

**Rainbow justice and peace
building
South Africa 1994-2001**

Elling N. Tjønneland

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Price: NOK 50 + postage

ISSN 0804-3639

ISBN 82-8062-004-4

Indexing terms

Democracy

Peace building

South Africa

Rainbow justice and peace building

South Africa 1994-2001¹

Elling N. Tjønneland²

Introduction

South Africa's achievements in building peace and democratic stability are widely regarded as a success. It is often heralded as a model also for other countries emerging out of deep and protracted violent conflicts. South Africa also emerged as a major recipient in the new wave of democracy assistance, which began around 1990. Together with Guatemala South Africa was the main target for Scandinavian assistance to human rights and democratisation in the first half of the 1990s.³

This paper shall address one dimension in the efforts to build peace and consolidate the new democracy in South Africa; the role of the *Truth and Reconciliation Commission* (TRC). How did it deal with past atrocities? How did it perform? How did it contribute to national and political reconciliation? In the final section the paper attempts to identify the main lessons learned and the recommendations for post-conflict societies attempting to deal with the violations of the past.

First, the paper will provide a brief overview of peace efforts and nation building in South Africa.

An overview of peace efforts

South Africa's 1993 Interim Constitution and the April 1994 elections saw the end of apartheid and the birth of a new democracy. This was a democracy typically forged "from below". It followed years of popular mobilisation, which forged regime elites to negotiate a transition. During intense negotiations the key trade-offs in the negotiated settlement were hammered out and the uncertainties of the transition limited. International actors assisted and facilitated the transition. Their role were strongest in the run up to the negotiations through various pressures on the regime, including sanctions, combined with financial assistance to the liberation movements in exile and the emerging civil society within South Africa. The international society

¹ This paper was prepared for the international conference on *Guatemala: Five Years After the Peace Accords*, Oslo 4-5 December 2001, organised by the International Peace Research Institute, Oslo (PRIO).

² Senior research fellow, Chr. Michelsen Institute, Bergen, Norway.

³ See more on the emergence of democracy support in development assistance in my "Foreign aid donors and democratisation in the South", pp. 35-55 in L. Thompson (ed.): *Development, Democracy and Aid in Southern Africa*, Cape Town: CSAS, University of the Western Cape 2001.

was less involved in the negotiations itself. The transition was strongly mediated and co-ordinated by domestic actors.⁴

The negotiated package revolved around the adoption of a new constitution which provided for the holding of free and fair elections based on the principle of one person, one vote. The key components were a very liberal constitution based on the principle of separation of power, parliamentary democracy, a strong independent constitutional court as well as the establishment of a number of constitutionally protected institutions to defend democracy. The constitution was also firmly anchored in a concern for human rights, with a state-of-the-art Bill of Rights included. An important component was also the requirement that all parties securing 10% of the votes should be entitled to proportional representation in a Government of National Unity in a transitional period of five years.

The 1993 Interim Constitution, which paved the way for democratic elections, was essentially a peace pact reached between the minority, the apartheid regime, and the disenfranchised majority, led by the ANC, in a situation where neither was defeated and none was a victor. None of the key parties in the negotiations had any previous commitments to liberal political ideals. Both parties saw the constitution as an instrument of political compromise. It was designed to protect the interests of the outgoing apartheid regime and its support groups under a new and democratically elected regime. For the incoming regime led by the ANC it became important to ensure that the new Constitution gave it the measures required to pursue a policy for social and economic reform and ensured that it had the means necessary to consolidate political power.

The two main parties, the National Party and the African National Congress, came to see the liberal constitution as a compromise able to satisfy their main objectives. This was no doubt reinforced by the key negotiators itself (on both side they were trained lawyers), by the global political climate after the end of the Cold War, and in some areas also by pressures from domestic groups calling for a protection of human rights. It must also be kept in mind that the outcome of the negotiations and the positions adopted were clearly informed by the fact that all parties knew that the outgoing regime would end up as a potentially very small opposition. The dominant ruling party, the ANC, on the other hand would be expected to a get clear majority of the votes. Both parties also realised that there were no alternatives to a negotiated solution.

The new Constitutions and the new political order succeeded in bringing political stability to South Africa. In 1994 the country was at the brink of civil war. One national and two local elections later the threat of political violence has almost vanished and no significant political groups contemplate an exit from the political system in order to fight it from the outside. The rules of the game as laid out the Constitution have been recognised. Former enemies may continue to disagree, but they have learned to live together in peaceful coexistence and social stability and to respect each other as equal citizens in a democratic society. In this sense the path

⁴ There is a wealth of studies available on the South African transition. A recent analysis, which compares it to the Central American experiences is provided in E. J. Wood: *Forging democracy from below. Insurgent transitions in South Africa and El Salvador*, Cambridge: Cambridge University Press 2000.

chosen in South Africa has been a success. Peace, democracy and stability have arrived. There is national political reconciliation and TRC Chair Desmond Tutu's vision of a *rainbow nation* may have been realised.

The reasons for this success cannot be ascribed to the drafting of rules for political behaviour and the establishment of democratic political institutions alone. A number of other factors are necessary to explain the path of the South African transition. One is the role of the new dominant ruling party, the ANC. It had the support of the vast majority of South Africans and enjoyed a *de facto* two-third majority in the new Parliament. The former apartheid regime was politically marginalised. They were in no position to set aside agreements and solutions negotiated before the April 1994 elections. The ANC and its leader Nelson Mandela used its position to pursue a policy of skilful political manoeuvring to achieve reconciliation. The opposition was co-opted or marginalised. Political power was consolidated around the ANC without antagonising the former regime. The repressive powers of the former regime through its control over the military and the police were weakened and eventually almost lost through the ANC's security sector reforms.

The social and economic policies installed hope of a better future for South Africa's black majority without at the same creating fear among the white minority. Furthermore, the economic interdependence in South Africa is so high that the option of breaking away and sabotaging is not viable. The costs are too high and the benefits of staying within are too attractive. Finally, South Africa had the financial resources and the institutional capacity to "buy off" and marginalise potential spoilers.

It must be emphasised that South Africa's main achievement in nation building lies in building political reconciliation between economic and political elites. There are many shortcomings and failures as we move to the local level and everyday life. The racial divide is still very present politically, economically and socially. Political loyalties are mainly shaped by racial identities. Blacks vote for the ANC and whites for the New National Party or the Democratic Alliance (although the leadership of these parties, especially the ANC, including their parliamentary groups, is multiracial and multiethnic). The number of people living in absolute poverty has not changed significantly since 1994. The economic policy has failed to create employment and take people out of income poverty although service delivery and welfare policies have improved significantly in certain areas. The main economic winners have been the rapidly expanding black middle classes both in the private and public sectors. They have increased their share of income and wealth significantly in the years after the 1994 elections. There are also elements of mismanagement and corruption within the public service. Some also point out that there is growing centralisation of power and authoritarianism within the ruling party.

Nor has South Africa been able to properly transform the criminal justice system and police making it efficient in preventing and combating crime. Violent crime has emerged as a particular important destabilising factor in the consolidation of the new democracy.

Despite this, the overall conclusion still stands: South Africa's achievements in building political reconciliation at the national level are significant and remarkable.

Pursuing truth and reconciliation

South Africa created a number of human rights institutions specifically to safeguard human rights and to build the new democracy. The most important of these was the South African *Truth and Reconciliation Commission* (TRC). It was established by Parliament's 1995 *Promotion of National Unity and Reconciliation Act* and set up the same year. The TRC was partly modelled on experiences from Latin America, but it was given a wider mandate and far more resources. The bulk of its activity came to an end in 1998 with the publication of its five-volume report although it will formally close down only at the end of 2001. TRC has internationally come to be seen as main model for how newly democratising and post-conflict societies should deal with the dark chapters of their recent past.

Mandate, origin and powers

TRC's objective was to address the legacy of the past by promoting national unity and reconciliation. It had to do this by

1. Developing a complete picture as possible of the causes, nature and extent of gross human rights violations between March 1960 and May 1994;
2. Facilitating the granting of amnesty to persons who would make a full disclosure of all the facts relating to a gross human rights violation with a political objective;
3. Establishing and making known the whereabouts of victims, restore the human and civil dignity of survivors by giving them an opportunity to relate their own accounts of the violations they suffered, and recommend reparation measures; and
4. Compiling a report detailing its activities and findings, and recommend measures to prevent future abuses.

The idea of such a commission originated within the ANC in 1992-93. The organisation was conducting investigations into human rights violations within its own military camps. It called for the establishment of a national truth commission, which could see these violations in its full context. This was however, not picked into up in the 1993 Interim Constitution. The last and final epilogue of this Constitution adopted on 5 December 1993 only stated that amnesty should be granted and directed Parliament to adopt a law providing for the mechanisms, criteria and procedures for the granting of amnesty. The outgoing regime was strongly in favour of a blanket amnesty for all. This position was unacceptable to the ANC while certain lobby groups and NGOs were going even further being opposed to any form of amnesty.⁵

⁵ See more on the origin and establishment of the TRC in A. Boraine, *A Country Unmasked. Inside South Africa's Truth and Reconciliation Commission*, Cape Town: Oxford University Press 2000, and J. de Lange, "The historical context, legal origins and philosophical foundations of the South African Truth and Reconciliation Commission", pp. 14-31 in C. Villa-Vicencio & W. Verwoerd (eds.), *Looking back. Reaching forward. Reflections on the Truth and Reconciliation Commission of South Africa*, Cape Town: University of Cape Town Press 2000. Boraine was the deputy chair of the TRC and played a crucial role in developing the idea of a truth commission after having established an NGO dedicated to this. De Lange is an ANC member of Parliament and was chairing Parliament's Justice Committee when the TRC Act was debated and passed.

The parliament passed the required legislation in July 1995. This followed months of negotiations, three hundred hours of public hearings and a five-hour plenary debate. The TRC was to be led by 17 commissioners. They were appointed by the President after an equally public and transparent process of nomination and debates.

The work of the TRC commenced in December 1995. It was divided in three committees: the Human Rights Violation Committee, the Reparations and Rehabilitation Committee, and the Amnesty Committee. The members of the Amnesty Committee were appointed directly by the President and the Committee had a quasi-independent position vis-à-vis TRC. At the height of its activities the TRC had a staff of several hundred, including some 20 investigators seconded from foreign countries. The total expenditure for the two-year period 1995-97 was, according to the TRC accounts, about 66 million Rand. (In addition, a number of TRC activities were funded separately and outside the official budget). Most of the funding came from domestic sources and through allocations from the Department of Justice, but significant funding also came from foreign donors.

The uniqueness of the South African TRC lies not only in the size. It also lies in the power of the Commission, particularly in the power to grant amnesty to individual perpetrators. No other country has combined this quasi-judicial power with the investigative task of an administrative truth-seeking body. The TRC also had the power to subpoena witnesses, to search premises and to seize evidence. Furthermore, it also maintained a witness protection programme, a first among truth commissions.⁶

How then did the TRC perform? The answer to this and the assessment below is based on three dimensions of its work; the search for truth, amnesty to perpetrators, and reparation and reconciliation.⁷

Finding the truth

The TRC was obliged to find the "facts" about gross human rights violations during a specified time period from the banning of the liberation movements in 1960 to the inauguration of the new President in May 1994. A series of highly publicised hearings dominated the Commission's work in 1996 and 1997. Victims and perpetrators came forward and told about gruesome cases of political violence and human rights violations. This was followed in 1997 and 1998 by collections of statements. The bulk of TRC's more than 21 000 officially recognised victims came forward through these written statements. The statements were coded and fed into TRC's comprehensive

⁶ See more on the comparative aspects of TRC in P. Haynes "Same species, different animal: how South Africa compares to truth commissions worldwide", pp. 32-41 in C. Villa-Vicencio & W. Vervoerd (eds.) *op.cit.*

⁷ Apart from the literature mentioned above the discussion also relies on R. A. Wilson, *The Politics of Truth and Reconciliation in South Africa. Legitimizing the Post-Apartheid State*, Cambridge: Cambridge University Press 2000, K. Christie, *The South African Truth Commission*, London: MacMillan 2000, and W. James & L. van de Vijver (eds.): *After the TRC. Reflections on Truth and Reconciliation in South Africa*, Cape Town: David Philip Publishers. Parts of the arguments below have also been developed in my article (with J. P. Holtedahl): "South Africa: Truth, Reconciliation, Justice?" (in Norwegian), pp. 176-202 in B. A. Andreassen & E. Skaar (eds.): *Forsoning eller rettferdighet? Om beskyttelse av menneskerettigheter gjennom sannhetskommisjoner og rettstribunaler*, Oslo: Cappelen Akademisk Forlag 1998.

database which provided a main source of information in the preparation of TRC's five-volume report.

The collection of data on human rights violations fed into both the Commission's own investigative work and into the work of the Amnesty Committee. In several cases TRC's work enabled it to shed new light on or even solve political crimes and human rights violations committed in the past.

Parallel to the TRC's own work there was a substantial media coverage, especially in 1996 and 1997, of the human rights violations and the apartheid past. Its public hearings were also transmitted live – several hours daily – on radio. Few might have read the TRC's report, but its work captured the nation in a way few could have imagined. Few could now say that they did not know about the atrocities committed in the past.

The findings from the statements and TRC's investigations provided the bulk of the information contained in TRC's five-volume report published in late 1998.⁸ This also marked the end of the commission's work. Only the Amnesty Committee continued to function in order to process the amnesty applications (see below). With the finalisation of this in 2001, TRC shall be officially closed down 31 December 2001 with the release of a final report or addendum to the 1998 report.

TRC's search for truth also received criticism. Most fundamentally, a critique was raised against the Commission's focus on gross human rights violence. The mandate limited TRC's work to extreme events and not on the everyday, mundane bureaucratic enforcement of apartheid. The commission, according to these critics, tended to have a narrow, individualistic and legalistic approach to human rights violations, which led to a neglect of apartheid as a system and to an avoidance of the beneficiaries of racial oppression and discrimination.⁹

TRC's rather narrow human rights perspective was partly established through an analogy with the Latin American dictatorships and the experiences of the truth commissions there. The similarities with Latin America did however obscure what was distinctive about apartheid. For the violence of apartheid was directed less at individuals than at entire communities. And this violence was not simply political. It was not just about defending power but also about dispossessing people of the means of livelihood through the creation of reserves and "homelands", group areas, migrant labour, pass laws and forced removals. The search for truth in South Africa, it is claimed, must go beyond the distinctive relation between perpetrators and victims. It must also capture the distinctive violence of apartheid and face the question confronting South Africa: how will those who continue to be the beneficiaries of apartheid, a substantial minority, and those who continue to be its victims, the majority, live together?

⁸ See *Truth and Reconciliation Commission of South Africa Report*, volumes 1-5, Cape Town: Juta 1998.

⁹ This point was most forcefully developed by, Mahmood Mamdani, a Ugandan scholar living in South Africa at the time. See his "Reconciliation without justice", *Southern African Review of Books*, No 46, 1996: 3-5.

This criticism was reinforced by the technology employed by TRC in compiling its data. TRC's information management system was based on a large-scale American human rights database. The system was designed to break the narrative contained in the statements from victims and others into quantifiable acts. Complex events and people were divided into constituent acts (48 acts in the case of events, or three categories in the case of persons). This reinforced the tendency to focus on individual acts.¹⁰

The TRC spent considerable time grappling with these issues and the operationalisation of a "gross human rights violation". Its approach and definitions also changed over time. Based on the 1995 Act, which also prescribed that the Commission should contextualise the violations, TRC held a series of special institutional hearings focusing on the role of some of the influential sectors of the apartheid society. This included the media, business, prisons, the faith community, the legal system and the health sector. This is also reflected in certain sections of the five-volume report.

Another criticism has been an accusation of political bias. The former regime and its support groups have been reluctant and have increasingly come to see TRC's work as a "witch-hunt".¹¹ From a different perspective the ANC also criticised the final report for its failure to distinguish properly between the just war of the liberation movements and the crimes of apartheid. It even sought a court interdict to stop the publication of the report.

Despite this criticism and the failures and shortcomings of TRC report, this author would still conclude that TRC's effort in putting together the truth was a success. The success should primarily be located in how the Commission worked, and less on the final reports and specific outputs. Of equal importance is the role of the media and the public debate sparked by the TRC investigations and hearings. The TRC succeeded in breaking a regime of official denial of atrocities by ending the silence on violence and violations. In so doing, the Commission managed to expose the excesses of the previous political order. By discrediting apartheid it has made an important contribution in consolidating the new democracy in South Africa.

The TRC report is not the final or authoritative truth. There are also significant gaps (it has, e.g., not produced a list of victims who died or disappeared). TRC was the first and most important attempt to deal with past. There will be many more "truths" and "truth-telling" exercises for decades to come.

Amnesty

TRC's Amnesty Committee was established after the Commission, but without a similar public and transparent process. The President appointed 5 members – three

¹⁰ On TRC and the human rights information management see especially R. A. Wilson *op.cit.* and L. Buur, *Institutionalising truth. Victims, perpetrators and professionals in the everyday work of the South African truth and reconciliation commission*, Unpublished Ph.D. dissertation, Department of Ethnography and Social Anthropology, Aarhus University, 2000.

¹¹ Anthea Jeffery argues that TRC's methodology was fundamentally flawed and that TRC is fostering a new form of Orwellian truth and political indoctrination. See her *The Truth about the Truth Commission*, Johannesburg: South African Institute of Race Relations 1999.

judges and two TRC commissioners. This figure has since increased significantly to enable the committee to carry out its tasks properly. Decisions by the Amnesty Committee are binding on both the TRC as a whole and on the government. By contrast the main TRC's decisions are confined to the status of recommendations.

The 1995 Act providing for the establishment of the TRC also specified the conditions for amnesty. It is not possible with a blanket amnesty. Amnesty only comes into question in an individual case. The perpetrator must personally apply in the prescribed form within a certain time limit; appear at a public hearing; make a full, public confession; and comply with the criteria for amnesty. The criteria were basically that the human rights violation was committed in order to achieve a political objective and that the applicant told the full truth. There was no requirement to regret the act committed, to apologise to the victims or to express remorse.

Once satisfied that the applicant satisfies the criteria an amnesty will be granted. The decision is final and there is no possibility for appeal. There is also criminal-procedural protection for the amnesty applicant under which evidence that may incriminate is later made inadmissible in court.

When the deadline for applications expired (in May 1997) more than 7000 had applied for amnesty. However, it turned out that the vast majority of the applications were from ordinary criminals seeking an early release from prison. When the Amnesty Committee had completed its hearings and reviews of all applications in mid-2001 some 5400 applications had been turned down with the rest being granted in part or in full. By and large the Amnesty Committee tended to approve all applications where the perpetrator(s) could claim a political objective and provide a reasonable justification for this and if they were convinced that the whole truth was told.

This South African way of handling amnesty applications turned the process into a tool to uncover details of past crimes. The peculiarity of the South African model lies primarily in the incentive for perpetrators to come forward with detailed and public accounts of their actions. If they failed to come forward they could risk prosecution. They could be accused by victims or witnesses, or they could be named by colleagues applying for amnesty.

The model was only partly successful. The TRC did manage to uncover significant new material, but most importantly the public hearings played a crucial role in creating a common South African understanding of the crimes of the apartheid past. The amnesty provision was less successful in securing applications. Relatively few applied considering the vast number of human rights violations. Those that applied were also mainly associated with the police with few coming from e.g. the military. Even more noticeable was the near total absence of applications from the instigators of violence – those responsible for planning and policy decisions, and for establishing the institutional and political framework for human rights violations.

Reparations and reconciliation

South Africa's TRC was also fairly unique among truth commissions in its strong emphasis on reconciliation. The slogan of TRC was typically also *Truth – The Road*

to *Reconciliation*. It turned out to be the most difficult part of TRC's mission and the one where it was least successful.

First, it always remained unclear what the meaning of the term reconciliation was. For many it seemed to be that victims and survivors should reconcile with their perpetrators. This focus was probably also motivated by the strong theological concerns of TRC's Chair, Desmond Tutu, and Deputy Chair, Alex Boraine. Their emphasis on reconciliation was heavily influenced by Christian values and their own religious background.

Measured against reconciliation between victims and perpetrators the TRC was a failure. True, the public hearings in 1995-96 became national rituals of reconciliation, forgiveness and truth-telling, but only a small fraction of the victims and perpetrators were involved. The feeling also started to give way to frustration, even anger from those victims who would not or could not forgive so easily, or who first requested a sincere apology and perhaps symbolic reparation from the wrongdoer. The growing emphasis of collection of statements and the phasing out of hearings seemed to have reinforced this tendency.

The focus on victims and reconciliation also implied the need to address the issue of reparation. The TRC had no funds or resources available for distribution. It did, however, provide recommendations for some compensation for the victims and survivors. This included a proposal for an annual financial contribution to victims over a period of six years. Parliament allocated the first amount to a fund for this in 2001, but on the whole the administrative treatment of victims since they came forward has been rather shabby.

The delays in providing reparations has caused much bitterness among victims, especially as they are kept waiting while the perpetrators are getting away with amnesties. These problems have been aggravated by TRC's changing criteria for being recognised a victim. The relatively low number of victims (21 000) also suggest that a significant number of victims have failed to come forward and be registered.

TRC also gradually began to shift its focus towards national and political reconciliation de-emphasising reconciliation at the individual level. Many key members of the commission began to talk of reconciliation as something that would require many years.¹² The TRC through the disclosure of the truth about specific human rights violations would facilitate the basis for peaceful co-existence, which would provide the substrate from which forgiveness and national reconciliation may later grow.

The 1998 report from the TRC also provides a number of recommendations and issues for consideration. The Commission has also touched upon political economy and race issues. *Inter alia* it recommends a redistribution of resources from the beneficiaries of apartheid to South Africa's poor. Among the specific issues it

¹² See C. villa-Vicencio (ed.): *Transcending a Century of Injustice*, Cape Town: Institute for Justice and Reconciliation 2000. The book contains papers presented at the launch of the *Institute for Justice and Reconciliation* in May 2000. The Institute is a university-based NGO led by Charles Villa-Vicencio, the former head of TRC's Research Department.

requests the government to consider is the introduction of a special wealth tax. The government has acted upon few of TRC's recommendations.

It was noted in the beginning of this paper that South Africa had made significant progress in nation-building and political reconciliation. It is difficult to isolate the role of TRC in this process. It has probably been less than many foreign observers assume. Its biggest achievement may lie in the fact that it enabled the new South Africa to address the atrocities of the past. That may have been crucial in enabling the new democracy to move forward. It also helped to discredit apartheid and its support groups, and it played a role in strengthening democratic values.

Truth and reconciliation: Lessons from South Africa

Truth commissions have emerged as standard post-conflict structures to investigate cases arising from past injustices, atrocities and human rights violations. For countries moving from authoritarianism to democracy with crumbling economies and fractured social orders terms such as "truth" and "reconciliation" have emerged as ideological adhesives. This has been accompanied – and partly also driven by – an academic literature on *transitional justice*.¹³

The increased interest in truth commissions – there has been about 20 such bodies in the last 30 years – is a reflection also of the limited success in judicial approaches. Many new governments are turning to mechanisms outside the judicial system to confront, as well as learn from the crimes and injustices of the past. The justification has also changed. With a focus on tribunals and trials the reference to the need for justice was strong. Now the justification is much more on reconciliation and building a human rights culture for the future.

Some conclusions and recommendations can be drawn from the South African and the transitional justice literature.

The *first* is that there is no universal model for how a country emerging out of a violent conflict and authoritarianism shall deal with its past. This will depend on the local context. The approach crucially depends on power relations, the strength of the former regime and its allies, and the nature of the past repression and injustices.

Second, the search for truth and reconciliation is ongoing and in one sense may never end. The timing of a truth commission is however important. It has to be introduced at the right time and its period of operations must be limited. Different strategies may also be used at different times. A single strategy is rarely sufficient.

Third, local ownership and legitimacy is important to ensure success although international agencies can be important and sometimes crucial in supporting and facilitating the process.

¹³ This discussion also borrows from the overview provided in Siri Gloppen, *Reconciliation and Democratisation. Outlining the research field*, Bergen CMI, October 2001 (A report commissioned by the Norwegian Ministry of Foreign Affairs). See also Elin Skaar: "Truth Commissions, Trials or Nothing? – Policy Options in Democratic Transitions", *Third World Quarterly* vol. 20, 1999: 1109-28.

Fourthly, the public process of the South African Commission stands out as one the most important factors behind its achievement and successes. The lessons from this, and from the popular mobilisation, should be carefully studied by other truth countries contemplating the establishing such commissions.

Fifthly, the granting of amnesty only after individual applications is an important principle and a major improvement compared to the issuing of blanket amnesties. It is also important as a tool to uncover details of past crimes. It may however, not always be feasible.

Finally, the victims and survivors are generally the ones than benefit least also from truth commissions. Much greater efforts must be made to provide assistance to them both inside, outside and after the work of such commissions.