



# Dialogue and Exchange Programs Report

*Study tour of Burundian Parliamentarians for understanding the different stages of the TRC (with a focus on the law) to South Africa with Skype interactions with TRC experts in Ghana, Sierra Leone and Togo*

April 6–12, 2013 in Cape Town, South Africa

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# Abbreviations

<b>AFSC</b>	American Friends Service Committee
<b>ANC</b>	African National Congress
<b>CS-WGTJ</b>	Civil Society – Working Group on Transitional Justice
<b>IJR</b>	Institute for Justice and Reconciliation
<b>MPs</b>	Members of Parliament
<b>NRC</b>	National Reconciliation Commission
<b>SA</b>	South Africa
<b>TRC</b>	Truth and Reconciliation Commission
<b>TJRC</b>	Truth Justice and Reconciliation Commission
<b>HQ</b>	Head Quarter
<b>HRV</b>	Human Rights Violations
<b>ICTJ</b>	International Center for Transitional Justice
<b>KVSG</b>	Khulumani Victims Support Group
<b>NGO</b>	Non-Government Organization
<b>SA TJRC</b>	South African Truth Justice and Reconciliation Commission
<b>TJC</b>	Truth and Justice Commission
<b>SATRC</b>	South Africa Truth and Reconciliation Commission
<b>UNOHCHR</b>	United Nations Office of High Commission for Human Rights

# Introduction

Since independence and even long before, Burundi was characterized with cyclical crises where thousands and thousands of people died, destroying the social cohesion, leaving the country in a disastrous situation of extreme poverty. These recurring crises have had significant impact on the socio-political, economic, institutional and environmental life of the country.

As a prelude to solutions to the problems plaguing the country at the time, were a series of Peace Agreements signed in Arusha and that of August 28, 2000 remains vital in the reconciliation process as this touches on the concept of Transitional Justice mechanisms. The first of the five protocols of the Arusha Agreement, relating to the nature of the conflict, provides in its Articles 6 and 8 for transitional justice mechanisms to be established and implemented.

After the 2005 general elections, the government raised the issue of transitional justice. In that light, a tripartite steering committee (UN, Government, civil society) was set up and had the responsibility of organizing national consultations. This was meant to touch on the issues of identifying mechanisms of transitional justice appropriate to the situation. To respond to the specifications of the Arusha Agreement on transitional justice and through the support of the Peacebuilding Funds of the United Nations, the Government alongside the United Nations developed and implemented a Project on National Consultations on Transitional Justice. Through this project, extensive National Consultations at both the national level and in the diaspora took place to listen to all Burundians that were affected and their expectations. A report from the national consultations was submitted in December 2010. Following this report, the government made it a duty to largely raise awareness on its content and on the other hand, it set up a Technical Committee which had among its mission, the development of a draft law on the Truth and Reconciliation Commission, which is currently at National Assembly for adoption.

Burundi has been one of the countries in which the Dialogue and Exchange Program has been running and the national actors have been quite supportive of this initiative. Burundi has benefited from such a program in the domain of elections, reintegration of war affected persons and transitional justice. This remains an ongoing program for the organization and opportunities and needs will continue to be seized and looked into to contribute to government's effort in bringing unity to its people.

As far as the transitional justice is concerned for Burundi, the organization held an International Conference on lessons learned from Truth and Reconciliation Commissions August 2011 and the report was officially published in 2012. This report was shared with government institutions including the National Assembly and the Senate, the UN, CSOs and continues to be shared within Burundi and internationally. This conference saw the participation of govern-

ment officials, civil society organizations and the international community among Experts in transitional justice mechanisms from South Africa, Sierra Leone, Liberia and Kenya.

Guided by the spirit of partnership and collaboration with the Government of Burundi, a request for a study tour was favorably received by AFSC for the Honorable Members of Parliament. This request was to enable the Burundian Members of Parliament who had the debated draft law on the TRC to be able to exchange views and discuss the various stages of the implementation of the TRC in countries that have already had the experience like: South Africa, Sierra Leone, Togo and Ghana.

*The processes of Transitional Justice are always compromised. They depend on the good will of the Party concerned as well as on the good will of the country concerned. If it is done honestly and if there is a good will, the process is accepted and can allow a new society to emerge.*

—MARY BURTON, FORMER COMMISSIONER FOR THE SOUTH AFRICAN TRC

The process leading towards a Truth and Reconciliation Commission reached a critical phase with the transfer of draft legislation by the executive to the National Assembly on 18 December 2012. The long process towards the establishment of a truth seeking and reconciliation mechanism provided for in the Arusha Peace Agreement of 28 August 2000 seems to be reaching its end. Recent developments have however demonstrated that there is still a lot to be done in terms of building the confidence between the officials (Government and Parliament) with the civil society organizations, the International Community and other Political Actors in Burundi. There is need for the legislative process led by the GoB to be inclusive and allow the opening of a dialogue on key features of the draft legislation. Civil society organizations have expressed concerns on a number of points they believe the TRC draft bill is inconsistent with the national consultation process (2009–2010), while presenting disruptions in consideration with recommendations formulated by the Government Technical Committee tasked with proposing a TRC bill. It is becoming more and more evident that the GoB organized wider consultations on the draft law of its Technical Committee and this seems to be stemming from its findings to defend the draft bill it has sent before the National Assembly. The features of the latter are mainly: a national composition of the membership, lack of mentioning of the possibility of a Special Tribunal, a pardon and reconciliation driven process based on forgiveness of the offender, confidentiality on the name of the perpetrators and closed management of its archives. While discussions on the matter raised herein are indispensable to create a peaceful condition to the operation of the TRC, it belongs to the parties involved in this process, namely the GoB and Civil Society to engage in a constructive dialogue. In the meantime, the legislative review of the TRC draft bill needs to be informed about minimum standards indispensable to give credibility to the TRC in Burundi. These standards, which constitute the backbone of a truth

seeking process, pertain to the procedural fairness encrypted in its mandate, mission, operations and findings.

For the above reasons, a study visit of the National Assembly Justice and Human Rights Commission working on the draft bill was organized to get the exposure of the processes where procedural fairness has been central to the TRC's conceptualization and operation. This was a timely initiative which is hoped will bring solutions to the stalemate that has been existing with the Burundian TRC process.

The choice of South Africa was motivated by the necessity to get the essence of a legislative process which produced a set of proceedings, making the South African TRC the most respected process on a procedural view point, regardless of what it achieved in terms of closure for the victims and reconciliation for South Africa.

Case studies and experiences from the Ghanaian National Reconciliation Commission, the Sierra Leonean Truth and Reconciliation Commission and the Togolese Truth, Justice and Reconciliation Commission provided a grasp of truth seeking processes presenting different legislative processes and features, necessary to capture the often dilemmatic business of coming to terms with past atrocities and the procedural decisions attached to it. There was a great interaction between thirty personalities and different institutions to exchange views, respond to questions from the ten Parliamentarians from Burundi and draw conclusions of where Burundi stood and the way forward.

To kick start the study visit agenda, the delegation was welcomed at the Institute of Justice and Reconciliation, IJR, by the Executive Director, Dr. Fanie du Toit. He was happy with the initiative for the MPs to seek other countries' experiences in order to seek the way forward and lauded AFSC for supporting the government in the idea. In his later interventions with the delegation, he made mention of the fact that there is no TRC process that did not receive criticisms and Burundi should expect same.

*Burundi as a sovereign state will choose its own path. But once Burundi gets its way, the argument is not won either with the international community or with its citizens. Two things will be important: it will have to be morally credible and defensible but also procedurally fair.*

—DR. FANIE

The delegation was opportune to get a presentation from Alex Boraine, former Deputy Chair of the South African Truth and Reconciliation Commission (TRC), Founder of the International Center for Transitional Justice (ICTJ) and former Chair of the Mauritius Truth and Justice Commission (TJC). He focused on democratic consultations that occurred before the appointment of Commissioners, the whole process of appointment of commissioners, the truth seeking process-

es' lessons learned at both domestic and international levels. In his presentation, he shared both the successes and the weaknesses of the South African TRC and the Mauritius TJC.

*My message for any country is to recognize as much as possible the recommendations from the truth seeking process and any country must implement these recommendations and put in place the machine to implement these recommendations.*

—ALEX BORAINÉ

Presentations were also received from Experts from the following institutions/countries: Khumani Victims Support Group, SA TRC Investigations Unit, Ghana, Sierra Leone and Togo.

# Overview

## Overall objective

The overall objective is to assist Parliamentarians use what they have learnt and experienced on this study tour to develop a suitable law capable of promoting the establishment of a functional and conforming TRC.

## Specific objectives

- To create a framework for learning and exchange for the Burundian Parliamentarians and other experts in South Africa and beyond;
- To improve understanding of the different stages for the establishment of the TRC such as creation with the law; its organization; its functioning and its missions;
- To help Burundi through the Parliament to implement appropriate measures to bring justice to victims and witnesses;

## Modus operandi

To reach the objectives of the study visit, a methodology revolving around presentations by experts in situ and by skype, followed by a debate between the presenter/expert and the MPs, as well as any other person in attendance was devised. Experts/presenters were briefed in advance to stem from procedural fairness premises and illustrations as an approach of sharing their respective country or thematic knowledge and experience.

## Duration of the study visit

The study visit took place within 6 days after the delegation of MPs and a representative of the Burundian Civil society working group on transitional justice arrived in Cape Town, on April 6, 2013.

## Participants

Ten (10) MPs of the National Assembly travelled to South Africa for the study visit; all MPs being members of the Justice and Human Rights Commission, including the chairperson of the Commission. This involved interactions with various Experts, Facilitators, general participants and organizers from different institutions and countries. This gave a total of 32 persons involved.

## Principal facilitator

A Consultant Olivier Kambala wa Kambala was hired as the Principal Facilitator, tasked with (1) identifying substantive issues to be addressed during the study visit (2) developing an agenda (3) promoting and stimulating the exchanges and experience sharing (4) organizing and

supervising different encounters (5) participating in various meetings of evaluation during the study tour (6) helping participants identify good recommendations (7) providing a final report, including main findings.

### Experts/Presenters

Alex Boraine	<ul style="list-style-type: none"> <li>• Former Deputy Chair of the South African Truth and Reconciliation Commission</li> <li>• Founder and former President of the International Center for Transitional Justice</li> <li>• Former Chair of the Mauritius Truth and Justice Commission</li> </ul>
Mary Burton	<ul style="list-style-type: none"> <li>• Former National President of the women’s anti-apartheid movement the “Black Sash”</li> <li>• Former Commissioner—South African Truth and Reconciliation Commission</li> </ul>
Nicodeme Barrigah	<ul style="list-style-type: none"> <li>• Roman Catholic Prelate and Diplomat</li> <li>• Bishop of Atakpame—Togo</li> <li>• Former Chair of the Togo TJRC</li> </ul>
Piers Pigou	<ul style="list-style-type: none"> <li>• Member of investigations team of the SA and East Timor TRCs</li> <li>• Former Director of the South African History Archive</li> </ul>
Marjorie Jobson	<ul style="list-style-type: none"> <li>• National Director of Khulumani Victim Support Group</li> </ul>
Fanie du Toit, Dr.	<ul style="list-style-type: none"> <li>• Executive Director of the Institute for Justice and Reconciliation</li> </ul>
Howard G. Varney	<ul style="list-style-type: none"> <li>• Former Head of Investigations at the Sierra Leonean TRC</li> </ul>
Franklin Oduro	<ul style="list-style-type: none"> <li>• Head of Research and Programs and Deputy Director</li> </ul>
Olivier Kambala wa Kambala	<ul style="list-style-type: none"> <li>• Former Burundi Country Lead for the International Center for Transitional Justice</li> <li>• Transitional Justice Expert and Consultant; author of a review of the Burundi draft legislation</li> </ul>

### Hosting of the study visit

The study tour was hosted by the Institute for Justice and Reconciliation, a Cape Town-based not for profit institution, which offered its venue for most of the meetings of the study visit and this helped much to have quality Skype exchanges with the three other countries.

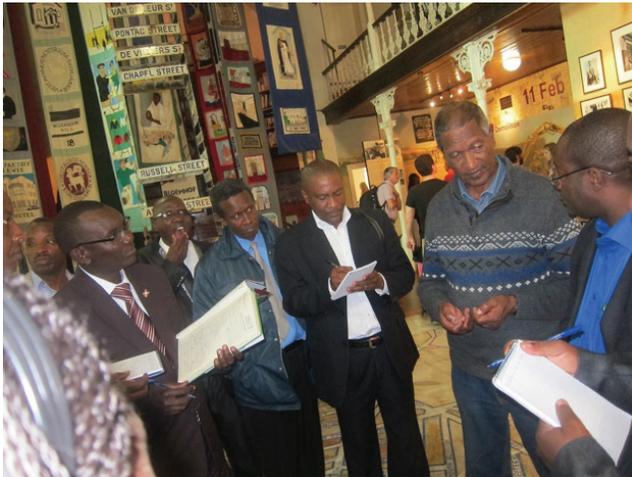
# Attaining objective I

*Creating a framework for learning and exchange for the Burundian Parliamentarians and other experts in South Africa and beyond.*

A site visit and nine (9) interactive presentations contributed to the attainment of this objective.

## 1. Site visit

### District Six Museum



*MPs tracing the root cause of conflict in South Africa to understand the TRC Process*

This was an opportunity for the Burundian delegation to make a comparison of the root causes of the SA conflict in order to appreciate path that was used in the reconciliation process. It was also an opportunity to compare notes with Burundi's context in order to pick out just what was relevant for the Burundi TRC process.

The delegation of Burundian MPs, the delegate from the Burundian CS-WGTJ, and the principal facilitator visited the District Six Museum in Cape Town. A

living account of the apartheid era discrimination, the District Museum crystalized the events which led to segregations into urban configurations, resulting in the forced removal of score of non-white habitants into the peripheral locations outside of the city of Cape Town. Following the enforcement of the Group Areas Act of 1950, about 60,000 non-white were displaced and their houses bulldozed.

In the wake of the TRC recommendations, a process of restitution of the District Six land to owners is under way, through the Department of Rural Development and Land Reform which oversees the District Six Claimants.

### Parliament of South Africa

In a bid to familiarize the delegation of Burundian MPs to the life and work of their South African counterparts, a visit was organized at the Parliament of South Africa. The visit was intended to allow Burundian MPs to learn from the work of the Constitutional and Legislative Committee which spearheaded the process leading to the Promotion of National Unity and

Reconciliation Act 34 of 1995 that canvassed for the post-Apartheid desire to redress and that was the bedrock of the SA TRC.

The South African MPS being on recess and only resuming work on April 16, the meeting couldn't take place. The Burundian delegation had instead a tour of the Parliament of SA.

## 2. Presentations

### Alex Boraine

SETTING THE SCENE OF THE SA TRC

Alex Boraine's presentations revolved around the following points to capture the essence of the work of the TRC in SA and to make an assessment on its operations and findings:

#### *Creation of the TRC*

- The historical background of SA, grounded in colonialism and racism;
- Controversy on the acceptance of the TRC: those denying the abuses of the past opposed the idea of a TRC;
- There were also genuine concerns that the TRC could destabilize the fragile reconciliation process;
- There were also discussions about the possibility the Nuremberg Trials model;
- The ANC gave the TRC an important support: the involvement of Dullah Omar, the then Minister of Justice was paramount;
- Mandela's will to knowing the truth, reconciling and moving ahead was a fundamental asset to the deliberations and work of the TRC;

#### *Consultation and nature of the SA TRC*

- After the idea of a TRC was mooted, there were deep interparty consultations on the Act creating the TRC;
- The TRC was a Parliamentarian driven Commission although its habilitation came from the President of SA;
- Consultations around the TRC were opened to the public, particularly its composition and membership;



*Alex Boraine, Former VP of SA TRC  
& Founder of ICTJ*

### *Powers*

- Subpoena powers;
- Search and seizure powers;

### *Substantive Operations*

- The Human Rights Violations committee organized the hearings of victims;
- The Amnesty committee (which had judges in its membership) organized hearings of alleged perpetrators; the huge bulk of information in possession of the SA TRC came from the hearing of perpetrators who knew all the modus operandi of human rights violations;
- The reparation and rehabilitation committee laid the groundwork for reparation plans for the victims; the TRC did not have a budget for ensuring reparations to victims; it rather submitted all its recommendations to the government;
- Special and institutional hearings: the TRC also held special hearings notably on women, but also special hearings of certain institutions on their experience of apartheid (notably political parties, labor and business, religious institutions).

### *Logistical operations*

- The TRC expanded its work on the country scale;
- Its HQ was in Cape Town, but had regional offices;
- The media (radio and television) extended the reach of the TRC through live broadcasts in different languages;
- The work of the TRC also reached a wide audience through the print media and other means of dissemination of the report.

### *Weaknesses of the South African TRC:*

- Failure to convince the large majority of the white minority (mostly afraid of being confronted to horror, a sense of shame and hostilities...);
- Impossibility to reach the bottom of the truth in all situations presented before the TRC due to different levels of truths—factual, personal, forensic, but also due to the fact that certain constituencies notably the military and the members of the liberation movement did not cooperate with the TRC;
- Little achievement of criminal prosecutions, as a result of the stand not to go through the criminal accountability path but also given the deliberate destruction of documents by the Apartheid regime;

- Reparations to victims were delayed given that it was given to the government to implement through its budget and when the time came for action, the benefits were significantly reduced;
- Many TRC recommendations on reconciliation were never implemented (bearing in mind that the mission of the TRC was not to reconcile the country).

*Positive points of the South African TRC:*

- The decision to create the TRC was good for SA in the sense that it allowed everyone to tell his story (and cut the monopoly of politicians' talks);
- The fact that the victims were listened to and the fact that the authors of the crimes were asked to explain in public hearings were consoling to the victims who had their dignity restored in one way;
- Internationally, the repercussion and impact of the SA TRC was massive, leading to the creation of several other TRCs in South America, Eastern Europe and Africa.

*Character and nature of the SA TRC recommendations:*

- Focus on human rights violations
- Stressing the importance of economic justice
- Prosecution for those who did not get amnesty
- Emphasis on memorials as a form of reparations
- Provision of reparations to every victim whose stories were documented by the TRC
- A great deal of truth emerged
- A measure of healing for those who appeared before the TRC, some forgiveness and some measure of reconciliation

*What is happening in present SA post TRC?*

- TRC did its work, but more still need to be done
- Rampant poor administration and corruption
- Higher number of uneducated people
- Lack of essential delivery services

# Mary Burton

## PROCEDURAL FAIRNESS IN THE SA TRC

In her position as a former commissioner with the SA TRC, Mary Burton focused her presentation on a wide range of procedural fairness issues before the SA TRC, notably:

### *Consultation*

- The consultation process prior and after the adoption of the Promotion of National Unity and Reconciliation Act of 1995 as well as a continued interaction of the TRC with the public during the implementation of its mandate;
- The consultative focus among others on the conceptual nature and options of the TRC (including its mandate, membership, etc.), the amnesty process, the definition of gross human rights violations, etc;
- The composition of the TRC: it must be said that President Mandela established a multi-party committee to advise him about the appointment of the 17 commissioners; a scrutiny process followed through which nominations, cross-examinations of nominations were done in order to get commissioners suiting the profile of impartiality, no active past political involvement and no loyalty to parties or groupings, inclusiveness of all sectors of the South African Society.



*Mary Burton, former SA TRC Commissioner exposing*

### *Statement-taking phase*

- An important process of the TRC in the sense that it had not only the mission to record the story, but also to offer some sort of healing;
- This phase necessitated the highest degree of fairness towards the victims, including allowing them time and space to speak in their own way, in their own language, with respect and acknowledgment;
- This implied that the team of statement-takers was a microcosm of people from all sectors, with language skills, ability to listen with empathy, record the facts meticulously, men and women, young and older.

### *Investigation and corroboration*

- Another key aspect of the work of the SA TRC in ensuring procedural fairness, thought of the veracity of each statement and a process of investigation and corroboration before a finding could be made;

- This process necessitated that if allegations were made against individuals, the latter were given notification to respond to the allegations;
- The composition of the investigation unit were clearly a matter of absolute sensitivity and observed a fair balance of competences and of provenance including elements of the previous Police Force, the ranks of the liberation movement, investigative journalists and civil society activists.

#### *Public hearings*

- Selected people who had testified were invited to relate their experience at a public hearing;
- The selection process was done in observing procedural fairness in: (a) the number of cases to be lined for public hearing (b) their sensitivity to all experience of the area of the public hearing and covering all the period of the mandate of the TRC (c) the coverage of a wide range of violations perpetrated by apartheid agents and by the elements of the liberation movements.

#### *Findings*

- Persons involved/accused had to be given notice and opportunity to respond;
- Notification of charges when individual accountability were established: alleged perpetrators were also contacted while mentioned in a statement and provide opportunity for the person to organize his/her defense
- Naming names: carefulness in carrying accusations. In case of doubt, the TRC report stated the abuse and harm but couldn't name the perpetrators; only if a perpetrator came forward to apply for amnesty, could the TRC establish the individual accountability
- When the alleged perpetrators could not be identified, findings acknowledged the victim and made a note of the impossibility to identify the perpetrator
- Findings were also made about institutions' responsibility such as the Apartheid state, the African National Congress, the Inkatha Freedom Party, the Pan Africanist Congress.

# Piers Pigou

DOCUMENTATION, RECORDS AND ARCHIVE—THE LIFEBLOOD OF TRUTH COMMISSIONS AND THEIR LEGACY

## *TRC and documentation*

- The lifespan of a TRC is limited;
- Key aspects of TRC related work survive after the TRC has concluded its work;
- Documentation includes accurate records for purpose of criminal accountability, economic and social accountability, institutional reform and memorialization;
- The TRC is an opportunity to collect materials, access or generate records domestically and internationally.



*Large volumes of SA TRC Reports—challenging!*

## *What did the SA TRC process produce?*

- It was of paramount importance to access the records of the Apartheid “state security council” which provided insights in the thinking of the Apartheid machinery;
- It was not easy to access the archives of the intelligence and security services;
- The TRC process resulted in the audit of existing documents of the Military, the Intelligence and Police;
- The Military disclosed 3 series of files available. 5 years after the completion of the work of the TRC, using the promotion of access to information act, the South African History Archives discovered that there were 42 series of files available and that the Military withheld about 90% of their archives from the TRC;
- The TRC had its own information gathering processes through notably: (a) statement-taking; (b) investigations; (c) public hearings; (d) other specific narratives, all of which need to be a positive experience from the victims.

## *What purpose does information gathering serve in a TRC process?*

- Establish an accurate narrative of events
- Facilitate the finding process
- Assess psychosocial or material needs

# Marjorie Jobson

KHULUMANI VICTIMS SUPPORT: PROCEDURAL FAIRNESS AND VICTIMS IN THE SA TRC

## *Who is a victim?*

- Determination on who a victim is?
- Broader than a human right violations victim, but rather a broad constituency including combatants and self-defense units (who wanted to be considered as combatants but the TRC did not include them);
- How much attention should be paid at “victims”, definitions need to be given at a very early stage;
- Early interaction with victim communities would prove to be the best approach.

## *Disappointment of victims as to what criminal justice has achieved:*

- The sense that those who failed amnesty applications will be subjected to criminal prosecutions has been disillusioned;
- Out of the 350 cases transferred to the National Prosecuting Authority, only one plea bargain received intervention 10 years after the completion of the work of the TRC;
- If there were an emphasis at an earlier stage on criminal justice, it would have helped a great deal for understanding.

## *Perception about victim-perpetrators entrenched due to slow transformative processes:*

- Post-apartheid dispensation had to deal with the fact that victims were blacks and poor and that perpetrators were white and well off;
- Power differentiation have been enforced rather than attended to
- If the focus was on economic justice rather on political justice?

## *How to secure the legitimacy of the TRC?*

- Legitimacy sacrificed when TRC is not given the power to implement the recommendations of the TRC:
- The only guarantee given to victims in the SA: if a person passed the criteria to be a HRV threshold, there will be a compensation/reparations; upon establishment of a list of victims by the TRC, the government didn't follow the TRC recommendations ;
- Right to an effective remedy to victims and how this is put in the public domain to transform victims into engaged citizens;

- KVSG sustained the struggle because the situation of victims went far from getting better, it rather deteriorated;
- Only last December (2012) when a national dialogue on reparations was held and well attended by the government, that KVSG has started hearing from people who have been in charge for more than 18 years;

*Lots of basic service delivery protests in SA, more than in Tunisia (with the Arab spring), due to people seeking the betterment of their conditions of life:*

- Prospects of renewed engagement with the ruling party on the eve of elections: What's the political context of SA? General elections next year; with a huge number of first voters, born free, possibility of the ANC losing votes, no allegiance to the liberation movement;
- Discussion with the ruling party about how it is planning to get to grasp on these issues that fell off the TRC report;
- Back to the table: defining a much more inclusive regime of who were the victims of apartheid and how in the light of the economic situations to do something for them.

*The reality in many African countries that there is not enough resources for a better reparations program, but talking of a reparations basket, which will be equal to a month minimum wage.*

*Procedural fairness in the SA:*

- Was there a complete transparency in setting up the TRC? Commissioners' appointment not controlled by one particular political party;
- Because of the attempts to control the TRC process, people who never had the opportunity to vote before in SA, felt they had to get involved in everything related to the TRC, including setting the law;
- Political parties told the underground liberation people not to get involved in the TRC process; benefits continue to be set up for former liberation combatants in the light of their participation to the struggle;
- Appointment of the commissioners: selection committee to interview more than 200 people nominated; one of the decisions was not to have victims of the crisis as commissioners; also the selection committee drew a lot from Faith Based Institutions.

## Dr. Fanie du Toit

### SA TRC PROCEDURAL FAIRNESS AND RECONCILIATION

Fanie started his presentation by putting into perspectives substantive and procedural fairness. The former relates to the substance the TRC is tasked to handle, notably its mandate, and the latter pertains to how the substantive mandate is implemented. He emphasized that in South Africa, the mandate of the TRC was not always well understood and consequently its substantive fairness was subject to controversy, ranging from its lack of criminal accountability focus to its lack of forgiveness drive, including its modus operandi approaches which were sometimes considered undemocratic and deemed narrowed given its primary focus on the gross human rights violations only. To sum up, Fanie considered that “the SATRC had a mandate that balanced a morally defensible approach with realistic outcomes, and I still think the mandate was appropriate. But one cannot understand the commission, nor effectively judge its work, without a careful study of this mandate.”



*Dr. Fanie du Toit exposing to MPs in IJR*

On procedural fairness, Fanie sustained that the SA TRC delivered satisfactorily, despite the existence of some gaps. Drawing on its analysis on the SA TRC, Fanie suggested 10 questions from which to assess a TRC as far as procedural fairness is concerned:

1. Who appoints the commissioners?
2. Will the people going before the TRC be treated indiscriminately?
3. To whom are the commissioners account to and why?
4. Will the commissioners be able to execute their tasks?
5. Will there be fair deliberations and mechanism of solving internal discordances within the TRC?
6. How will the TRC relate to the public?
7. Will alleged perpetrators and victims be treated consistently?
8. How will the dignity of victims and perpetrators be guaranteed?
9. What mechanisms will be in place to ascertain the veracity of testimonies?
10. How accessible will the commission be to the victims?

# Nicodeme Barrigah

LEARNING FROM THE TOGOLESE TRUTH, JUSTICE AND RECONCILIATION COMMISSION

## *Political Context*

- TJRC in Togo came as a resolution of the Ouagadougou agreement of August 2006;
- TJRC: an attempt to attend to the outcome of political violence, following protests surrounding 2005 elections.



*Nicodeme Barrigah via Skype: Former Chair of Ghana TJRC*

## *National Consultation*

- At the request of the Government of Togo, the UN-OHCHR conducted a national consultation on key features and designs of the TJRC in 2008;
- National consultations were also a resolution of the political agreement of August 2006.

## *Establishment and membership*

- TJRC was established by a Presidential decree; it was anticipated that a legislative process would exacerbate the debate and would not result in a consensus;
- Politicians and the military were excluded from being members of the TJRC: this was the will of the people, expressed through national consultations;
- 11 Commissioners were appointed by the Head of State, following a submission of propositions by an inter-ministerial committee: members were representing religious bodies and the civil society;
- Although people did not scrutinize the 11 members appointed, they gave their opinion on the profile of Commissioners during the national consultations;
- The composition of the TJRC was also sensitive to ethnic, regional and political affiliations.

## *Mandate*

The TJRC was tasked with:

1. Establishing the truth about political violence and other human rights violations committed between 1958 and 2005;
2. Identifying victims;

### 3. Propose remedies and other palliative measures.

The TJRC was also tasked with proposing institutional reforms measures as well as measures to cement the reconciliation process.

#### *Powers*

- TJRC law did not specify much on the powers;
- TJRC did not subpoena powers;
- TJRC had the powers to access archives, conduct investigations, hold hearings and formulate recommendations.

#### *Investigations and key figures*

- Analysts were tasked to analyze (1) the documentation collected and (2) the submissions received;
- Investigators were assigned to uncover the truth about specific events;
- 22,315 testimonies collected, of which 8,000 were selected as per the requirements of the TJRC and 600 were on the basis of various forms of hearings.

#### *Hearings*

- Public, held across the country and broadcasted by the media;
- In camera: hearings filmed at the headquarter of the TJRC, but not made public;
- Private: not filmed nor recorded and at some point held in the presence of a single member of the TJRC (most of the time, the Chair of the TJRC);
- Institutional hearings.

#### *Report*

- Submitted in March 2012;
- Figures: 309 pages, 68 recommendations on human rights and reparations;
- Naming names: publication of the list of alleged perpetrators publicly named in the hearings.

#### *Follow-up mechanism*

- A white paper on the reception of the recommendations by the Head of State is being finalized;
- A follow-up structure still to be created;
- On-going deliberations on the creation of a reparations fund.

## Howard Varney

SIERRA LEONE TRC—PROCEDURAL FAIRNESS, MASS ATROCITIES AND RECONCILIATION

His intervention was focused on the following:

*On substantive procedural rights, a Truth Commission should observe to preserve the rights of the victims and of those called to partake in its proceedings, notably:*

- The right to be heard: Whenever a commission contemplates making a decision or recommendation that may be detrimental to anyone, that person, along with any associated victim, should, as far as is practically possible, have an opportunity to make representations and/or to appear at a hearing.
- The right against self-incrimination: If a witness is compelled to appear before the Commission and to answer questions that may be incriminating, such answers should not be admissible as evidence against that person in subsequent legal proceedings;
- The right to legal representation: Any person questioned by an investigator, or who has been subpoenaed, or called upon to appear before a commission should be entitled to have a lawyer. If that person is proven to be indigent, then a commission ought to appoint a legal representative if it is satisfied that it is in the interests of the justice that the person be legally represented;

*Witness protection:*

- A limited witness protection program should be established for essential witnesses when there is a demonstrable threat to their safety.
- Such a program necessitates financial provisions and in some TRC proceedings, the lack of finances made the protection of witnesses shady.

## Franklin Oduro

GHANA NATIONAL RECONCILIATION COMMISSION (NRC)—KEY PROCEDURAL FAIRNESS ISSUES

### *Consultations*

Various institutions, notably the Centre for Democracy and Development—Ghana collected perceptions and expectations of the victims and the public about the NRC

### *Establishment*

The NRC was established by act of parliament, the National Reconciliation Commission Act, 2002, which came into force on 11th January, 2002. The Act was passed in Parliament after a boycott of the opposition parties, composed of members of previous military regimes. They asked for an amendment for one provision—the original draft was referring only to the investigation of the military regime which lasted about 22 years. The opposition feared the NRC Act could lead to a backlash against the military regime and particularly against the person of former President Jerry Rawlings. The opposition requested extended investigations to cover military and civilian regimes. While the members of the ruling party accepted the opposition request, stalemate persisted because of the wording of the Act which stipulated that the investigations would focus on all military regimes, and the commission may investigate other cases in between those periods.



*Franklin ODURO via Skype: Ghana TRC*

### *Mission*

The NRC was established to seek and promote national reconciliation among the people of this country by recommending appropriate redress for persons who have suffered any injury, hurt, damage, grievance or who have in any other manner been adversely affected by violations and abuses of their human rights arising from activities or inactions of public institutions and persons holding public offices.

### *Appointment and membership*

- Members of the Commission were appointed by the President in consultation with the Council of State—a non-partisan constitutional body of eminent Ghanaians that advises the President on appointments to public offices and other matters prescribed by the Constitution.
- The NRC was composed of 9 commissioners, all of them Ghanaians.

### *Powers*

- Investigation
- Search and seizure
- Conduct hearings (public and in camera)
- Formulate recommendations

### *Key figures*

- 4,000 petitions brought forward
- 1,800 hearings in all 10 capitals

### *Findings*

- NRC concluded its work in October 2004; as its report became subject to politicization in December 2004 in the course of elections. The NRC suspended its work which resumed after the elections.
- The post 2004 elections continued with the implementation of the NRC findings.
- Main findings were on monetary compensation of the victims.

### *Follow up mechanism*

Recommendations were implemented by the Attorney General (Minister of Justice). In 2008, there was a change in the pattern of powers and parties close to the military regimes won elections. Ever since, nothing has been done on the NRC recommendations.

## Attaining objective II

*Improving understanding of the different stages for the establishment of the TRC such as creation with the law; its organization; its functioning and its missions.*

Throughout the presentations and discussions which ensued, the MPs were offered significant elements and materials to understand the processes leading to the establishment and functioning of a TRC.

A particular emphasis was placed on the procedural fairness of these processes which are in fact guarantees for fair, equitable and just treatments by all who would be interacting with a TRC, including the victims, alleged perpetrators, witnesses as well as the Commissioners and other TRC staff members.

Procedural fairness was also an emphasis of all presentations as a pre-requisite and determining factor for substantive fairness and consequent steps of the life and post life of a TRC.

This objective enabled the MPs to ask as many questions as possible for a better understanding of the entire process. Some of the questions could not receive definite answers as the various Experts reminded the MPs to take appropriate decisions on what they wanted. They were all along reminded that the TRC process remains a Burundian affaire and no International Actor can dictate to them what had to be done but rather, International Actors were ready to bring in their technical and material expertise for the smooth running of the process. They were reminded to make a sift of all the knowledge they had acquired and take what was pertinent for the Burundi context.

# Attaining objective III

*Helping Burundi through the Parliament to implement appropriate measures to bring justice to victims and witnesses.*

The last day of the Study visit, a process of establishing key conclusions took place. It was triggered by a short presentation on main findings on the analysis of the draft TRC legislation for Burundi sent to the National Assembly in the course of December 2012.

Olivier Kambala wa Kambala, the author of the analysis titled « analyses sur le projet de loi portant création, mandat, composition, organisation et fonctionnement de la Commission Vérité et Réconciliation au Burundi » briefly presented the key findings of the analysis which included:

- The relevance of observing standards for remedies of victims of gross human rights violations, which are standards organized and contained in the Burundian legal framework;
- The necessity to build the TRC process in Burundi in the parameters of procedural fairness, including 10 non exhaustive elements among which are independence, impartiality, accountability, competence, non-discrimination, transparency, proportionality, dignity, accessibility and good faith.

# Conclusions from the study visit

The delegation of Burundian MPs and a member of the TJ WG (Global Rights Burundi Representative) and the Facilitator proceeded with highlighting key conclusions to apply to the law making process in Burundi. The exercise ended with a 16-point conclusion that was agreed by all which are:

1. A TRC in Burundi is important and essential;
2. The mandate must be clearly defined;
3. The power of the commission must be clearly precised;
4. The duration of the commission must be defined in terms of its mandate;
5. The Budget has to be planned by taking into account the length and weight of the work to be done;
6. A broad public consultation between various stakeholders before and during the process is required;
7. Credibility : To select members of the TRC by endeavoring to give the process guarantees of consensus;
8. Look for a minimum of political consensus on the TRC;
9. There must be equity in the composition of Commission (gender, region, ethnicity, etc);
10. Existence of sub-committees in order to tackle all aspects;
11. It is advisable to choose a suitable period for the operation of the TRC;
12. There must be a guarantee for protection of Commissioners, including Immunity;
13. The desire/need of each person for a true reconciliation is quite important;
14. Avoid unrealistic promises to the public in terms of reparation;
15. Measures to protect both victims, witnesses, and perpetrators must be put into place and must be well defined;
16. Establish a structure/ Unit for monitoring the implementation of recommendations;

# Evaluation of the study visit activity

*Given that the draft law on the TRC has been sent to the Parliament for and precisely this within our Commission, I have very much appreciated this study visit as I have greatly enriched my knowledge package in order to work on this draft law.*

—MP FROM BURUNDI

## Methodology

The study tour visit brought together a total of 32 persons from different institutions and 4 different countries among whom about 31.25% were women and the remaining 68.75% were men. This shows that the subject matter was quite a sensitive issue and most institutions sent forward male participants. These were Experts in transitional justice, Politicians and leaders of institutions who were all ready to share and learn from the experiences of one another. The language of presentation was mostly English though the direct beneficiaries of the study visit were French speaking. This meant that we had to use translators and interpreters all through the activity. Though there was this language barrier, this did not in any way influence the full participation from the participants. There were instances of very challenging questions and this required a great mastery of the sensitivity of some of the answers and the Experts were all ready to enlighten.

The study visit had listed a number of activities which were hoped would enable the attainment of set objectives. It was evaluated at the end of all interactions and it came out clear that the DEP activity had a score of 91.7 out of 100 and only one activity was not implemented to satisfaction. This was the interaction between the SA MPs who happened to be on recess though the delegation visited the National Assembly. There were no substantive discussions that took place.

In order to have a better evaluation of the four days event, an evaluation form was designed in French that had to be used on the last day. This touched on both operational and substantive issues that were experienced during the study. They had to anonymously fill out these forms and we did an analysis of their responses.

# Lessons learnt

- TRC remains a process that has to be owned and managed by the country itself and receive technical and material support from the international community;
- Elections remain a onetime activity that cannot compromise the kick-starting of the TRC process;
- When the spirit of fear looms around in participants in a workshop or over a sensitive activity, give enough time to clarify their concerns and make them see that each of their opinions is valued and can make a difference in the life of a country;
- Maintain a high degree of effective communication with a delegation on a study tour to minimize the high expectations that may arise as a result of high esteem for an activity;
- Joint planning exercises are opportunities where each partner sees and values the assets and liabilities of the other and build trust;
- In a group with different political and ethnic affiliations, bring in neutral and international experts to help bring them to the same wavelength of understanding.

# Progress after the visit to South Africa by MPs



*From right to left, the 1st Vice President, the President and the second vice President of the Lower Chamber.*

Upon their return from South Africa and after going on Parliamentary recess, the MPs worked hard to prepare a report that was presented to the rest of the MPs in the National Assembly on June 27, 2013.

This session was presided over by the President of National Assembly in the presence of his First and Second Vice Presidents. The reported was presented by the Head of the delegation to South Africa who happens to be the President of the Justice and Human Rights Commission in the National Assembly. It is worth not-

ing that is the Commission who has been charged with the responsibility of analyzing the draft law. The session was observed by some members of the civil society organizations, the United Nations and American Friends Service Committee in the presence of the media. This was later on in the national television and radio news broadcasted to the hearing of all Burundians.

The Head of the delegation presented succinctly the different encounters they had while in South Africa. He also gave experiences gathered from the TRCs of Togo Ghana and Sierra Leone and what they learned. Interestingly, the Head of the delegation gave both the successes and failures of the various experiences they were exposed to. In his conclusion, the Head of the delegation presented the main points of the conclusion from different TRC to which they were exposed in order to establish priorities for the Burundian TRC.



*MPs in the restitution session.*

After his exposé, the President of the Lower Chamber asked MPs who didn't go to SA to ask questions and those who went to SA to answer to those questions. There were series of questions but all the MPs to SA showed a good team spirit by answering and complementing one another in all the answers.

The President of the National Assembly at the end lauded the effort of the MPs to South Africa and made them to understand that they were now equipped with all that was needed to move the process forward and as such should go in for the analysis to come out with recommendations for the success of the reconciliation process.

*This study visit to South Africa for the Burundian MPs was facilitated by:*



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The AFSC is a Quaker organization that promotes lasting peace with justice, as a practical expression of faith in action. Drawing on continuing spiritual insights and working with people of many backgrounds, we nurture the seeds of change and respect for human life that transform social relations and systems.

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