
STATEMENT OF PIERS PIGOU

Introduction

1. I am an adult male. I was a member of the Investigation Unit of the Truth and Reconciliation Commission (the TRC), based at its regional office in Johannesburg.
2. I make this statement at the request of the Commission's Evidence Leaders.
3. I am aware that the focus of this Commission is on the State's general failure to investigate and prosecute perpetrators of gross human rights violations notwithstanding the TRC's recommendation that this be done. I am respectfully of the view that it would be instructive to that inquiry to begin by closely considering what happened at the TRC itself, in particular some of the challenges it faced, the approach of the important role players to the work of the TRC and extent to which it was allowed to fulfil its mandate. Those are the issues that I address in the first part of the statement. Thereafter, I will deal with how it appears that those matters may have contributed to the poor outcomes in respect of the investigation and prosecution of perpetrators of human rights violations.
4. At present I am the director of a small NGO called Intelwatch, which monitors the role of intelligence, the intelligence

community and the role of state actors and private sector actors in surveillance, cybersecurity, regulatory space, or the absence thereof, in which they operate. Intelwatch's principal focus is on Southern Africa, but we do work on such issues elsewhere, for example in Uganda and the Ivory Coast. Our primary objective is to strengthen oversight and accountability, and to strengthen civil society's capacities in this regard. We look at the more nefarious side of the importation of surveillance technology, the role of international actors and how to mitigate against their use against particular groupings, such as for example investigative journalists, human rights defenders and opposition political actors. We thereby seek to contribute to the building of strong institutional accountable spaces.

5. My knowledge of the TRC and its processes derives from the following. For more than two years (in the period between April 1996 and March 1988), I was a member of and worked closely with the TRC's Regional Investigation Unit based in Johannesburg. This unit had responsibility for working with the Commission's Human Rights Violation Committee in the provinces that were formally constituted as Transvaal (i.e Gauteng, North West, Limpopo and Mpumalanga). I was also subsequently involved in contributing to the "Final Report" submitted to President Mandela in November 1998. I was also involved in several amnesty cases working with families of victims and survivors providing Pro Bono investigation support. I have subsequently written about the TRC, including several chapters in

books and newspaper articles, and have made numerous presentations. I also used to provide a training module on the South African Truth Commission when the International Center for Transitional Justice was operational in South Africa between 2006 and 2010. I accordingly have a fair amount of experience and knowledge of the work of the TRC.

6. I have followed with interest the extent to which the investigation and prosecution of perpetrators of offences committed both in the opposition to apartheid and more particularly those who perpetrated gross human rights violations in the defence of apartheid has taken place. I point out however that I had also followed with great interest such investigations and prosecutions from the early 1990s in the context of the various enquiries (i.e. the Harms Commission, the Goldstone Commission, the Steyn Commission, Transvaal) and other provincial Attorney General-led cases, etc, through to the late 1990s, when I used to visit Eugene De Kock and others in prison, that is, even before the TRC had handed in its final report and obviously after the TRC had submitted its Final Report in 2003.
7. I perhaps need to record that I am conscious of the Mbeki Administration's efforts to introduce a "backdoor amnesty process" into the then prosecution policy and subsequently a new pardons system which was successfully challenged in the Constitutional Court by civil society groupings, with whom I was involved. I had been an active member of the Board of the

Khulumani Support Group in the late 1990s early 2000s, but resigned because I did not think that they had a broad-based strategy to push forward key recommendations of the TRC and was of the view that they were overly focused on a limited reparation agenda and that there was a broader range of issues that needed attention, especially in terms of connecting survivor/victim interests to a wider set of transformation, reform and development considerations. Be that as it may, it was clear to me that there was little or no interest on the part of the state in investigating and prosecuting TRC-related matters or other cases from the apartheid era.

8. After working in Timor Leste in their Truth Commission, between 2002 and 2004, I worked in Johannesburg at the Zimbabwe Torture Victims Project which documented contemporaneous abuses in Zimbabwe and provided legal, psycho-social and material support for asylum seekers and refugees. In 2006, I became the director of the South African History Archive (SAHA), which was dedicated to the identification, collection and preservation of documents relating primarily to past conflict from the apartheid era and key issues relating to the making of democracy. This included a very active Freedom of Information programme that probed state archives relating to security, intelligence and the Truth Commission.
9. In considering the work of the TRC, I will focus on the following matters: the mandate of the TRC; the structures that were

created so that it could fulfil its mandate, in particular the Investigation Unit, the Human Rights Violation Committee (the HRV Committee) and the Amnesty Committee; and set out some of my observation thereon.

Mandate of the TRC

10. The TRC's founding legislation, the Provision of National Unity and Reconciliation Act, No 34 of 1995, gave the TRC a broad and exhaustive mandate. In terms of that mandate, the TRC was required to investigate and establish "as complete a picture as possible of the cause, nature and extent of gross violations of human rights" committed during the period under review. To this end, the HRV Committee and the Amnesty Committee were established for the following purposes: to afford victims "an opportunity to relate their own accounts of violations of which they are the victims"; and to grant amnesty to persons who "make a full disclosure of all the relevant facts" relating to the acts associated with a political objective committed during the course of conflicts of the past.
11. It is perhaps helpful to begin by noting that the original time-frame of 30 months allocated to the TRC to accomplish its mission was simply unrealistic. The various extensions granted, thankfully, for the finalisation of its work, including that of its various committees, somewhat ameliorated the position. But, and this must be emphasised, given the enormity of the

mandate, for the TRC and all who were involved in its work, it remained “Mission Impossible”. This work was an important foundational contribution to understanding apartheid-era conflict, but certainly could not be considered the final word. And, as I point out hereunder, the unrealistic time-frame within which the TRC was required to fulfil its mandate exacerbated the position on account of the following. The limited time granted meant that there was no time afforded to draw up a plan or determine any of the following: the extent of the tasks ahead; what type of skills were required; and how many people were required to ensure that the mandate was reasonably fulfilled. Adding to those challenges was the fact that urgently required resources were not always available. The TRC was expected to be operational whilst it was still building its infrastructure and staffing, and developing its policies, modalities and determining its priorities.

12. In view of the foregoing, the TRC has been subjected to many criticisms. I will deal with these later in this statement.
13. However, fairness demands that the following is placed on record quite early in this statement. Much of what the TRC achieved is laudable. Foremost among these are the following matters.
14. First, for the first time, the marginalised and oppressed and vulnerable were given a public platform to tell the world, without

fear, prejudice or recrimination, the unbearable wrongs the apartheid power brokers, in particular its security forces, meted out to them or their loved ones in defence of apartheid and oppression. Public participation in this way was unprecedented in terms of Truth Commissions and transitional justice processes that had been put in place during the 1980s and early 1990s.

15. Second, the TRC's amnesty hearings publicly confirmed the involvement of individual perpetrators in a range of abuses that had been vehemently denied in the past. The apartheid system and its horrors were laid bare before the whole of South Africa and the world at large. This was because, in a welcome break from the past, for the most part, the TRC's processes were transparent and open.
16. Third, a huge resource of documentary and other material has been left for future analysis and further inquiry, though unfortunately little analysis could be done by the TRC itself on account of the rush to produce the Commission's final report.

The Investigation Unit

17. Although in principle there was one TRC Investigation Unit, in reality there were five separate Units: four Regional Units and a National Unit. The Regional Units were located in Cape Town, Durban, East London and Johannesburg. The National Unit, known as the National Special Investigation Unit, was located in

Cape Town. Each of the five Units was staffed with 12 members.

18. However, the Investigation Unit as a whole only became operational in mid-1996 and in some areas did not have its full complement of investigators until the end of that year. Unfortunately, administrative support for the Units was virtually non-existent initially and was only attended to during the course of 1997, to the grave prejudice of the Investigation Unit's investigations.
19. It is important to note that the Investigation Unit's capabilities were circumscribed by the skills and expertise of its 60 members, who were drawn from a range of backgrounds, including the law, NGOs and the South African police. Lawyers held four of the six senior investigator positions. Most investigators had limited or no experience of human rights investigations, or detailed insight into apartheid era conflict dynamics. . Twelve members of the team were seconded from various European police forces and most had little or no experience of or expertise in respect of South Africa.

The HRV Committee

20. The task of the HRV Committee was to obtain and evaluate submissions which individuals or groups made in respect of conflicts of the past. Initially, the complaints were heard by the complete panel of 15 Commissioners. Soon thereafter, however, the hearings before the HRV Committee were before

a smaller number of Commissioners and additional members had to be appointed later so that the HRV Committees could hold more hearings across the country.

21. However, the HRV Committee's ability to access the truth through its hearings was limited by several factors. Among them were the following: constraints in respect of resources, time constraints and similar matters.
22. In this regard, the following matters fall to be noted: (a) more than 21 000 submissions were received by the HRV Committee over a two-year period; (b) however, insufficient "statement-takers" were engaged: only six were allocated to each of the four Regional offices; (c) moreover, the statement-takers had little experience of this type of work, with the result that many statements were insubstantial and made subsequent investigative and other work that more difficult; (d) in order to include peri-urban and rural communities, in April 1997, the TRC had to launch a designated statement-taking programme with NGOs and community-based organisations and engaged 300 community-based statement-takers, thereby if nothing else confirming how inadequate the original number of statement-takers who had been appointed.

The Amnesty Committee

23. The Amnesty Committee received many more applications than had been anticipated. The cut-off date for the receipt of

applications, however, had to be extended several times. In order to expedite the processing of applications for amnesty: the size of the Amnesty Committee was increased on several occasions, from the initial five members to 19 finally; and the Committee was split into six smaller committees which operated simultaneously and independently of each other. The Amnesty Committee also had to be provided with additional administrative staff, evidence analysts and evidence leaders. The Amnesty Committee had only a handful of dedicated investigators deployed to it and their work was focused on locating records and corroborative tasks, rather than primary investigation.

General comments on Investigation Unit and the Committees

24. I pointed out earlier that given the very tight timelines within which the TRC and its Committees were required to complete their work, there was very little time in which to plan how the investigations would be conducted and how the different Committees would work.
25. Whilst the Amnesty Committee had very limited investigative capacity to investigate cases and test the versions of amnesty applicants, the HRV Committee often publicly responded to those testifying that cases would be referred to the investigation unit. I am not certain about other regional units, but there was no official referral mechanism from the HRV Committee to the

team in the Johannesburg office. This was done in a somewhat ad hoc manner. As has been noted, given the enormity of the task facing the TRC and its Committees, the number of investigators who were appointed was totally inadequate. Moreover, the HRV Committee began their hearings before the Investigation Unit had appointed its full complement of investigators or plans were finalised for how investigations would be prioritised and conducted, in particular whether investigations would be controlled nationally or regionally and how investigators would service the HRV Committee.

26. In the result, plans and systems central to the work and operations of the Commission, the Investigation Units and the various TRC Committees were developed and frequently changed as the need arose.
27. In this regard it is worth noting that after the South African TRC, other truth commissions learnt from a serious error we had committed, namely you do not fly a plane while you are trying to build it. You have a set-up period in terms of which you recruit properly after identifying the personnel requirements. You also put in place proper policies and processes that would be implemented. None of this happened in respect of our TRC. It was not a smoothly functioning machine, although systems were put in place to structure the flows of information into the Commission. The public face of the TRC made it look as though the TRC was a relatively slick operation. This was invariably not

the case in my experience.

28. The observations noted immediately above are necessary to record that, because we were trying to function without having effective functionality, this inevitably further restricted what could have been achieved, notwithstanding the challenging conditions and circumstances under which it operated.
29. In order to fully appreciate how the TRC's outcomes were affected, it will be helpful to consider the work of the Investigation Unit, the HRV Committee and the Amnesty Committee separately. I do this in the paragraphs immediately hereunder.

Observations on the work of the Investigation Unit

30. As regards the Investigation Unit, there are several matters that are deserving of mention.
31. First, where requests were made by the HRV Committee, it was clear what matters were to be investigated.
32. Second, however, where that was not the position, it was not entirely clear on what basis investigations would be initiated or what criteria were to be used to identify a matter for investigation. For example, this is how the TRC investigation into allegations against Mrs Winnie Madikzela-Mandela were initiated. Commissioner Yasmin Sooka bumped into me in the corridor one day in early 1997 and said: I have seen there are

half a dozen or so statements about “the football club”. Will you start pulling stuff together? And it was as simple as that. I started digging around with a couple of colleagues, and we put things together, which formed the basis on which the hearing relating to Mrs Madikezela-Mandela was held later that same year.

33. Third, I am constrained to observe that describing the Unit as the “Investigation Unit” is a bit of a misnomer. As members of the Unit, we did not conduct in-depth investigations for the most part; nor did we conduct forensic investigations. It is so that there were some primary investigations and statement-takings. But for the most part we were, I think, inquiring and collating available data and trying to pull things together to scaffold the various processes of the TRC, mainly the public hearings of the HRV Committee, which started around March/April 1996, and the in-camera hearings that commenced later that year: Investigators in an *ad hoc* way worked on the generation and analysis of statements, the selection of cases for public hearings as well as developing more in-depth inquiries. Indeed, on an *ad hoc* basis investigators could be drawn into scaffolding a number of other TRC-related processes.

34. Fourth, sometimes the public hearing schedule was difficult to comply with. As a result, members of the Investigation Unit ran around trying to support the statement-taking unit to make sure that we had enough statements from which the TRC Commissioners could choose and select for pending public

hearing process. This was of course a consequence of not only lack of proper planning but also the lack of experience of many of the role-players.

35. Fifth, I must also record that the quality of statement-taking was generally poor. In fact, the quality of most statements that came to the Commission was deficient: most merely captured a certain amount of information that the relational database could work with. This reflected a lack of sufficient investment in the statement taking process, and in my opinion, huge opportunities for documenting important context and detail in these statements were lost.
36. Sixth, there were also certain developments which created unexpected challenges for us. For example, we had this rush of statements in the April to June 1997 period, a large chunk of this because the Inkatha Freedom Party (IFP) had suddenly woken up to the fact that if their people did not provide statements, there was a chance they might lose out on reparations, because the TRC was making a connection between victim findings and recommendations on whether reparations ought to be paid to the individual concerned. Up to this point, the IFP had actively discouraged its members and supporters from engaging at the TRC, of which it was publicly dismissive. The TRC also decided not to recall Mangosothu Buthelezi, the IFP leader, to face the TRC following his first appearance which left multiple unanswered questions, fearing this might result in violent

blowback. Parts of KwaZulu-Natal remained a sensitive conflict zone during this post-1994 period.

37. Seventh, a related general issue was the basis on which findings may be made that a particular person was a “victim”. The Investigation Unit were directly involved in such matters. In our unit, I was involved in the writing of a recommendation on how to go about this, given our limited resources. This contributed to what was subsequently referred to as the “corroboration process” where basic facts about a particular incident were verified. For example, if your daughter died in a demonstration in Alexandria Township in June 1976, or whenever it was, or whatever it might be, the Commission would establish that there is that person who was killed at that time through death certificates, or maybe media reports, or statements and so forth. However, we would not look into what actually the family wanted, which is: what happened that day and why? We simply didn’t have the resources to make that broader enquiry, and needed to employ a methodologically defensible process to underpin victim recommendations and findings.
38. Eighth, the Investigation Unit was plagued by organisational, managerial and bureaucratic difficulties. Priorities and strategic objectives were not set and there was a lack of direction and integration of activities. It was evident, given the size and limited experience of the members of the Investigation Unit, that even when cases had been selected for in-depth probes, no more

than cursory “investigations” would be conducted. Indeed, there were very few independent investigative breakthroughs, and many investigations were focused on the time-consuming task of sourcing and gathering information, including identified secondary source material.

39. Ninth, in light of the foregoing, there are huge gaps in many things that the TRC was mandated to do. We can see from the statements taken there are major spatial and temporal gaps in the record of violations. Very few cases, including high profile ones received dedicated investigative attention. For example, after looking at the circumstances surrounding the death of Dr Neil Aggett, I made a recommendation to the Commission that the policeman who had interrogated Dr Aggett, Mr Stephen Whitehead, a well-known individual actively involved in the private intelligence sector after 1994, be subpoenaed for a section 29 inquiry. However, that did not happen. A similar recommendation about a key witness in the Ahmed Timol case was also not followed up. That was largely because there was no capacity to do so. In addition, we did not have proper organisational structures that filtered out clearly what matters or even types of matters would be accorded priority. Unfortunately, from my vantage point it was evident, but not surprising, that many decisions were made on an *ad hoc* basis.

40. The Investigation Unit had to sift through mountains of documents in order to service the human rights violations processes. In this regard, I record that, whilst investigations were centralised initially, a more decentralised approach was later adopted. As the TRC's Final Report points out: "The structure and functioning of the Investigation Unit altered as the institutional priorities of the Commission changed." This meant that limited attention and resources could be allocated specifically to proactive investigations into a range of pressing matters.
41. Finally, the effectiveness of any investigation depends on access to information. However, various obstacles were put in the way of the Investigation Unit's accessing these documents. There is this further issue that arose. Many official records were simply unavailable. In this regard, the then Minister of Safety and Security, Mr Sydney Mufamadi, informed the TRC that thousands of police files had been destroyed. According to one report, the files of 314 000 individuals and 9 500 organisations were burnt or shredded. The TRC, under the guidance of Verne Harris, undertook a dedicated inquiry into apartheid-era security archives, records management, and their destruction.

Observations on the HRV Committee

42. I have noted above that the HRV Committee was subjected to severe resource constraints. The consequences thereof were

quite far-reaching. Among the consequences were the following. Some 2 000 of the 21 000 submissions that were received were examined – in some 60 public hearings around the country that dealt with specific cases from particular areas. In the circumstances, the complaints of only a small fraction of those who had made submissions to the HRV Committee could be heard publicly. This meant that the cases to be heard had to be selected. To this end, the HRV Committee tried to ensure that a cross-section of cases was heard in each area. This was not always achieved and in some instances this led to indigent black victims being under-represented, whilst conversely white victims were over-represented, ostensibly in the name of impartiality.

43. But there were two significant matters about which the TRC and the HRV Committee could do little, if anything.
44. First, it is clear that many human rights violations were not reported to the TRC. Moreover, most of those who came forward were black women, many of whom may be described as “reporters of abuse” setting out what had happened to their loved ones, as opposed to what happened themselves.
45. Second, in light of the foregoing, the TRC was unable to secure as wide a cross-section of submissions as it might of. In this connection it is worth noting with grave disappointment that many political activists, community leaders, [former] parliamentarians and Cabinet Ministers did not submit

statements, nor did certain significant constituencies, such as former members of the civil service, National Security Management System or the judiciary or magistracy. Many activists and liberation movement cadres also did not provide statements to the TRC. With varying degrees of focus, a range of these issues were addressed by the TRC in other processes, including Section 29 in-camera hearings and the public “institutional/sector” hearings.

46. Third, it is clear that some pockets of society kept their distance from the TRC processes. For, example, some minority groups, notably whites in general, largely stayed away, prompting concerns about a lack of commitment to finding a common understanding of the past and building reconciliation. The situation was not uniform, physical access to TRC processes was limited to public hearing schedules and locations. Despite this, there was widespread broadcast and print media coverage; the public broadcasters’ television and radio work was particularly important in ensuring there was widespread national coverage. Love it or hate it, you could not ignore the TRC and the light it was shining on the past! The politics in the immediate post-1994 period were febrile. It is possible that some constituencies perceived the TRC as an ANC entity, or decided not to engage with a process that would expose how they benefited under apartheid. The extent to which activists and others boycotted the TRC because they did not support or did

not feel the need to participate is unclear, although it appears many deliberately eschewed the process.

47. Fourth, the allegations could not be properly tested. In respect of the processes of the HRV Committee, the following observations may be helpful. As I have noted above, when dealing with the Investigation Unit, the quality of the information gathered was not always good and the versions presented often could not be tested properly. This, however, did not constitute a basis to contend that the information was unreliable. This is because, as was also noted above when dealing with the Investigation Unit, there was a process to establish the truth and relatively consistent procedures, using corroborated information, secondary documents and similar fact evidence were used. While this may have diminished the reliance on “hard” factual truth, it allowed for the emergence of a range of truths, as outlined in the Commission’s Report. It is very important to distinguish between what will fall under consideration in a human rights investigation, compared to a criminal investigation. The former necessarily adopts a much wider angle lens. Whilst truth recovery and accountability lie at the heart of the objectives of such inquiries, they are generally not locked into forensic inquiry, custody of evidence, etc.

Commentary on Amnesty Committee

48. It is perhaps worth emphasising that the TRC legislation did not allow for a general amnesty but required detailed disclosure of specific events. Although the TRC Act required the disclosure of “all relevant facts”, interpretations of relevancy varied, with the Amnesty Committee leaning towards a narrower definition. Not surprisingly, the disclosures made tended to be limited, adding to the frustrations of victims and their families.
49. Amnesty hearings were often frustrated by legal argument. Lawyers argued passionately for the exclusion of certain testimony, for rulings against certain lines of questioning, for the recusal of commissioners, and so on. There were interminable delays as legal representatives manoeuvred to protect their clients’ interests, instead of assisting the Commission to get to the truth. Often applicants for amnesty revealed the bare minimum required to secure amnesty, effectively preventing the TRC from establishing “as complete a picture as possible”.
50. Moreover, a handful of attorneys and advocates represented most of the security force members and politicians. Tightly interlocking submissions and testimonies reinforced the perception that their versions of events were contrived and designed to minimise fall-out. On several occasions, leaders of evidence raised concerns about collusion between witnesses and ethical misconduct by lawyers. Not surprisingly, some

families felt that applicants for amnesty or their legal representatives were acting in bad faith.

51. Perhaps the greatest obstacle to determine whether the truth had been disclosed was the following: the Amnesty Committee initially lacked any effective investigative capacity: its investigative component was only developed in the second half of 1997. Some of these personnel came from HRV Committee's investigation unit that had been largely closed down by late 1997. Amnesty applications sometimes contained the barest detail. The capacity to verify information or pursue leads was extremely limited and the gathering of evidence focused on official documents or other secondary sources, as opposed to statement-taking or some other primary research.
52. Finally, the HRV Committee and the Amnesty Committee of necessity held separate hearings and followed different processes, but in principle they ought to have been complementary, it being envisaged that material would flow between the two Committees, facilitated by the investigations and the checking of facts. The major source of new material relating to wide array of violations was submitted to the Amnesty Committee, mainly in the the first half of 1997; this material was not made available to the HRV Committee investigators. In reality, and deeply regrettably, the Committees worked in isolation and vital opportunities to conduct further investigations based on amnesty applications and testimonies were missed.

This was, in my opinion, an essential design fault of the TRC.

Further reflections on the TRC

53. The observations made above are in the main based on difficulties inherent in the evolving structures and processes of the TRC. However, there are other problems that need to be taken into account in any assessment of the work and workings of the TRC. These are considered in the paragraphs hereunder.
54. It would be appropriate to begin by recording an unfortunate difficulty the TRC faced quite early in the work of the HRV Committee, namely a decision of the then Appellate Division relating to the rights of persons accused of committing gross human rights violations and the subsequent quite cynical attitude of the perpetrators who, having largely derailed the initial HRV Committee hearing then approached the Amnesty Committee to secure amnesty for the serious violations they had been accused of.
55. In the case I refer to, two retired Security Policemen [Brigadier Jan du Preez and Colonel Van Rensburg] were informed in separate letters that in the week thereafter the evidence of a family member of an activist who had been poisoned and had disappeared would be led at a hearing of the HRV Committee that he was involved in or had knowledge about the activist's poisoning and disappearance in Port Elizabeth in 1981/2.

56. However, the policemen, through their attorney Jan Wagener, approached the High Court urgently for an order interdicting the TRC from hearing the evidence until the policemen were given timeous notice of the hearing and furnished with information by way of witness statements and other relevant documents to enable them to identify the events, incidents and the persons whose evidence would be led. In its answering papers, the TRC explained the limited information that was furnished on the following basis: victims were still traumatised by their experiences and feared the prospect of testifying against the alleged perpetrators and the prospect of intimidation befalling them or their families should their identities be revealed. This notwithstanding, the identity of the witness, the activist's mother, although initially not made known to the Security Policemen, was made known before the hearing of the urgent application. The High Court nevertheless granted the interdict and that decision was upheld by the then Appellate Division on the basis that *fairness to the alleged perpetrators* justified the order granted by the High Court.¹

57. However, it needs to be recorded that, in a twisted and cruel irony, both Security Policemen subsequently applied for amnesty in connection with the poisoning and murder of the

¹ The AD's judgment is reported as *Du Preez & Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (AD). It is perhaps worth comparing the AD's approach with that of the Full Court in *Truth and Reconciliation Commission v Du Preez & Another* 1996 (3) SA 997 (C), which found on the contrary that the grant of the interdict by the High Court was not justified and upheld the TRC's appeal against the High Court's grant of the interdict.

activist.

58. The above AD ruling had a tremendously negative impact on the subsequent functioning of the Commission, as energy and limited resources now had to be diverted to locating any person who may be adversely named in a public process and giving the perpetrator all information known by family. This effect of this was that alleged perpetrators knew precisely what information was known about his or her involvement in gross human rights violations and enabled him or her to choose to disclose only what appeared to be known to the victim or his or her family. The necessity for full disclosure appears to have been an unfortunate casualty.

Missed opportunities

59. Some of the matters that the TRC was required to investigate had been or were also being investigated the Office of the Transvaal Attorney-General. That Office had its own special investigation unit, which had been set up following revelations before the Goldstone Commission. Seemingly, these units were served by investigators seconded from the police. In the circumstances, a relationship between the TRC's Investigation Unit and the A-G's Office held enormous potential for the broader truth recovery process. My understanding is the head of the Johannesburg investigation unit and one other of the police investigators had been seconded from the AG's office.

However, despite the potential of effective information sharing, a politics of territorialism took over. As TRC investigators, we were frustrated that in many instances investigative material secured by the AG's office could have been more effectively employed for TRC inquiries. I am aware of at least one high-level meeting between the TRC and various AG offices, but this did not result in agreement on a constructive engagement. This is highly regrettable as the exchange of information might have prompted more applications for amnesty from members of the security forces. Nevertheless, it should be stated that the vast majority of apartheid security force applications had their genesis in the work of the AG's office and I would argue the disclosures of Eugene De Kock during his mitigation in the sentencing part of his trial in October 1996. The AG had opened the door for an array of inquiries, not only amongst the ground operatives, but also in terms of the command structure of especially the former Security Police. There was a measure of co-operation around the overlapping interests in Dr Wouter Basson and the SADF Chemical and Biological Warfare programme, but the opportunity for wider co-operation did not materialise.

60. In my view we must come to terms with the following. The TRC achieved what it did on the basis of a dedicated staff component and because it operated under the protection of President Mandela and certain key individuals within the ANC's

leadership. The TRC process does not appear to have been a popular enterprise within many parts of the ANC. In my view, this is one of the reasons that most people inside the ANC who could have brought information to the TRC did not do so, and relied on the party's institutional submissions from the leadership. The bulk of cadres and activist stayed away. They did not come to the TRC and detail what happened to them. You can also see this in the temporal and spatial gaps in the record of the victim lists of people who went to the TRC. Whilst a number of cadres applied for amnesty, without the prospect of a potential prosecution sitting on their shoulder, most active ANC members relied on the organisational submission of the party, which to be fair was more detailed with respect to violations than any other major conflict actor (i.e. PAC, NP, IFP).

61. Inevitably, however, given the nature of the tasks it was required to undertake and the decisions it would take, the TRC was subject to serious criticism as well. Among the criticisms levelled against the Commission were the following: it was politically biased, perpetrator friendly or selective and blinkered in its focus on victims of gross human rights violations; inconsistencies in which it made decisions on the grant or refusal of amnesty and the legitimacy of the data collected and the specific interpretations made.
62. In my view, underlying much of the criticism was disagreement about whether the truth had been told or not and whether it

should be pursued further, if at all.

63. The Commission's view appeared to be this: reconciliation could only be built on a foundation of truth. However, whilst the truth by itself would not automatically ensure reconciliation, the absence of truth would effectively prevent reconciliation. What constituted the truth was not straight forward. The Commission adopted an approach that allowed for varying approaches to truth: factual/forensic truth; personal/narrative truth; social/dialogical truth; and healing/ restorative truth.
64. However, the reality played itself out in a more complex way, illustrating that the relationship between truth and reconciliation is multi-faceted. For example, many people assumed that the TRC itself would somehow "create" reconciliation or be the vehicle for "delivering" it. Unfortunately, sometimes the opposite appeared to happen and the attempt to establish the truth led to greater enmity. Having heard the testimony of certain amnesty applicants, some families of victims were unprepared to forgive, especially if they felt the perpetrator had not told the truth. However, where an Amnesty Committee granted amnesty in such a case [thereby seemingly accepting the perpetrator's version], families were unlikely to want to reconcile with those whom they believe had told half-truths, especially when there was little or no investigation of the version of the applicant for amnesty.

65. Difficulties such as these have given some critics an excuse to argue that all truth-recovery processes are counter-productive and that the TRC process was not the required solution. Some further argued: interrogating the past endangers reconciliation instead of fostering it and we should rather pursue a policy of “forgiving and forgetting”. My view is this: although this approach may be politically expedient, it fails to acknowledge that *knowing* the truth is a requirement for *understanding* the past, which itself underpins reconciliation. Even the “forgive and forget” approach must rest on an understanding of what actually happened.
66. In my respectful view there were two causes [for the lack of prosecutions and the pursuit of truth] – following the Truth Commission. The primary cause is the political environment, which did not support an engagement with this, including for some of the reasons I have already outlined. And the second was civil society. The TRC, in the process of building recommendations, failed fundamentally to identify champions in civil society and in the political arena who could drive those recommendations forward afterwards. This includes both the prosecution and reparation agendas, although the former was a legal obligation of the state and by extension should not be subject to the deliberate dilutions we witnessed with other recommendations. A core objective of the TRC's mandate was to put in place processes and recommendations that would help ensure such violations never take place again. This is why a

wide range of recommendations were included covering an array of constituencies and institutions. This included the need to pursue investigations with a view to criminal prosecution and, as we have seen, victim-centred truth recovery processes such as the sterling work over the last two decades of the NPA's Missing Persons Task Team.

67. One of the matters that I have been asked to deal with is this. How did it come about that the Office of the NDPP, as opposed to the SAP, was the TRC's first port of call as it were, given that prosecutions are usually proceeded by a detailed forensic investigation, which it appears the TRC was unable to conduct, for the reasons I have outlined. I am unfortunately not aware how this came about or what the agreements between these agencies were.
68. I am also constrained to record that despite opportunities for investigations into certain quite serious abuses of human rights becoming available to the Investigative Unit, the requisite investigations were not conducted. Among those that are worthy of mention are the following.
69. First, although a former commander of a police hit-squad, Brigadier Jack Cronje, had confessed to the killing in the 1980s of more than 60 people in the then Northern Transvaal and surrounding territories, no detailed coordinated investigative probes into those killings or organisational primary

investigations were undertaken by the Johannesburg investigation team. Ironically, these matters were being probed by offices of the then AGs. However, when this group applied to the TRC for amnesty it had the effect of closing down the AG's investigations.

70. Second, the Investigation Unit did not probe the apparent inadequacies of internal investigations conducted by the ANC into alleged abuses committed in its own facilities during the 1980s. This was despite the fact that details of alleged perpetrators and offences were available. Only three in-camera hearings with senior MK commanders were held.
71. In my view it is regrettable that such important issues were not addressed more thoroughly.
72. Be that as it may, I must hasten to add the following. Despite all the dysfunction, which I have set out above, I firmly hold the view that the TRC managed to achieve much more than many had expected, though there were huge opportunities lost, as I noted in an article I penned.² For the purposes of this Commission, I highlight the failure to foster institutional interactions between the TRC and the Offices of the different Attorneys-General [there were 13 then], the Office of the National Intelligence Agency, the South African Police and the

² *False Promises and Wasted Opportunities in Commissioning the Past*, edited by Deborah Posel and Graeme Simpson (2002).

South African Defence Force. I attribute this to a certain level of dysfunction in the senior management of the TRC and its Investigation Unit. I also believe that this also reflected varying degrees of institutional resistance from state institutions themselves in the throes of institutional reform. The TRC was charged with looking at the responsibility of these institutions for gross violations of human rights at the very time of significant institutional volatility.

A non-prosecution deal?

73. I am aware that there is evidence before this Commission that Mr Wagenaar, who acted for many police officers of various rank, has alleged that there was a deal between security force generals and senior members of the ANC. I had several discussions with him on this issue when we met at a conference in Boston in the late 1990s or early 2000s. He told me that the generals and the ANC had an arrangement though it was not written. But he basically indicated that there was an implicit threat that if prosecutions were pursued against former state security operatives, the door would open for a push-back against the ANC. And the interesting thing for me was that it was not exclusively about criminal prosecutions he spoke of, because I have seen this debate around the ANC cases unfolding. He said that there were criminal ANC cases that could have been pursued. But he also argued during those discussions that they would “take the ANC down” through the

civil courts with these cases, that they would paralyse the ANC. There was also a sub-text that permeated regarding the exposure of informants and spies as well.

74. The subsequent actions with back-door amnesties and pardon processes by Mr Mbeki perhaps indicated that there was not a deal, that there had been an attempt at a deal. Be that as it may, there was a *de facto* response of asphyxiating the resources and not a particular drive, at least in terms of public exposures from any National Director of Public Prosecutions and that includes, in my opinion, Mr Pikoli and others in terms of what was said and done when in office. I recognise that decisions on priority resource allocation necessarily included consideration of an array of contemporary investigation and prosecution challenges. Ultimately, these cases were not going to be looked out without the required measure of political support and attendant resourcing.

Other possible explanations

75. In order to understand the lack of progress in prosecutions, one needs to accept that there is a very complex set of live, evolving factors playing that state actors have to kind of surf and navigate. That changes significantly post 1994. Most violence in this country between 1960 and 1994, happened between 1990 and 1994, as did the vast majority of violations and deaths. You will see that most people who came to the Truth

Commission did so to report on incidents in the 1990s. There were only a handful of statements taken around 1976, for example, or from the Vaal Uprising in the mid-1980s. There are huge gaps in the TRC's own primary record.

76. But I think that the 1990s and the live nature of that violence and the role of security actors, and Inkatha in particular, and some elements of the ANC security infrastructure with rogue self-defence units and so forth presented a febrile destabilising mix that still needed significant stabilisation post 1994. I think the granting to Philip Powell, for example, authority to leave the country when in 1999 he had not disclosed full details of arms caches, reportedly leaving tons of arms still unaccounted for floating around KwaZulu-Natal is highly worrisome. And, he is in the UK running a community development NGO!

Conclusion

77. In my view, there was no political interest or will in investigating and prosecuting crimes of the past.
78. I think there are several factors that point to this. If you take the TRC recommendations and distil them down to a smaller group of issues through a parliamentary *ad hoc* committee, and then establish some kind of tiny under-resourced sub-unit inside the Department of Justice, what message does this send? These institutional responses were a clear indicator of a lack of political interest, and subsequent experiences reflected the lack of

administrative bandwidth and limited traction on many TRC related issues, many of which are still in play. The acts of omission by state actors at the political level and senior administrative level constitute reinforcement of this, whether it is the lack of resourcing of investigations, whether it is how they dealt with memorialisation or archives and records and how they dealt with the reparation agenda. Bear in mind though that this was enabled by the process and design faults in the TRC. I think that it was not an oversight that the TRC, was set up to be deliberately isolated from other transitional and transformational processes in the country.

79. Whilst it was one of the failures of the TRC to not hook into those other transformation processes that would allow the momentum of what it added to the debate to be carried forward on these issues, there is a substantial chapter of recommendations, which the state did not take seriously. Unfortunately, there was no one pushing for this, there were no champions to hold them to account on these issues. No one in that context within the ANC was ever going to champion post-TRC stuff, though certain individuals tried to advance that process within a context of competing priorities.

80. One of the issues that has intrigued me is why some perpetrators, like Eugene de Kock's commanders, such as Krappies Engelbrecht and Basie Smit were not prosecuted as priority cases. De Kock and others had evidence to underwrite

solid investigations that could have been done with the proper resources. However, having regard to the context, I am of the respectful view that that there was slow paddling from within the NPA, which itself lacked resources to push beyond its case load. Ultimately, in the context of institutional and policy dynamics a “politics of prosecution” reflected an absence of political will to pursue these cases. That was particularly indicative of the Mbeki Administration. This applied not only in respect of prosecutions, but also reparations, in respect of which I had quite serious disputes with the DG in the Presidency. Be that as it may, I am of the view that much that was left undone or unfinished was as much a result of omissions as well.

81. I have mentioned Mr Mbeki several times. I believe he has a duty to account to South Africans for this state of affairs.

A handwritten signature in blue ink, appearing to be 'Piers Pigou', written on a light yellow rectangular background.

Piers Pigou