

Connecting TRCs to global trends: Implications for policy and practice

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We didn't accept the fact of our late husbands, we didn't accept the word, late, because we said at that moment we did not know what happened to them. When I got home, the reverend from my church visited me. He had come to explain that the bodies of Fort and Matthew were found.¹

On 15 April 1996, Nomonde Calata recounted the events surrounding the assassination of her husband, Fort Calata, at the first hearing of the South African Truth and Reconciliation Commission (TRC). Her harrowing account was heard at one of 2 000 public hearings and became one of the 21 000 testimonies documented during the process. Concluding on 31 July 1998, the TRC highlighted the lethal reach of the apartheid regime, with its iniquitous power to normalise structural as well as physical violence.

In the 20 years since the first hearing, reflection on and critical examination of the South African TRC has been necessary, for South Africa and the rest of the continent. Has addressing the injustices of the past in order to sustain nation-building today been valuable? More directly, what value has the TRC process had for individuals like Nomonde Calata? Have their needs for recognition and redress been met?

TRCs are framed as a means to address the needs of victims and to encourage perpetrators to hold themselves accountable before they can be integrated back into society. Justice is served, in this sense, by focusing on both victims and perpetrators in a bid to 'restore their humanity and dignity in a healed society'.²

These noble objectives notwithstanding, the challenge remains for TRCs to achieve all of this in an ever-

changing global environment. Has the TRC 'industry' kept pace with global trends in economics, politics and conflict? This policy brief maps these global trends and makes recommendations that are informed by two key target areas.

The premise of TRCs

Human rights abuses can be processed either through criminal tribunals or commissions such as TRCs. The core task of TRCs in a post-transitional setting is to establish or restore relationships between disputing groups in order to facilitate their non-violent coexistence and to promote human rights. In a legal sense, however, commissions exercise less power than judicial courts. They cannot force anyone to appear for questioning, nor can they send anyone to prison. They can only make suggestions and recommendations for governmental bodies to act upon.³ However, their mandate extends beyond the operations of trials, and this flexibility is seen as an asset.

Commissions can create broader public awareness of victims' suffering than trials can.⁴ In addition, their investigative scope is greater because they look at patterns of oppression over a period of time and not just at specific events. If a commission recommends that an individual undergo further investigation and prosecution, it can pass on the information it has gathered to the judicial authorities.⁵

Dubbed the third wave of democratisation, TRCs emerged during the 1970s, and were popularised

in the 1980s when a number of countries in Latin America transitioned from dictatorship to democracy. Regarded as alternatives to prosecution, TRCs emphasise different institutional responses to the injustices committed by ruling regimes on the macro level.⁶ TRCs employ various, but connected, ways of truth-seeking. Their fundamental objective is fact-finding, with a view to create an accurate historical record and prevent a culture of silence, secrecy and denial. Fact-finding and the consequent deconstruction of a distorted history is the beginning point for addressing the needs of victims, ensuring accountability, promoting institutional reform and reducing the likelihood of resumed conflict. In some cases, TRCs are less occupied with revealing the truth and more concerned with shattering the silence that prevents a well-known truth from being publicly acknowledged.

While TRCs have been broadly commended, the inclusion of *reconciliation* as part of a commission's mandate is regularly contested. The precise nature of reconciliation is disputed, leading to alternative theories on how reconciliation should be conceptualised and implemented. Views on the concept of reconciliation vary greatly, from dismissing its relevance and potential to revering it as a symbol of forgiveness and atonement. It is difficult to define reconciliation because its meaning will always be dependent on a particular social setting.

However, the term has become linked to the power relations within transitional societies attempting to abide by negotiated peace settlements. Therefore, despite a lack of consensus on a definition, there is general agreement that reconciliation strategies must focus on changing the relationships between antagonistic groups.

Reconciliation has both a short- and long-term trajectory. In the short term, reconciliation is concerned with fostering agreement on specific negotiations and settlements. In the long term, it seeks to reform entrenched attitudes, develop sustainable socio-economic policies, improve governance structures and create democratic institutions.

South Africa and beyond

The South African TRC has been written about in a staggering 7 000 publications since concluding its operations and handing over the final report to former President Nelson Mandela in 1998. However, the subsequent 11⁷ and previous four⁸ TRCs or commissions of inquiry in Africa have attracted only a fraction of this attention. Admittedly, some of the initiatives were obscure and constituted hardly more

than an induction conference and one or two carefully choreographed hearings. Nonetheless, publications on these commissions by African authors are notably scarce. Even rarer are those written by Africans with actual hands-on, practical experience of TRCs, albeit with some notable exceptions.⁹

The attraction of implementing the TRC model in Africa can be linked to the international community's generally positive regard for the South African case. This could be problematic. Although legacies of historical injustice, varying degrees of economic and political exploitation, and examples of civil rights violations are shared by African countries, an awareness of context-specificity should be critical. In South Africa, the TRC sought to address systematic violations of human rights that had actually been encoded in the rule of law. There was also a clear understanding of the state's role in carrying out abuses, and therefore a clear understanding of who the perpetrators and beneficiaries of the system were. In other African countries – where the distinction between perpetrator, victim and survivor is often blurred and the roles of state and non-state actors are ambiguous – TRCs do not address so much the wrongful legalisation of violations but rather the failure of the rule of law, via the state, to prevent such violations.¹⁰

On one level, the deployment of TRCs on the African continent can be seen within the context of the emergence of transitional justice concepts and the exporting of such mechanisms to African post-conflict countries. On another level, their deployment is a genuine acknowledgement of the need for the systematic analysis of oppressive legacies and for an engagement with conflict-ridden societies' demands for justice, reconciliation and healing. These kinds of restorative justice mechanism are not new to Africa. Thus the advent of TRCs in Africa falls within a wider continental history of local justice structures and procedures, extant or destroyed. Maintaining this awareness is vital to understanding the trajectory of TRCs in Africa as well as why some TRCs have been largely successful and others less so.

The South African TRC still dominates discussions on TRCs in Africa. This is unfortunate on a number of fronts. Not only do the opinions on the South African experiment become less and less accurate as time passes (veering between irresponsible romanticism and rough-shod condemnation), but they also obscure crucial questions. Have the actual practices and impact of TRCs improved at all over the past 20 years? What lessons have been learnt? How have improvements been implemented? And has the beneficial impact of TRCs risen commensurately?

Critiques to learn from

The many publications on the South African TRC have gradually developed into a body of literature with a distinct topography. Leaving aside the adulation, the criticism of the South African TRC can be divided into several broad types. These critiques also speak to subsequent African TRCs that have worked to avoid replicating the blind spots or disappointments of the South African TRC.

The gender critique identifies the South African TRC as reproducing patriarchy through its failure to develop an effective gender lens for its work. This resulted in distinct efforts in the commissions of Sierra Leone and Tunisia to be more inclusive of women's perspectives and interests, and to be more gender sensitive when addressing sexual violence.

The structural critique considers the neglect of apartheid's structural violence in favour of a narrow focus on politically motivated interpersonal violence. In contrast, the Mauritian and Kenyan commissions focused explicitly on economic crimes and their structural implications.

The liberal critique arises from the assessment that perpetrators were not effectively held accountable. This has led to closer cooperation between TRCs and subsequent prosecutorial efforts, with TRCs effectively becoming agencies for grading levels of accountability, as intended by the plan for Burundi's commission.

The forgiveness critique asserts that there was little forgiveness between victims and perpetrators, with the burden of forgiveness largely placed on black South Africans without sufficient demands for apology from white South Africans. In Liberia, Sierra Leone and Ghana, there was a greater move to facilitate direct opportunities for forgiveness between perpetrators and victims.

The operational and recommendations critique most poignantly speaks to the failure to adequately reach all communities in South Africa, and also to the government's glaring lack of follow-through on some of the commissions' most important recommendations. These involved reparations, prosecutions and structural reform, and included a once-off wealth tax for the white businesses that profited from apartheid. The failure to pay adequate, timely and munificent reparations has been especially painful. Today, TRCs in African countries produce thoughtful reports, only for them to be shelved without their recommendations being followed. There is no agreement on what form

reparations should take, and thus little to no progress in delivering tangible reparations to affected communities.

Despite these criticisms, South Africa remains a functioning democracy with institutions which effectively curb executive impunity (of which there has been no shortage). Twenty years on, a positive assessment must be granted to the achievements of the transition, from service delivery roll-outs to a free and robust press.

Whatever the South African successes and failures may have been, certain global trends complicate efforts directed towards nation-building and healing. TRCs therefore must not only avoid making the same mistakes, but also respond to the specific local context as shaped by the global environment.

Mapping global trends

Trend 1: Extensive waves of migration within the African continent and the Middle East result from the economic hardship, political repression and continued conflict experienced in these parts of the world.¹¹ The growing refugee crisis is caused by the failure of the state to uphold the rule of law and protect its citizens. National and community borders do not have the same immutable meaning and, as a result, nation states do not wield the same power. At the same time, local governments are becoming powerful hubs of decision-making as cities gain economic and political clout.

Trend 2: Inequality is increasing sharply, as is, importantly, the awareness of this inequality. Earlier this year, Oxfam reported that the world's richest one percent own as much as the other 99 percent combined.¹² Africans are aware of this imbalance and thus the primary pressure on African state institutions is to become more redistributive. This trend is discernible throughout the whole world, from a post-Brexit Europe to an increasingly volatile China and reactionary USA, and states are struggling to cope with this demand for fairness and inclusion. TRCs won't be immune from this trend and will increasingly be held accountable to the demand for a fairer and more inclusive society however its boundaries are drawn, whether along national or regional, urban or communal lines.

Trend 3: This trend involves violent extremism and the youth's increasing susceptibility to it. In Africa we see a very sharp rise in the activities of groups like Al Shabaab, Boko Haram, ISIL, Al-Qaeda and others. Once they are defeated in the Middle East, Africa, with Nigeria as the potential entry point, will become the

likely market for a serious recruitment drive. TRCs will be tasked with managing this radicalisation of youth, who will continue to commit unspeakable atrocities while at the same time being themselves victims of extreme marginalisation, systematic discrimination, indoctrination or even abduction and torture. TRC practitioners' messaging must become more direct and holistic in the context of disillusioned African youth's struggle for social legitimacy.

Trend 4: Democracy as the ideal outcome of political transition has come into question. This crisis is not just related to developments in the global south, but primarily in the so-called established democracies, where, of late, demagoguery and thinly veiled racism have been on the rise. Along with the countries who have traditionally sponsored it, democracy appears to be having a mid-life crisis. The interrogation seems to question how to set the dial of value pluralism appropriately so that freedom of speech remains guaranteed while the dignity of all is ensured. This kind of balance is essential to the work TRCs do. The South African TRC attempted to address this by forging a double message: on the one hand acknowledging the fight against apartheid as a just struggle while, on the other, condemning human rights violations committed on both sides with precisely the same seriousness, arguing that even in the name of a just war, human rights violations remain unjustifiable.

Recommendations for TRCs

A set of benchmarks fashioned by previous TRCs remains relevant. It is important to note that these benchmarks do not take place in a vacuum and are informed by the consideration of the following factors:

1. Contexts that are rarely conducive to TRCs taking place and where transitions are often not peaceful;
2. Uncertainty of assuring sustainable transitions beyond elite political agreements; and
3. Holding the promises of transitions and the mechanisms of TRCs to account.

Policy and implementation can be approached through the following two key target areas, using benchmarks to determine whether TRCs are successful in fulfilling meaningful mandates within an ever-evolving global system.

Area 1: Mandates and operations

Governed by its mandate and judged on its ability to carry out operations, a TRC must remain focused on restoring the dignity of victims of gross human rights violations however these are defined in a given context. For this to be realised, it is important that the mandate

combines human rights standards and aspirations while remaining practical in offering goals that are consistently applicable to all victims and to all perpetrators. Under no circumstances should the politicisation or ethnicisation of victim or perpetrator communities be allowed. To the contrary, a mandate should aim to demonstrate that victimhood and perpetration typically cut across conflict lines, even in extreme cases such as genocide – if not, post-genocide reconciliation efforts will be severely impaired.

1. **A victim-centred and gender-sensitive approach to justice.** While this has the ability to take a range of forms, too often it is not addressed through due process, adequate reparation or munificent redress. This outcome is seen in the disconnect between mandate and operations where the knowledge and capacity of individuals involved compromises the said approach, or where budget limitations place a hierarchy on meeting the mandate. However, it is important that mandate and operations are connected (especially when committed to this approach) through measures based on extensive community consultation, and thoughtful, compassionate, individualised and considerate personal engagements with individual victims and groups. These engagements must be consistently carried out by appropriately trained professionals, along with a strong referral system for the most serious and immediate psycho-social, physical and legal needs. Operations should also include carefully recorded, thorough and secure archives of all testimonies – all of which need, ideally, to be independently verified and to form part of an analytical report that will be afforded national acknowledgement through appropriate acts of remembrance and honouring.
2. **Incentivise and compel perpetrators to come forward and account for their actions.** A statutory mandate is required for powers extending to search and seizure, subpoena and investigation. Given the numbers involved, and the need for treating everyone equally under the rule of law, TRCs should be free to develop a regime consisting of court-tested levels of accountability and commensurate forms of sanction, ranging from conditional amnesty to community service to the payment of fines, referral for prosecution and incarceration. This points to the need for responsible mandates. In the interests of restorative justice, TRCs should never be associated with capital punishment. Thus, similar to victim hearings, perpetrator testimonies should also be carefully recorded, and a referral system

developed depending on the seriousness of the crime. This should be measured in terms of both the actual crimes committed as well as the level of responsibility for the planning and ordering of those crimes.

3. **TRC mandated to deliver concrete recommendations to government and civil society.** Recommendations must focus on longer-term memorialisation as well as institutional and social reform measures to address the root causes of the conflict and ensure its non-recurrence. The mandate must make clear the legal force of the recommendations and the minimum government obligations in response – as well as remedial measures should government fail to respond adequately. A well-substantiated indication on what would constitute fair reparations to victims should accompany recommendations to ensure that there is adequate redress. Finally, recommendations should be made to civil society for ongoing work with victim communities, including engagements around areas for redress and the monitoring of the government's implementation of recommendations.

Area 2: Institutional and political

While mandate-making and the regulation of operations speak to *internal* benchmarks that must be met to ensure objectives are realised, TRCs exist within a broader ecosystem of institutional and political benchmarks that are able to reinforce or deter their work. It is important to institutionalise TRCs in order to keep their processes sustainable and to increase citizen awareness of their procedures. This is particularly necessary during the intermediate phases of transitions, where coalition governments or a new ruling party have taken office. TRCs can effectively facilitate this period if they are designed as part of a set of institutional arrangements that support the political agreements on the transition process. It is an open question whether TRCs can operate effectively and legitimately unless accompanied by a working judiciary, sound service delivery and an active civil society. After all, if the central goal of TRCs is the restoration of the dignity, voice and agency of victims, how is this achievable in a political and social context that continues to harm dignity, silence voices and diminish agency?

1. **Restoring and building adjoining institutions.** TRCs form part of a set of institutional arrangements that together constitute a political transition, and are together mutually reinforcing in their processes and outcomes. Therefore the work of a TRC can only be as good as those institutions

around it. This includes inclusive legislative and deliberative processes, which have to produce a credible, politically acceptable and civic-informed mandate. Sound judicial systems are needed to arbitrate between divergent views in the new dispensation, and government ministries must be focused on the redress of structural violations and the implementation of TRC recommendations. From civil society, there must be a push for independent human rights watchdogs, which have to ensure the non-recurrence of mass violence and discrimination. Finally, the individuals who hold positions within these different institutions, from executives to office bearers, must work to lend symbolic credibility to the state and its institutional arrangements.

2. **Assessing the political will of stakeholders.** In addition to these institutional benchmarks, an unusual mix of political will and restraint is required to make TRCs work. In short, authorities must be willing to implement the recommendations of a body that will inevitably criticise their track records and hold them accountable. In cases where TRCs meet their mandate effectively and are not swayed in their moral obligation, the publishing of findings inevitably angers politicians. Following from this tension, office bearers must additionally be held accountable for present (in)actions in implementing the recommendations made by the same individuals who questioned their credentials. Such political will is critical, from being willing to hold high-ranking individuals to account to adhering to redress through the funding and administering of complicated reparation programmes alongside daily service delivery challenges. Daunting as these already are for post-conflict countries, this translates into a wider message of being committed to honouring victims, including those who suffered at the hand of one's own party. For this to be realised, a strong and reflective kind of leadership is required – but which is in short supply just about everywhere in the world. One of the key issues is therefore to be realistic about the levels of political restraint and political will (compliance with recommendations) that are likely to be forthcoming, and to put in place (civic-led) mitigating measures to help safeguard the integrity of the TRC process.

Conclusion

South Africa, the African continent and the world have changed enormously since the 90s. This means that South Africa's TRC and many others cannot be seen in isolation. More importantly, the dynamic nature of conflict requires going beyond adapting the practices

of a TRC that took place in South Africa 20 years ago. Instead, caution must be exercised when uncritically following blueprints meant to guide the unique and context-specific processes of political transitions across the continent. This is no more evident than in the case of transitional justice processes such as TRCs.

On a deeper level, this begs the question of whether contemporary TRCs can be managed to respond adequately to new global challenges that require decisive and targeted interventions. Has the TRC 'industry' kept pace with global changes in economics, politics and conflict?

It is important to neither overstate nor understate the potential of TRCs. The movement towards critically assessing transitional justice mechanisms, especially TRCs, must be encouraged in order to ensure that current realities are countered with appropriate solutions.

The push for innovation and critical thinking must therefore look at how TRCs, from a local perspective, can inform the kinds of democratic engagements and culture that are able to adapt to global trends. TRCs cannot kick-start reconciliation processes, nor can they always deliver concrete answers through truth-seeking. Instead, translating the gains of truth-seeking into lived realities is a function of maintaining an awareness of local needs within global trends. Furthermore, the internal structures of mandates and operations, along with external institutions and political stakeholders, must be approached as critical target areas for effecting change and enhancing accountability.

These questions extend beyond the borders of one country. The African continent, as a key site of both transitioning post-conflict countries and the field of transitional justice (with TRCs as its most recognisable intervention), thus becomes a crucial point of practice and discussion.

Endnotes

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ABOUT THE INSTITUTE FOR JUSTICE AND RECONCILIATION

The Institute for Justice and Reconciliation (IJR) was launched in 2000 by officials who worked in the South African Truth and Reconciliation Commission, with the aim of ensuring that lessons learnt from South Africa's transition from apartheid to democracy are taken into account and utilised in advancing the interests of national reconciliation across Africa. IJR works with partner organisations across Africa to promote reconciliation and socio-economic justice in countries emerging from conflict or undergoing democratic transition. IJR is based in Cape Town, South Africa. For more information, visit <http://www.ijr.org.za>, and for comments or enquiries contact info@ijr.org.za.

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