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Article

'Just war' and 'Just means': Was the TRC wrong about the ANC?

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Introduction

When the report of the South African Truth and Reconciliation Commission was released in October 1998, nobody liked it. To be precise, none of the main protagonists in the South African conflict liked the findings it made about them. Superficially, at least, this seemed a good sign for of course, no perpetrators of human rights violations like to be found publicly to be violators of human rights. The fact that the TRC made such findings against all parties to the conflict made it seem as if at the very least, the TRC had been even-handed in its judgements. TRC staff could be heard muttering words to the effect that 'if all sides criticise us, then we must have done something right'.

However, it soon became clear that there were negative implications for the non-acceptance of the TRC's findings. In the special sitting of both houses of parliament to debate the TRC report, held on 25 February last year, almost all of the parties in government castigated the report. In the course of a highly emotional and at times irrational debate, one IFP member, MA Mncwango, went so far as to say it would be 'consigned to the dustbin of history'. The most serious statement, however, was made in the introductory speech by then Deputy President Thabo Mbeki, who complained that the ANC had not been able to meet with the TRC to discuss its findings against the ANC. Mbeki then made the following statement:

What we had sought to discuss with the TRC pertained to such obviously important matters as the definition of the concept of gross violations of human rights in the context of a war situation and other issues relating to war and peace and the humane conduct of warfare. One of the central matters at issue was, and remains, the erroneous determination of various actions of our liberation movement as gross violations of human rights, including the general implication that any

and all military activity which results in the loss of civilian lives constitutes a gross violation of human rights... Indeed, it could also be said that the erroneous logic followed by the TRC, which was contrary even to the Geneva Conventions and Protocols governing the conduct of warfare, would result in the characterisation of all irregular wars of liberation as tantamount to a gross violation of human rights. We cannot accept such a conclusion.... (Hansard February 5 – March 26, 1999)

These criticisms, which amount to a refusal to accept the TRC's findings, will surely impact upon the acceptance and stature of the TRC report among the majority of South Africans. After all, most South Africans voted for the ANC and supported its liberation struggle. If the ANC dismisses the TRC as being in some fundamental way wrong, this could mean that the TRC 'project' is in jeopardy. What implications does this have for reconciliation, for the creation of consensus about history, and for future respect for human rights by both the government and the citizens of South Africa?

I take the parliamentary debate, which took place some six months after the release of the TRC's report, as a more significant indicator of the ANC's response to the TRC than its initial reaction on the eve of the release of the Report in October 1998. The events surrounding the ANC's application to the High Court 'for an interdict to stop (the Commission) from publishing any part of the report that implicated them in human rights violations until (the Commission) had considered their submissions' (Tutu 1999:211-2) are complex, and involved errors of judgement on both sides. On the Commission's side, the wording of the 'findings notice' sent to the ANC was hastily drafted, inaccurate in places and possibly perceived as insulting or crude in that it did not give the context in which the findings were made. The ANC, for its part, failed to meet the given deadlines in responding to the findings, which all 'perpetrators' had served on them. Some feel that the ANC's response was a 'kneejerk' one, and that it shot itself in the foot by reacting so strongly. The surprise felt by the TRC, including Archbishop Tutu, to the ANC's legal challenge was real. As Tutu noted, 'I must say that some of us were taken aback, since we had believed that the notice would be a mere formality with the ANC. The contemplated finding had been based on the ANC's own very substantial, full and frank submissions ...' (Tutu 1999:208).

While the anger of the ANC leadership at the TRC's 'findings notice' may be understood in this context, it is harder to understand the statements

made at the parliamentary debate, after the dust had settled and after the ANC had had time to peruse and discuss the TRC's report thoroughly and in its entirety. Those who participated in the parliamentary debate took care to make it clear that they saw the report as an 'interim' document', and hoped that the 'final report' to be released after the amnesty hearings were completed, would rectify some of the 'failures' of the October 1998 version. The Speaker of the House, in concluding the debate, stated that it was not 'the occasion to accept the report or to reject it, but merely to acknowledge its importance and respond to it'.

It is of course possible that when the TRC commissioners meet later this year, after the amnesty hearings have been completed, they will revise their findings in the light of information received at amnesty hearings. The findings of the amnesty committee are to be published in the form of a codicil to the report, and it is likely that this will add a substantial amount of detailed information to the existing five-volume report.

Yet it is naïve to believe that the TRC will adopt a codicil which substantially differs from the findings in the initial report, or that the public perceptions of the TRC are going to change in this last stage of the process. In fact, following the ANC's (and other parties') perceived rejection of the report, public interest in the TRC has waned. Except for those awaiting the outcome of amnesty applications, or those who still (probably in vain) anticipate some form of reparations, many South Africans – both black and white – are inclined to regard the TRC as an expensive exercise which should have been more speedily concluded. It is precisely because the implications in terms of loss for the South African polity, and the dangers of future human rights violations, are so great that it is important that the perceived failures or inaccuracies of the TRC be taken seriously.

More recently, some independent or 'non-party' observers, most notably Anthea Jeffery (1999) of the South African Institute of Race Relations, have also criticised the TRC report and its findings. Some of these criticisms are substantial, and deal with questions of the TRC's methodology in its investigations and the making of findings. They also reflect accurately on some of the weaknesses of the TRC process. However, it is argued below that the criticisms of certain of the TRC's findings in relation to the ANC and its allies (such as the UDF) are unfounded.

This article, therefore, focuses specifically on the TRC's findings as regards the ANC, and examines the bases of the criticisms of these findings. It looks, on the one hand, at the ANC itself, which found that the

TRC had been 'too hard' on it. On the other, it looks at those opponents of the ANC and critics of the TRC who found that the TRC had been 'too soft' on the ANC.

What was the TRC's finding on the ANC?

In its overall finding on the South African liberation movements, the TRC (1998, vol 2, ch 4:235) stated as follows:

In reviewing the activities of the ANC and the PAC, the Commission endorses the position in international law that the policy of apartheid was a crime against humanity and that both the ANC and 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 NEC, the NWC, the RC, the Secretariat and its armed wing MK, and the PAC and its armed formations Poqo and 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.¹

Elsewhere in its discussion of the activities of the liberation movements, other more detailed findings were made. Three kinds of actions were found to be gross violations of human rights. These were the planting of bombs and landmines by MK where civilians were killed or injured; the killing of informers or state witnesses; and the torture and execution in exile of suspected agents or mutineers. The ANC was also found to have been responsible for killing political opponents in the post-1990 period and for 'contributing to a spiral of violence' through the creation of SDUs (Self-Defence Units) in this period. The ANC was also held to be accountable for 'creating a climate in which ... supporters believed their actions to be legitimate and carried out within the broad parameters of a "people's war" as enunciated by the ANC'. The local structures of the ANC, UDF and MK were held to be responsible for the systematic killing of IFP office-bearers while the UDF was held accountable for gross violations of human rights through its failure to control its supporters in particularly the late 1980s. Finally, a set of serious violations findings, including conspiracy to murder, abduction and torture, were made against Winnie Mandela.

There is a considerable amount of contextualisation and justification given in the report for reaching these findings, and the reader is encouraged to read these sections in order to understand the findings more thoroughly. It is also perhaps pertinent here to remind readers that even more severe or

damning findings were directed at the former National Party government and the Inkatha Freedom Party.

Was the TRC 'hard' on the ANC?

There appear to have been a number of grounds upon which the ANC based its objection to the TRC's finding that it had been responsible for 'gross violations of human rights'.

First, the ANC took great exception to what it termed the TRC's 'moral equivalence', that is, the equating of the actions of those who fought for a just cause (against apartheid) with those who fought in defence of an unjust cause (for the apartheid state). Second, the ANC claimed that the TRC had applied one set of law (South African) to the South African/apartheid state authorities, and another set of law (international) to the liberation movements. Third, the ANC argued that it should not be found to be guilty of 'gross violations' in cases where its failure to adhere to its voluntary commitments in terms of international humanitarian law had been the result of either 'policy aberrations' (the Amanzintoti shopping centre bombing) or 'accidents' where, for example, civilians had been killed or injured. Finally, in amnesty applications heard since the appearance of the TRC report in October 1998, the ANC has offered a variant on the last argument suggesting that in certain circumstances, civilian casualties should be viewed as 'acceptable collateral damage'.

There are a number of complex arguments embodied in these criticisms, which relate to international human rights law and to international humanitarian law, or the laws of war, and each is examined below. Perhaps the best starting point in addressing these issues is to look at the TRC's own terms of reference, as set out in the legislation which brought the TRC into being.

The language used in the TRC's enabling act, and subsequently by the TRC, was one of 'gross human rights violations'. There was extensive debate within the TRC about what precisely constituted a 'gross human rights violation', and eventually the TRC came up with a working definition which included all acts of killing, abduction, torture and severe ill-treatment which occurred within the political conflicts of the past, and within the Commission's mandate period (1960-94). Acts which did not meet these criteria were deemed 'out of mandate', despite many pleas for some – like forced land removals – to be considered gross violations. Having agreed upon this definition, the TRC concluded that it could not and should not distinguish between 'human rights violations' and 'human

rights abuses'; or between 'acts of war' and 'acts of government'. It also concluded that it must apply the same standards and definitions to all acts which came to its attention, whoever perpetrated them and whomever they were perpetrated upon.

This may not have been strictly correct in terms of international law, and did not perhaps take into account the distinction between human rights law and humanitarian law. But for the Commission it seemed the only reasonable course of action – both politically and ethically. Politically, the Commission had to be perceived as even-handed, both by the South African public, the major political players, the former state security forces, and by the international community. Ethically, too, the Commission was bound to work according to a consistent set of definitions in the interests of justice and fairness. With the TRC Act using the language of 'gross human rights violations', the TRC concluded that these were the terms in which its findings would have to be made. It therefore, quite consciously did not create different terminologies to describe the acts perpetrated by different players in the conflict. Nor did it create a system of 'grading' violations as more or less 'gross', or of categorising them differently depending on the identity of the perpetrator.

These issues of definition are dealt with in chapter four of volume one of the TRC report, entitled 'The Mandate'. It focusses on questions of terminology, of even-handedness, of state and non-state actors, of justice in war and of crimes against humanity. In the course of this chapter, it is made palpably clear that the TRC did not adopt the 'moral equivalence' position and that it did take into account the moral distinction between actions taken to uphold an unjust system, and ones taken to destroy that system. It, for example, accepted both the international legal declaration of apartheid as 'a crime against humanity', as well as the widely-held view that the ANC's armed struggle constituted 'a just war'. But, and this is as significant, it added the critical rider that a 'just cause' could not and did not render all acts committed in pursuit of that cause as 'just'.

Following on from this position, it argued that it could do no other than treat all civilians or non-combatant victims equivalently. Thus, who were killed, tortured, abducted or suffered severe ill-treatment within the context of the political conflict, and within the mandate period, could be nothing other than victims of gross human rights violations. It followed logically, therefore, that those responsible for committing such acts were the perpetrators of gross human rights violations.

Due to the relative lack of co-operation on the part of the National Party, the obduracy of the South African Defence Force and the intransigence of the IFP, state or IFP perpetrators could not in many instances be identified; but this was not the case as regards many of the ANC's acts. The ANC leadership, to its credit, took full responsibility for most of the actions of its soldiers. It also made available to the TRC the findings of the two commissions it set up to probe alleged abuses in its Angolan camps. Having done so, the ANC argued it was 'unfair' for the TRC to judge its actions using international law (and its own professed commitment to the Geneva Conventions) while the actions of South African security forces were accepted within the bounds of South African (apartheid) law.

This is, however, not a correct analysis of the basis on which the TRC made its findings. There were, for example, many instances where individual policemen (who were part of state institutions) or the SAP as a whole were found to have committed gross violations of human rights – even in instances where they had been exonerated by the legal institutions or processes of the time. One such example is that of the Uitenhage (Langa) massacre, where the police had been legally 'let off the hook' by the Kannemeyer Commission but where the TRC found that gross human rights violations had been committed by the SAP (1998, vol 3, ch 2:87). Here an interpretation of national law and the principles of international human rights law were employed to reach this conclusion. The same procedure was followed in developing the general finding that the apartheid state had been responsible for a gross rights violation in its riot or crowd-control policy involving the 'unjustified use of deadly force...to control demonstrations' (1998, vol 5, ch 6:223).

The ANC also took exception to the TRC's analysis of human rights violations committed in the course of 'irregular warfare'. It suggests in its two submissions to the TRC that as it never adopted a policy of deliberately targeting civilians, any of its acts in which civilians were killed or injured must be considered 'errors' or 'aberrations'. The implication is that the ANC cannot be found through these particular acts to have committed human rights violations. In a variant on this theme, the ANC has since the report appeared argued that even where its operatives did, in fact, command or carry out acts in which civilians were killed or injured, some of these were actually justifiable acts of irregular war. In these circumstances, it suggests that the civilian casualties were 'acceptable collateral damage'.

The TRC had a number of difficulties with these positions. First, how was it to separate out those acts which were 'mistakes' from those which were deliberate? Second, how could any one operation be simultaneously a mistake and an attack on a justifiable military target? In light of these difficulties, the TRC stuck to its interpretation of the Act, namely, whether or not a particular act was a mistake – which could involve various problems such as faulty intelligence, infiltration, inferior equipment, and other things that occur in warfare of whatever kind, factors outlined by the ANC in their submissions – a gross violation had been perpetrated where civilians were killed or injured.

This interpretation was applied to all sides. Thus, the death of Bheki Mlangeni, who was the unintended recipient of a security-police parcel bomb destined for their own dissident Dirk Coetzee, was regarded as no less of a gross human rights violation than the death of a Mr Rangasamy, who was killed when an MK bomb exploded at the wrong time and in the wrong place. Though both were victims of circumstance or of tragic error, they were also both the victims of a gross human rights violation.

Recent amnesty applications have substantiated the ANC's defence of the 'collateral damage' position with regard to erroneous acts. Aboobaker Ismail, MK Head of Special Operations, has testified at length at different amnesty hearings regarding some of the most controversial ANC bombings, in particular the Church Street bomb of 1983 and the Magoos Bar bomb of 1986. In regard to the latter, Ismail testified that the operation's commander Robert McBride was instructed by him to 'identify ... areas with high concentrations of enemy personnel, on duty or not'. He further stated that when McBride raised the possibility of civilian casualties, he was referred to the decision taken at the 1985 ANC policy conference at Kabwe conference where it was decided that the possibility of civilian casualties should no longer stand in the way of executing the struggle against apartheid. Once a number of possible targets frequented by off-duty security force members had been identified, Ismail said he instructed McBride to select a final target after further reconnaissance and to proceed with the operation. Questioned at the hearing as to what constituted a legitimate target, Ismail repeated that while 'it was policy that civilian casualties should be limited, they should not stand in the way of further operations' (*Mail and Guardian*, October 8-14, 1998).

At the post-report amnesty hearings regarding the bombing of the Ellis Park rugby stadium, and the planting of anti-tank mines by MK units, the

MK leadership has continued to justify its choice of targets. It has not argued that these were cases of cadres 'acting outside of orders' or 'breaking discipline' or 'undermining policy'. Rather, it has suggested that the targets were in fact 'enemy personnel' and that it was understood that there was a 'grey area' in which civilian casualties would 'not always be able to be avoided'. This again, is the 'acceptable collateral damage' argument, namely, that in some situations, although civilians were not the primary target, it was accepted (and foreseen) that some would get 'caught in the crossfire'. This, while regrettable, was understood (by the ANC) to be 'in proportion' to the ends it was trying to achieve. The methods of modern or irregular warfare, so the argument was made, inevitably lead to some loss of civilian life.

Thus Ismail, at the TRC amnesty hearings on May 6, 1998 on the Church Street bomb, justified the ANC's use of bombs in the following words:

During world war II, more civilians died than military people. During World War II, in order to get at the Nazi beast, the Allies went in and went on blanket bombings. In those days they couldn't target specific targets. They bombed cities. All of those are considered legitimate. Were they tried - no! They were considered victors. They were considered as people, they were considered as liberators from the Nazi beast.

Ismail here is expressing some of the anger felt by MK soldiers in being found to have committed human rights violations, after they had sacrificed so much in the struggle against the apartheid regime, one which could be equated with the Nazi regime. While this anger is understandable, it does nothing to change the international legal position and could in no way influence or give cause to amend the TRC's negative findings in cases like the Church Street and Magoos bar bombings where civilians died and were harmed.

In finding that such acts constituted gross violations of human rights, the TRC was not reflecting an ignorance of international humanitarian law, as claimed by Thabo Mbeki, but actually applying it. The ANC should have known better as it had itself made a declaration accepting the terms of Protocol I of the Geneva Conventions of 1977, which states unequivocally that 'parties to the conflict shall at all times distinguish between the civilian population and combatants'. In an article entitled 'International humanitarian law and the protection of war victims', Hans-Peter Gasser (1998) former Senior Legal Adviser at the International Committee of the Red Cross, states that:

the rules of international law apply to all armed conflicts, irrespective of their origin or cause. They have to be respected in all circumstances and with regard to all persons protected by them, without any discrimination. In modern humanitarian law there is no place for discriminatory treatment of victims of warfare based on the concept of "just war".

In relation to Ismail's argument about the bombing of cities in World War II, Gasser has this to say:

The new Geneva Conventions of 1949 did not develop the rules of "Hague law" (which limits warfare to attacks against military objectives). In particular, they failed to cover a fundamental issue of international humanitarian law: *the protection of the civilian population against direct effects of hostilities* (attacks on the civilian population, indiscriminate bombardment etc). The lessons of Coventry, Dresden, Stalingrad and Tokyo were still to be drawn.

An attempt to draw these lessons for international humanitarian law was made with the adoption of Protocol 1 of 1977, to which the ANC became a signatory. Unfortunately, in its practice, it failed, as so many others have, to learn the lessons of World War II.

Both human rights law and humanitarian law apply concurrently in situations of internal armed conflict. While the liberation struggle in South Africa was defined in international law as a 'War of National Liberation' (in terms of Protocol I of 1977), the peculiar circumstances of the conflict in South Africa meant that it was not strictly a conflict of an international character. It was more a non-international armed conflict or 'civil war' for which Common Article 3 of the Geneva Conventions 'lays down minimum standards of treatment in the case of armed conflicts which are not of an "international character"' (O'Shea 1998:144).

In terms of obligations under humanitarian law, liberation movements are only legally bound by its conventions and principles if they lodge a declaration with the Swiss Federal Council. Technically, the ANC did not do so. Nonetheless, the TRC took the position that the ANC considered itself as an 'insurgent party' in the South African 'civil war' to be morally and legally bound by humanitarian law. This was consequent to the fact that on November 28, 1980, at the headquarters of the International Committee of the Red Cross in Geneva ANC President OR Tambo had signed a declaration of adherence to the Geneva Conventions and Protocol 1 on behalf of the ANC and Umkhonto we Sizwe.

This almost unprecedented action by a liberation movement was the ANC's response to a number of critical developments pertaining to the system of apartheid in the realm of international law. The first was the UN's adoption in 1973 of the International Convention for the Suppression and Punishment of Apartheid in terms of which apartheid was proclaimed a 'crime against humanity'. The second was the adoption of Protocol 1 of 1977 which recognised, inter alia, that 'practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination' constituted grave breaches of the Geneva Conventions and were identified as crimes against humanity. It also recognised the conflict in South Africa as a war of national liberation or self-determination.

At the signing ceremony, Tambo, explained the ANC's motives and intentions in the following terms:

We in the African National Congress have taken the serious step of making a solemn declaration at the headquarters of the ICRC this afternoon because we have for nearly 70 years respected humanitarian principles in our struggle. We have always defined the enemy in terms of a system of domination and not of a people or a race.... In signing this Declaration, the African National Congress of South Africa solemnly affirms its adherence to the Geneva Conventions and to Protocol 1 of 1977. As we have done in the past, so shall we continue, consistently and unreservedly, to support, fight for and abide by the principles of international law. (ANC 1980)

He then signed the following declaration:

It is the conviction of the ANC of SA that international rules protecting the dignity of human beings must be upheld at all times. Therefore, and for humanitarian reasons, the ANC of SA hereby declares that, in the conduct of the struggle against apartheid and racism, and for self-determination in South Africa, it intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts. Wherever practically possible, the ANC of SA will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of armed conflicts and the 1977 additional Protocol 1 relating to the protection of victims of international armed conflicts. (ANC 1980)

Kader Asmal, perhaps the ANC's leading expert in international law, explained the ANC's acceptance of the Geneva Conventions as follows:

The applicability of the humanitarian rules of war to conflicts between an incumbent state and a national liberation movement fighting for

self-determination is clearly accepted. The Protocols to the 1977 Geneva Conventions are intended to apply to such a conflict and were subscribed to by the ANC in 1980. Although the apartheid state did not ratify the relevant Protocol, that Protocol merely codified pre-existing contemporary law on the subject. Thus both belligerents in South Africa were under an obligation to treat the conflict as one governed by the law of war. Under Article 85, paragraph 5 of the Geneva Protocol, 'grave breaches' of the Convention and Protocol constitute war crimes. (Asmal et al 1996:197)

In the Motsuenyane Commission report (1993:6-15) on conditions in the ANC's Angolan camps, the ANC's obligations under humanitarian law are clearly spelled out and the applicability of Article 75 of Protocol 1 of 1977 and Common Article 3 of the Geneva Conventions of 1949 to MK prisoners is discussed. In addition, the Motsuenyane Commission refers to the ANC's obligations in terms of customary international law and the principles of inviolability, non-discrimination and security; and also to the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights. The ANC accepted the findings of this report.

That the ANC considered itself bound by the principles of international law from at least November 1980 is clear. The TRC was fully conversant with this position and the Commissioners debated the implications at length. On behalf of the TRC, Commissioner Mary Burton rejected Mbeki's assertion that the Commission's findings were 'contrary even to the Geneva Conventions and Protocols'. She described this as a 'clear misperception of the Commission's conclusions, which were, in fact, based on a careful study of the Geneva Conventions and Protocols, and gave careful consideration to how gross violations of human rights should be defined in the context of a war situation or a state of internal conflict' (2000:77-78). She challenged the ANC to take the debate further: 'It is not enough for the former Deputy President simply to state that the Commission's findings contradicted the Geneva Conventions and Protocols. The deliberations of the Commission in this regard are there to be read and debated – and challenged, if necessary, against chapter and verse of these declarations' (2000:83).

There is no gainsaying that the ANC co-operated with the TRC more fully than any other protagonist in the South African conflict. There is also no gainsaying that the ANC leadership were prepared to take full responsibility for the actions of their members – unlike most other parties

to the conflict. Nor is there really any argument about the justice of the ANC's cause, or that it exercised considerable restraint in its armed actions. While some critics of the TRC, such as Asmal, Asmal and Roberts (1996), may have wished for more emphasis to be placed on the justice of the cause, and the amount of restraint exercised, they miss the TRC's main point. This was that in instances where the ANC, as it itself acknowledged, carried out acts in which civilians or non-combatants were killed or injured, or where 'enemy agents' (or suspected 'enemy agents') were tortured or executed, the TRC applied a proper interpretation of international law to find that these specific acts were gross violations of the human rights of the victims. There can no victim without a perpetrator, and in these cases the perpetrator was the ANC.

What has perhaps been most disturbing about the ANC's refusal to accept the TRC's finding on its armed struggle has been its failure to debate the issue openly. Thus, at a recent conference at the University of the Witwatersrand, SACP leader Jeremy Cronin was the only 'liberation movement' leader to submit a paper in which he criticised the TRC. However, he failed to attend the conference and engage with other delegates about his argument. At this same gathering, political philosopher Andre Du Toit (1999) delivered a clear and well-argued critique of the TRC's achievements and successes. Significantly in regard to the issue under discussion in this article, he commended the Commission 'for taking a clear stand in principle on the issue of civilian targets in line with the tradition of justice in war and of contemporary human rights doctrines'.

Was the TRC 'soft' on the ANC?

As mentioned earlier, Anthea Jeffery of the South African Institute of Race Relations has been critical of the TRC report. While there is merit to some of the arguments advanced by her, her view that the TRC was incorrect in its findings on the ANC fails to convince.

The essence of Jeffery's argument is that the TRC failed to investigate and analyse the revolutionary strategy of the liberation movements, in particular the strategy of 'people's war' adopted by the ANC in the 1980s. Because of this failure, she argues, the TRC did not adequately hold the ANC accountable for the many deaths that occurred in the context of this violent conflict. She states that 'despite the voluminous evidence presented to it and without proper investigation or explanation, the Commission has effectively consigned the people's war to an Orwellian "memory hole"'

(1999:5). She describes the Commission's findings – as recorded above – as 'too superficial to add significantly to our understanding of the past. On the contrary, they seem to be calculated to preclude a proper comprehension by discounting rather than exploring the impact of the people's war' (1999:5).

Given the TRC's findings summarised above, which explicitly hold the ANC accountable for gross violations of human rights that occurred in the context of the strategy of peoples' war, on what grounds does Jeffery argue the above? One is her view – asserted without any substantiating evidence – that the TRC failed to take into consideration the submissions of other parties about the ANC, in particular those of the NP, the IFP and representatives of the security forces such as Herman Stadler. While there are probably individual cases raised in these submissions which were not thoroughly investigated by the TRC, this does not establish that the TRC failed to take the information in these documents into account. That Jeffery quotes extensively from them, reflecting their beliefs about the ANC, does not make their or her analyses necessarily 'right' or 'true'.

Jeffery also argues that there is a need for more contextualisation in the TRC report. While there is some merit in this criticism, the problem is largely the result of the structure and editing of the five-volume report. The original research reports on the perpetrators of human rights violations (both those opposing the South African government and those part of, or aligned to, it) were structured in such a way as to provide first, an in-depth historical analysis of the strategies of the protagonists, followed by another section dealing with cases of human rights violation, including investigation and findings. Given the huge volume of information available to the TRC, and the decision about the size and number of volumes of the final report, the two sections were 'collapsed' into one, and much of the original research was edited out for the sake of brevity. Thus, sections on the relationship of various organisations to the ANC – including the SACP and the Black Consciousness Movement – were omitted in the final edit. Similarly, a detailed explanation of the strategy of 'peoples war' and the relationship between the ANC and the UDF was omitted.

There is in fact a section of the report dealing with political motives (1998, vol 5, ch 7:276-82) which gives substantial 'contextualisation' of the South African conflict, and details the perspectives of the various 'players' in the light of the cold war, anti-colonial struggles, and apartheid. The detailed consideration of the motives and perspectives of perpetrators

during amnesty hearings did not mean that the TRC accepted the analysis put forward by the security forces. That many South African government security force members genuinely believed they were fighting a 'communist threat' did not make the anti-apartheid struggle any less just. The beliefs of these security force members were taken into account by the TRC in its consideration of the motives and perspectives of these people, but that does not mean that they were correct in their analysis of the ANC, or that the Commission was incorrect in its findings. A careful readings of the findings (1998, vol 5, ch 6:238-49) shows that the Commission, if anything, tried too hard to be even-handed in its findings and that the findings on the ANC cannot be considered 'soft'.

However, while the analysis may in Jeffery's view have been too brief or superficial, it would seem that Jeffery's fundamental point is actually not the lack of detail but the fact that she disagrees with the TRC's analysis. The TRC report holds with the view that while the ANC did have a revolutionary strategy aimed at the seizure of state power, it was not always fully in control of the political actions of its supporters in the townships of South Africa. Thus, while the TRC did, in fact, find the UDF leadership responsible for using language which incited its supporters to violence – which some would argue is quite a harsh finding – it was not possible to ascertain structures of command and control within the UDF or ANC which led to the commission of gross human rights violations in the context of the township 'uprising' of the 1980s. This was simply because such structures did not usually exist. It can of course, be argued that it is in the nature of a 'peoples war' that such distinctions between combatants and civilians are blurred as the 'arming of the masses' takes place. This is true, and was frequently used by security force members to justify their own blurring of such distinctions. However, it does not lead to the conclusion that the ANC or UDF can be seen as 'starting the war' and thus be held responsible for the deaths that ensued.

In academic studies of the period what has been stressed is how weak the ANC was internally, and how little control the ANC exerted over its followers. While there were certainly high levels of intolerance and a considerable amount of brutality and violence in the townships, neither the conspiracy theories of the former regime, nor the SAIRR analysis of 'mass mobilisation' as itself being the root cause of the violence, hold much water.

Even if the TRC had come to a different conclusion on the central issue of the injustice of apartheid, and the justice of a violent attempt to oppose this system, would it have affected the TRC's findings on the commission of human rights violations by the ANC? I do not believe so for the reasons outlined above. The TRC was working within certain mandated parameters and legal definitions of gross violations of human rights. This may be viewed as a narrow or 'legalistic' interpretation of its mandate, but ultimately the political analysis of causality of conflict was not used for making findings. Whether the TRC had found both sides to be equally responsible for 'starting the war', or whether the ANC was found to be a pawn of Soviet revolutionary expansionism, or whether the ANC was found to be conducting a just war of national liberation, the findings would still be the same: that the ANC, in the course of its armed struggle against the South African state, committed gross violations of human rights.

With regard to the criticism that the TRC was biased in that it failed to conduct in-depth investigations or public hearings on the ANC's violations of human rights, there are a number of points to be made. The first is that it should be restated that the ANC had given a huge amount of detailed information to the Commission; its leadership had accepted responsibility for a number of acts; its members were encouraged to apply for amnesty, and many did so; and the ANC had itself instituted various commissions of enquiry into abuses in its camps in exile. There was little need for the TRC to repeat what was already in the public domain. Second, there were in fact lengthy hearings at which the TRC interrogated the ANC leadership about its strategies and the details of particular actions. The 'Party Recall hearings' and the 'Armed Forces hearings' were public hearings in which extensive testimony was led, and TRC put a great deal of effort into preparing and leading the questioning of the ANC and MK leadership. The transcripts of these hearings are now in the public domain. In addition, there were the 'in camera' hearings of those responsible for the ANC's camps in Angola; and the (eventually public) hearing on the role of Winnie Mandela and her 'Football Club'. Equally lengthy questioning is still continuing at amnesty hearings.

Where Jeffery has a point is that it was nearly impossible for the TRC to make definitive conclusions about particular incidents where the amnesty hearings had not yet been held. In addition, it had difficulty in unravelling the violence in KwaZulu-Natal, partially because of the reluctance of IFP supporters to make statements to the Commission, partly because so many

of the statements from that region were made at the last minute, and partly because many of the amnesty hearings concerning the ANC's role in the violence were still to be heard. However, her criticism that the TRC failed to investigate the ANC's 'PMC' which made decisions about military strategy holds little water, given that the ANC leadership had taken responsibility for all the acts of its soldiers; and given that it had submitted to the TRC, in response to its questions, a detailed list of all its command structures, naming the individuals who held particular positions for the whole period under review. This is in sharp contrast to the previous government, its structures, and other players such as the IFP, who refused to take responsibility for the actions of their members, and did not supply the TRC with detailed information.

There is another aspect of Jeffery's critique that needs to be queried. Is it really that more detail is needed? Much of Jeffery's broadside on the TRC report in relation to the liberation movement is based on the apparent failure of the commission to 'do enough': to investigate certain ANC activities enough; to write enough about ANC strategy; to give enough detail on ANC violations. Yet how much is enough? For example, Jeffery writes that the ANC strategy of 'people's war' is 'not adequately addressed' (1999:104) and that 'there are innumerable aspects of the people's war the commission omits adequately to explore' (1999:106). In other words, it would seem that to Jeffery the basic problem was not substance but quantity.

None of the above is intended to justify the actions of the ANC – just to make clear that in some respects, investigation was not necessary in order to find out 'the truth'. In other respects, investigation was necessary: sometimes the TRC failed due to its lack of capacity or internal divisions or differences of opinions, and this should be acknowledged. With regard to the post-1990 violence, the TRC has acknowledged its own inadequacy in dealing with the causes and details of the violence. Sometimes the TRC tried to obtain additional information from the ANC, but was distinctly unsuccessful. The ANC prepared a detailed submission for the TRC in 1996. Following a memorandum from the TRC, the ANC prepared an additional detailed submission, including among other things, the details of all its structures and the names of those who held positions in these structures.

However, despite setting up a 'TRC desk' to respond to queries and process applications, the ANC did not respond to a number of specific

questions put to it. In March 1998, a final memorandum was sent to the ANC by the TRC, but the ANC did not respond. On pages 199-200 and 204 of volume 5, chapter 6 of the report, the TRC set out some of the problems it faced in its relation to the ANC. That there are errors and omissions in the report in terms of detail is acknowledged; likewise, a great deal more detail on ANC violations could have been included. Hopefully, some of this will be reflected in the codicil to the report when the amnesty committee concludes its hearings. It is unlikely, however, that this report will show the ANC in a more favourable light or lead to the commission changing its finding as regards ANC violations.

Conclusion

While this article concedes that some or many of the general criticisms of the TRC have substance, it is the gist of this paper that those relating to the finding that the ANC had committed gross violations of human rights are not sustainable. Some have argued that the TRC did not do enough in relation to exploring the role of liberation movements in South Africa, and/or of the revolutionary strategy of the ANC. Asmal, Asmal and Roberts (2000), who can be seen as broadly sympathetic to the ANC's position on the TRC, argue that the TRC failed to advance international law on the issue of 'justice in war'. While all these points may have merit, again the point is stressed – these are criticisms based on quantity rather than substance.

The TRC could certainly – given greater capacity, time, skills and space in an already hefty report – have conducted additional investigations and analysis. One such example would have been detailed investigations into 'missing persons' in frontline states where the ANC had bases; but there were other 'mandate debates' and legal problems with conducting inquiries in foreign countries. Another would have been the insertion of a lengthy analysis of the support given by communist regimes to the ANC, including the training of its security apparatus by the East German police.

But would such investigation and analysis have changed the TRC's findings on the ANC? If a lengthy discussion on international law, or on revolutionary strategy (both of which were thoroughly debated and analysed within the TRC) had been included in the report, would the Commissioners have reached a different finding on human rights violations committed by liberation movements? The thrust of this paper is that they would not have as there was simply no other legally sound finding they could have reached. It is also worth noting that no grouping or individual in the international

legal fraternity worldwide has supported the ANC's contentions and suggested that the TRC got it wrong in law.

This paper has argued that the acceptance of the TRC's findings, both by the ANC and by its opponents, is politically important for South Africa. It is especially important for the building of a culture of respect for human rights, from participants on both sides of the conflict, and their supporters. It also has possible ramifications for attempts to hold liberation movements or other armed groups accountable for human rights violations in other countries or contexts.

TRC Commissioner Mary Burton noted this concern in her article on 'Making moral judgements' (2000). She strongly defends the Commission's findings on the ANC and its position on 'justice in war', and in her usual diplomatic way she gently urges the ANC to rediscuss the issue: 'It is important for the future of South Africa that ongoing attention be given to this discussion....The ANC is in a strong position to make a valuable contribution to such a debate' (2000:83).

The hope is that this article will further the debate on the TRC report and this important aspect of its findings. Hopefully too, it will elicit some discussion and response from those within and outside of the ANC who hold such matters dear. The hope too is that through such a process a greater degree of understanding and acceptance of the TRC's findings will develop.

Note

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