particulars are to be published by the Commission. Given this, the need for the Commission to make any further individual perpetrator findings in their cases falls away. It may perhaps be argued that the gross human rights violations to which applicants have actually admitted must be prime cases for individual perpetrator findings. But it would surely be a contradiction for the Commission to make perpetrator findings regarding the same individuals to whom the Amnesty Committee has granted amnesty. In short, it would be either a needless duplication or a contradiction for the Commission to make individual perpetrator findings on those who have been granted amnesty.

This leaves two other categories of perpetrators, those whose amnesty applications were not granted and those who did not apply for amnesty at all. In the former case individual perpetrator findings by the Commission may conceivably be complementary to refusals of amnesty applications by the Amnesty Committee for such reasons as denial of guilt or lack of full disclosure. However, the overwhelming majority of amnesty applications refused by the Amnesty Committee have been due to the absence of a political objective (2629 cases out of 4020) and presumably this would also disqualify these as possible cases for individual perpetrator findings in the TRC context. In either case there would be a need for very close coordination between amnesty refusals by the Amnesty Committee and the Commission's own perpetrator findings while in practice these appears to have been quite distinct processes.

The majority of the individual perpetrator findings by the Commission most probably concern those who did *not* apply for amnesty. If so, then the relation of these findings to the amnesty process is problematic in various ways. First, it transpires that the TRC actually involved two distinct processes of dealing with the perpetrators of gross human rights violations, that of the amnesty process and that of the Commission's own perpetrator findings. In the case of the amnesty process, those who voluntarily applied, made full disclosures and met the relevant criteria were granted amnesty even if they had been publicly established as perpetrators of gross human rights violations. By comparison the Commission's own process of perpetrator findings largely concerned those who did *not* apply for amnesty but who were found by the Commission, on the basis of available corroborated evidence, to be responsible and accountable for the perpetration of gross human rights violations. Moreover, in doing so the Commission very heavily relied on the data generated by the amnesty process as well as by the victim hearings. While the amnesty process resulted in indemnities to self-confessed perpetrators of gross human rights violations the Commission's own findings process resulted in individual perpetrator findings regarding those who did not admit to such gross human rights violations nor applied for amnesty. In short, the very objectives of the amnesty process and of the Commission's process of making individual perpetrator findings appear to be in conflict with each other: amnesty means that self-confessed perpetrators are not prosecuted and punished, while the TRC's perpetrator findings mean that the Commission makes judgements without a legal process.

Perpetrator Findings and Legal Verdicts:

The problems in relation to the amnesty process of the Commission's individual perpetrator findings, also apply to the relation of such findings to the courts. In principle there is supposed to be a definite relation of complementarity between the amnesty process and possible prosecution in the courts. Perpetrators of gross

human rights violations who have been granted amnesty are thereby indemnified from both criminal prosecution and civil action with respect to these violations. Conversely, those whose amnesty applications were refused, as well as those who did not apply for amnesty, remain liable to both criminal prosecution as well as civil actions. The threat of possible criminal prosecution or civil action served as a major incentive inducing reluctant perpetrators to submit themselves to the amnesty process; on the other hand, the information about a range of gross violations of human rights disclosed in the course of amnesty applications by some perpetrators greatly strengthened the prospects for effective prosecutions of others. In this way the amnesty process need not function merely as an alternative to *justice* but could also indirectly come to serve it.

However, by interposing its individual perpetrator findings between the amnesty process and the criminal justice system this complementarity may in various ways be complicated and even compromised. What is the *legal* standing, if any, of the Commission's perpetrator findings? As we have seen the Commission generally refrained from making *legal* determinations, evidently recognising that this is the terrain of the courts. A notable feature of the Commission's perpetrator findings are that these very rarely include recommendations of referral to the prosecuting authorities. What then is the relation of such perpetrator findings by the Commission supposed to be to criminal prosecutions or to legal verdicts on the same events? Do they function entirely independently, or do they in some way complement or even replace the verdicts of the courts?

This problem is posed most starkly in relation to the controversial 'Kwamakutha trial' of 1996. In this case a number of high profile figures, including the former Minister of Defence Magnus Malan (but not dr. Mangosutho Buthelezi) were prosecuted in connection with the covert training of an Inkatha group and their involvement in the Kwamakutha massacre of 1987. Justice Hugo found General Malan and his main co-accused not guilty, which they then interpreted as a vindication of their innocence by the criminal justice system. The Commission conducted a comprehensive further investigation of its own into Operation Marion, the covert state security project of which the Caprivi training scheme and subsequent actions formed part. It came to contrary conclusions than the court in part due to a number of serious questions regarding the defective conduct of the prosecution in the Kwamakuthu trial. In response to urgings that it should accept the verdict of the court the Commission instead made its own finding. Notably the Commission's finding did *not* recommend that the courts should re-open the case or consider new prosecutions. Instead the Commission made its own perpetrator finding identifying 22 named individuals as accountable for these gross violations (including both Genl. Malan and dr Buthelezi). (Report III:3, 182). In effect this means that the Commission has made individual perpetrator findings of accountability for gross violations of human rights with respect to some of the same individuals and events in which a criminal court had returned a contrary verdict. Whatever the merits or demerits of the Commission's perpetrator findings may be compared to that of the court in this particular case, there evidently are more general questions regarding the standing of its perpetrator findings in relation to the criminal justice system. It is especially striking that the Commission did *not* take the route of referring what it considered a defective verdict back to the courts for reconsideration, but offered its own perpetrator findings instead. It is difficult to see how this can be interpreted otherwise than as an attempt to provide some kind of quasi-legal determination by the Commission even if it otherwise recognises that it is not a legal tribunal. It is not clear what the implications may be for possible criminal prosecutions or even civil actions in this case or more generally. In short, with perpetrator findings of this kind the Commission is venturing onto the terrain of the courts without sufficient clarity on the status and implications of its determinations in relation to the criminal justice system.

We may then conclude that in practice as well as in principle the Commission's commitment to perpetrator findings is highly problematic and misdirected. If the Report had been confined to the "naming" of perpetrators in reporting mode, leaving it to the courts and other bodies to take appropriate action, the Commission could have fulfilled its investigative mandate with equal and even greater informational specificity. But by setting

out to make its own individual perpetrator findings the Commission encountered serious complications both in relation to the amnesty process and the criminal justice system.

3 Conclusion: Revisiting the TRC's Perpetrator Findings and the ANC

We are now in a position to revisit the issue of the confrontation between the ANC and the TRC around the submission of the TRC Report. Our analysis has been designed to show that it is the TRC's perpetrator findings regarding the ANC which, more than anything else, accounts for this confrontation. In a sense the ANC's comments that the TRC had "misdirected itself" in its findings have proved correct, though not in the sense intended by the ANC itself. The misdirection did not consist in the TRC's "even-handed" making of perpetrator findings on the ANC as well as on the leaders and agents of the apartheid state, thereby setting up a "moral equation" between what was done in the liberation struggle and in defence of apartheid. Instead, the misdirection consisted in the TRC's commitment to making perpetrator findings at all. The TRC was correct in insisting on the fundamental distinction between a just cause and justice *in* war; it also deserves considerable credit for standing firm on the principle that gross violations of human rights had to be dealt with even-handedly irrespective of the justice of the cause of the different parties to the conflict. It could have done this merely by *reporting* the truth about gross human rights violations, including the paticulars of victims and perpetrators. Such reporting could have included a range of factual and other findings as well as possible policy recommendations. But it need not have included formal *perpetrator findings,* as definitive attributions of responsibility and accountability for gross human rights violations; the Commission could quite simply have reported the truth as it found it, naming the names of victims and perpetrators, but then leaving it to the courts or to other appropriate institutions of society to make whatever further judgements are necessary. However, once the Commission had set itself up for the purpose of making perpetrator findings, it was thereby also committed to do so on an even-handed basis. If it was to make perpetrator findings at all, then it followed that this had to be done in the same way no matter who had committed such gross human rights violations.The commission could not make perpetrator findings on the political leaders and functionaries of the apartheid state, but not do the same with regard to possible abuses or atrocities committed in the course of the liberation struggle. If this amounted to a "moral equation" between apartheid and the liberation struggle by generating "perpetrators" on both sides, then the mistake lay in the commitment to make perpetrator findings at all, rather than in doing so even-handedly. The problem came about when the truth commission as an essentially investigative body took on a quasi-legal role of sitting in judgement on alleged perpetrators and bringing it into the domain better reserved for legal tribunals and the courts.

It follows from the argument of this paper that neither the TRC nor the ANC fully grasp what it is that have brought them into confrontation and conflict with each other over the TRC Report. The explanation, I contend, is to be found in the nature of the TRC's findings on the ANC as *perpetrator findings*, holding the organisation and its leadership explicitly and formally accountable and responsible for gross human rights violations. In effect the ANC responded not so much to the TRC Report as a whole or to the findings in the context of that Report. Prior to the publication of the Report the Commission had to serve legal notification in terms of section 30(c) to all individuals who might be adversely affected by its perpetrator findings, including those in the ANC. In other words, before they would have had any opportunity to see and assess the full Report, including the Commission's rationale for its interpretation of its mandate, or the various ways in which the ANC's known concerns about a possible "moral equation" between apartheid and the liberation struggle had been accommodated, leading figures in the ANC received legal notifications that the Commission proposes to make perpetrator findings about them in the Report. What they were confronted with, quite literally, must have been lawyers' letters informing them that they are to be held formally accountable and responsible as perpetrators of gross human rights violations in the findings of the TRC Report. Presumably the ANC would not have had serious objections against such perpetrator findings on the apartheid state and

the NP leadership; indeed, it is likely that for those who found it difficult to go along with amnesty for the killers and torturers of the apartheid state *perpetrator findings* of this kind might provide a minimal substitute. But it was altogether another matter for the TRC to make such perpetrator findings about the ANC as well.

How did the Commission more specifically motivate and justify its actual perpetrator findings on the ANC? In conclusion we may briefly look at some of the specific considerations advanced in this connection in the Report. This will also serve to bring out some of the underlying issues and assumptions involved in our thinking about political and collective accountability for gross human rights violations.

The need for such a rationale is all the more important since the Commission was only too well aware of the difficulties and complications in making attributions of responsibility and accountability for the gross human rights violations which occured in the context of the liberation struggle. Thus the chapter on the Liberation Movements in Volume 2 includes a discussion of the problems of ascertaining the political accountability of the ANC and UDF for gross human rights violations committed by their supporters in the context of the emergent "people's war' during the 1980s. The Report actually comments that "the 'naming' of the ANC as a perpetrator organisation during this period is often inaccurate" (Report II:4, 92). In a similar finding with regard to the Mass Democratic Movement the Commission "acknowledges that it was not the policy of the UDF to attack and kill political opponents" (Report II:4, 229). But this did not prevent the Commission from making perpetrator findings on the ANC and UDF. The Report also observed that "both the ANC and the leadership of the mass movement must bear some general responsibility for atrocities that occurred in this period, committed usually by youths acting in the name of the liberation struggle" (Report II:4, 93). More than that, the Commission went on to make explicit perpetrator findings regarding the accountability of the ANC leadership for atrocities committed by its members and supporters

> " The Commission finds that the ANC is morally and politically accountable for creating a climate in which such supporters believed their actions to be legitimateand carried out within the broad parameters of a 'people's war' as enunciated and actively promoted by the ANC" (Report II:4, 97)

Similarly the Commission held the UDF accountable for the facilitation of gross human rights violations and found more specifically that

> "the UDF and its leadership failed to exert the political and moral authority available to it to stop such practices ... In particular the UDF and its leadership failed to use the full extent of such authority to end the practice of necklacing, committed in many instances by its members and supporters" (Report II:4, 229).

On what grounds did the Commission base such perpetrator findings on the ANC and UDF despite the acknowledged difficulties in ascribing accountability for gross human rights violations in these contexts? The Report provides two different and highly revealing motivations. The first involves an actual appeal to the need for even-handed treatment in attributions of responsibility and accountability for gross human rights violation. In its finding on the accountability of the UDF the Commission includes the following motivation: "*Inasmuch as the state is held accountable* for the use of language in speeches and slogans, *so too must the Mass Democratic Movement be held accountable*" (Report II:4, 229). This explicitly postulates an analogy between the assessment of the conduct of the NP leaders and other functionaries of the apartheid state and that of the political leadership of the anti-apartheid struggle. It must immediately be added, though, that the analogy is applied in certain respects only, and is not repeatedly or consistently utilised.

More significant is another motivation which is used repeatedly in different contexts. In its finding on the UDF the Commission also added the following concluding observation:

> "The Commission notes that the political leadership of the UDF has *accepted political and moral responsibility* for the actions of its members. *Accordingly the UDF is accountable* for the gross violations of human rights committed in its name and as a consequence of its failure to take steps..." (Report II:4, 229).

Essentially the same motivation is provided for the Commission's perpetrator findings regarding the leadership

of ANC and MK for political atrocities during the period from 1990 to 1994 (Report II:7, 460). At first glance the argument that if the ANC had *taken political and moral responsibility* for certain actions of its members or done in the name of the organisation, then it follows that it can be *held accountable and responsible* for such acts has a certain plausibility. On closer analysis, though, it will appear that this is a misleading argument and one that actually is highly revealing about the problems associated with the Commission's perpetrator findings. The point is that neither the ANC nor the UDF ever took political responsibility *for gross violations of human rights*. They did take responsibility for certain actions in the course of the liberation struggle, as the leaders and spokesmen of political organisations commonly do, but rightly or wrongly they maintained that those actions were justified and necessary for the conduct of their campaigns and struggle. Indeed in taking political responsibility for such actions these would implicitly or explicitly be associated with the objectives of that struggle. It is the Commission which has determined that some of these actions are *not* justified and that they actually constitute gross violations of human rights. In doing so, the Commission may indeed be correct, but they are also putting a fundamentally different characterisation on the significance of these actions from that initially maintained by the political leadership of the ANC or UDF. In other words it is not permissible to go from the ANC/UDF *taking political responsibility* (for certain actions in the course of the struggle) to the Commission *holding them accountable and responsible* (for the same actions now determined to be gross violations of human rights). The crucial step in going from the premises to the conclusion of this argument, and the implicit premise in any perpetrator finding, is the Commission's *determination* that such actions actually constitute gross violations of human rights. But what is the meaning and status of such a determination? Who can make it, and on what grounds, or according to what procedures? Is it appropriate for a truth commission, essentially an investigative body and not a legal tribunal, to make such determinations? What is the relation between a general determination of this kind and its application to particular cases in individual perpetrator findings? Is a truth commission properly constituted and authorised to make individual perpetrator findings? What would be the relation of such perpetrator findings to the amnesty process, on the one hand, and to the courts, on the other hand? With this we are back to the basic problems regarding the meaning and status of the Commission's perpetrator findings discussed above.

We are also referred to the intractable and profound problems involved in how our society wants to deal with basic issues of political responsibility and accountability especially for gross violations of human rights. Just what does it mean when the leaders of political movements and organisations commonly say that they "*take responsibility*" for certain actions? Does that mean that they can formally be "*held accountable*" for these actions, especially if it is later determined that these also involved gross violations of human rights? If the political leaders concerned fails to take such accountability for the past actions associated with their movement or organisation, who is in a position to sit in judgement on them? The Commission may well be right that at the time, in the heat and confusion of the liberation struggle, some important slippages occurred in the ANC's approach to violations of human rights which occurred in its own ranks. The Commission may also be correct that the right thing for the ANC leadership to do now would be to accept accountability for these past violations (just as it would be the right thing for FW de Klerk and the NP leadership to accept full responsibility for the major gross violations with which they are associated). If they fail to take on such responsibility in clear and unambiguous ways when offered the opportunity to do so in the context of the TRC process, then Archbishop Tutu may well have reason to be profoundly disappointed in them. If anyone is in the position to tell the ANC leadership that they should have spoken out sooner and more clearly against such atrocities as necklacing, then it is the Archbishop who personally intervened on several occasions to save individuals from crowds threatening to kill them. But this special moral authority is an exceptional case. The rest of us is hardly in a position to sit in judgement, with the benefit of hindsight from the perspective of 1998, on what would have been the right thing to do for the ANC or UDF leadership in the context of 1985/86. That applies to the TRC as well. As a truth commission it provided a major service by *reporting*fully, frankly and dispassionately on the gross human rights violations in our recent past, acknowledging the victims and naming

the names of the perpetrators. In the process it brought into the open many uncomfortable truths which political leaders, including the ANC, would rather like to be forgotten. This will pose a major challenge to those political organisations, and also to institutions of civil society, not to forget the courts, as to how they will deal wih the torturers and murderers revealed to be in their ranks. But when the Commission took the further step of taking it on itself to make *perpetrator findings*, it entered uncharted and dangerous waters, effectively overstepping the boundaries of an investigative body, and venturing onto terrain better reserved for the courts.

The final irony may be that the TRC's commitment to the making of perpetrator findings is in large part due to a misplaced effort to see that some minimum of *justice* is done with regard to the perpetrators of gross violations of human rights. Due to its association with the amnesty process the TRC has commonly been castigated for its failures to see that justice is done and it has been widely depicted and criticised for proposing *truth* as an alternative to the demands of justice. But while this "Truth" vs "Justice" debate has been proliferating in discussions on the TRC, the Commission itself almost unbeknownst started out in a different direction, that of its perpetrator findings. As attempts to make authoritative determinations of responsibility and accountability for gross human rights violations the Commission's perpetrator findings are evidently inspired by the demands of *justice* rather than those of *truth* only. In the circumstances this is entirely understandable, but it has also proved unwise as the unfortunate confrontation with the ANC has shown. We may conclude, then, that the Commission would have done better to stay within the essentially investigative functions of truth commissions and to leave perpetrator findings and institutional stigmatisations to the courts, the political leaders and other institutions of civil society.

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1.Opening Address by President Nelson Mandela in the Special Debate on the Report of the Truth and Reconciliation Commission, Parliament, 25 February 1999 (italics added)

2.Thabo Mbeki: Statement on the Report of the TRC, Joint Sitting of the Houses of Parliament, Cape Town, 25 February 1999

3.Submission of the African National Congress to theTruth and Reconciliation Commission in Reply to the Section 30 (2) of Act 34 of 1996 on the TRC: "Findings on the African National Congress", October 1998

4. Carlos Nino, Radical Evil On Trial, p.81

5.Carlos Nino, Radical Evil On Trial, p.134

6.Carlos Nino, Radical Evil On Trial, p.134:

7. Reconciliation Through Truth, pp .14-15

8.Reconciliation Through Truth, p.63

9. Reconciliation Through Truth, p. 41.

10.For examples of such criticism from different political perspectives see, e.g., Robert Fine & Dennis Davis, "The Turn to Armed Struggle", Ch.10 of Beyond Apartheid: Labour and liberation in South Africa (1990), pp.230-255, and R.W.Johnson, "The Sharpevill Crisis and the Defeat of the Revolution", Ch.1 of How long Will South Africa Survive? (1977), pp.17-25.

11. SAPA report 22 October 1996

12.Statement by Archbishop Desmond Tutu, Chairperson, Truth and Reconciliation Commission, October 25, 1996

13. Mail & Guardian, ZA*NOW, 11 November 1996

14.SAPA reports14 May 1997: "NP objects to cross-examination of de Klerk at TRC"

15.Antjie Krog, Country of My Skull, 124

16. Americas Watch, Truth and Partial Justice in Argentina: An Update (1991) in: Neil J Kritz (ed), Transitional Justice Vol.II , p.330

17. Americas Watch, "Truth and Partial Justice in Argentina: An Update" (1991), in: Neil Kritz (ed), Transitional Justice Vol .II, p.328. CONADEP submitted over 1000 cases of "disappearances" to civilian courts for judicial investigation (Amnesty International, Argentina: The Military Juntas and Human Rights, 1987 in Kritz (ed), Transitional Justice, Vol. II, p.337)

18.Carlos Nino, Radical Evil on Trial, p.80

19. Servicio Paz y Justicia, Uruguay Nunca Mas (1989), in: Neil Kritz (ed), Transitional Justice, Vol .II, pp.424, 429

20.Servicio Paz y Justicia, Uruguay Nunca Mas (1989), in: Neil Kritz (ed), Transitional JusticeVol .II, p.425

21.Servicio Paz y Justicia, Uruguay Nunca Mas (1989), in: Neil Kritz (ed), Transitional Justice, Vol .II: p.424

22. David Weisbrodt and Paul W Fraser, "Book Review Report of the Chilean National Commission on Truth and Reconciliation", *Human Rights Quarterly* 14 (1992), in: Neil Kritz (ed), Transitional Justice, Vol .II: p.472

23. Jose Zalaquett, "Balancing Ethical Imperatives and political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations", *Hastings Law Journal* 43 (1992), p.

24. David Weisbrodt and Paul W Fraser, "Book Review Report of the Chilean National Commission on Truth and Reconciliation", *Human Rights Quarterly* 14 (1992), in: Neil Kritz (ed), Transitional Justice, Vol .II, p.473

25.Report of the Commission on the Truth for El Salvador: From Madness to Hope U.N . Doc. S/25500, Annexes (1993) at 25

26.Priscilla Hayner, "Fifteen Truth Commissions -- 1974 to 1994: A Comparative Study", *Human Rights Quarterly* 16 (1994), p.(TJ I: 242) ; Thomas Buergenthal, "The United Nations Truth Commission for El Salvador", *Vanderbilt Journal for Transnational Law*27 (1994) p (TJ I: 306-307)

27.Thomas Buergenthal, "The United Nations Truth Commission for El Salvador", *Vanderbilt Journal for Transnational Law*27 (1994) p (TJ I: 308)

28. Douglass W.Cassel Jr, "International Truth Commissions and Justice", *The Aspen Institute Quarterly* 5 (1993) p. [TJ I: 326,333]

29. Douglass W.Cassel Jr, "International Truth Commissions and Justice", *The Aspen Institute Quarterly* 5 (1993) p. [TJ I: 329]

30.Douglass W.Cassel Jr, "International Truth Commissions and Justice", *The Aspen Institute Quarterly* 5 (1993) p. [TJ I: 330-331]

31. *Promotion of National Unity and Reconciliation Act*, Republic of South Africa, 1995, Section 30

32.Admittedly this is contrary to an established usage in terms of which both criminal prosecutions and amnesty applications are seen as procedures for effecting "accountability" in some broad sense. Perhaps this broad sense of "accountability", of which attributions of *responsibility* in the sense indicated here may be regarded as a sub-species, should be distinguished from *(political) accountability* more narrowly defined in the present sense.

33.Cf. Ch. 5: "Naming the Guilty" of the forthcoming book by Priscilla Hayner.

34. But see the qualmss concerning the commission's actual procedures in this regard expressed in the minority report by Commissioner Wynand Malan: TRC Report Vol 5: Minority Position, 6-10

35.The administrative report in Vol.1 of the TRC Report contains a table with statistical information concerning different categories of amnesty applications as at 30 June 1998 (TRC Report, Vol 1, Ch. 10, p.276)

36.It appears that the Commission actually did make individual perpetrator findings in some cases even if amnesty applications were still pending.