

15/7/94

COMMENT BY ALBIE SACHS
ON A FIRST PERUSAL OF THE BILL SETTING UP THE TRUTH AND
RECONCILIATION COMMISSION

1. Indemnity - Cut-Off Date

On the question of indemnity, a proposal I would like to make is that the cut-off date be staggered. The Constitution seems to imply that amnesty shall be granted once certain tribunal procedures have been followed. The present draft bill seems to give a discretion to the President to grant indemnity, after being advised by the Commission. This could raise problems of constitutionality.

I also feel that the definition of "gross human rights violations" is put under pressure because it has to deal with situations pre-1990 and post-1990. My suggestion is that the constitutional requirements for the granting of an amnesty be met by having a cut-off date in 1990 in terms of which, subject to disclosure, indemnity will automatically follow once the person applying establishes that he or she falls within the category of persons entitled to such indemnity. The discretionary approach could then be adopted for the period 1990 to 1993, i.e. the committee on indemnity could make recommendations to the Commission and the Commission to the President, in the light of pre-established criteria. This would solve the problem of unconstitutionality (because the firm cut-off date will comply with the Constitution) and also introduce an appropriate degree of flexibility in evaluating the multiple activities such as Walus, Apla, AWB, Inkatha/ANC, Third Force. It might be that something less than indemnity but acknowledging the importance of the political climate could be considered. For example, death sentences could be commuted and special consideration given to parole.

I really feel that the broad public would accept a distinction between pre-1990 and post-1990 activities. The only problem with the pre-1990 activities is that grievous acts such as the murder of Goniwe would be indemnified. I don't see any way out of this, provided that the full truth comes out. As far as post-1990 actions are concerned, everyone knows that we were in a period of negotiations and that there was a chance for all political movements to make their case. Cruel and gratuitous acts during this period, including Third Force activity, would not in the public mind qualify for automatic indemnity, although consideration could be given to the turbulent political climate as an extenuating factor.

In practical terms, such an approach could imply a review of the definition of "gross human rights violations" although I do not think that this would be required. It would, however, require the indemnity committee to distinguish between two classes of cases, namely those that refer to acts before 1990 and those in the period 1990 to 1993. It would also affect the provisions dealing with the functions of the indemnity committee.

2. Compensation

~~I feel that~~ The term "compensation" on its own could be misleading because it would be equated with compensation awarded to motor car accident victims or even the compensation given by a court to victims of police misconduct. What the Commission should have in mind is rather a process of acknowledgement and reparation, which could include material compensation, but even then the material compensation would be more of symbolical than full compensation in the ordinary legal sense. I think the provisions dealing with the function of the Compensation Committee should be revised to bring out their duty to recommend appropriate forms of public acknowledgement of the injuries done. This could include proposals for memorials, living and otherwise, a letter from the President to the families of victims, appropriate public ceremonies, both nationally and at grassroots levels, and other ways of enabling the nation as a whole to honour the victims. I also support the idea of Parliament, once it is given the facts from the Commission, devoting a lump sum for purposes of reparation in the way that I have mentioned and then having a subsequent body to deal with families or individuals on a case-by-case basis. It should be made plain right from the beginning that what is envisaged is not full monetary compensation but rather a gesture from the democratic state towards the victims and their families. This could include lump sum monetary payments, graduated according to the nature of the injury (death in detention, assassination, torture, disappearance). It could also include scholarships for children, training programmes, possibly count towards housing allocation and generally the provision of special opportunities. What we do not want is the creation of invidious distinctions in the community highlighted by monetary awards. Many people suffered in multiple ways under apartheid, huge personal and family indignities. I doubt if any of them would begrudge some form of compensation being given to the victims of gross abuses as mentioned above, provided the sums involved are not large. Similarly, it would be most unfortunate to introduce a purely monetary element into the whole process of healing and reconstruction. There is no price that can be put on dignity and suffering. The issue is essentially a moral one and what makes us human beings. The money comes in as part of the symbolical reparation - it is not the measure of that reparation.

Another important aspect is ensuring that proper rehabilitation centres are established which can give the moral and psychological support to victims of brutality. Already the embryo of such centres exists and in the light of international experience (for example in the Netherlands and Denmark) valuable work can be done. There is a lot of individual healing and repair that has to take place.

If the above recommendations are accepted, there would have to be considerable rewriting of Chapter 5, which at the moment seems to imply that the Committee itself will make cash recommendations in relation to individual applicants.

3. General

Jurisdiction: The definition section (1)(viii) makes it clear that the Republic includes the whole of South Africa. I do not like to see the word "independent" used in a way that could be seen as acknowledging the legality of such independence. But this is not my main concern. It is not clear from my quick reading of the Bill as to whether the Commission will have competence to deal with questions outside of South Africa's borders. To me it is clear that the Commission must deal with matters across the borders. This would include the massacres in Maseru, Matola, the assassination of Dulcie September and cases of that kind. It would also bring in gross violations of human rights that might have taken place in the ANC camps in Angola and possibly elsewhere. If the ANC camps were excluded, this could redound to the benefit of the great villains in the security police and the military, who would then be able to allege that they are the victims of unequal treatment. As far as the ANC is concerned, the National Executive Committee issued a public statement in favour of a Truth Commission which would be even-handed and which would have the power to investigate complaints of gross ill-treatment in the camps. It would also help the question of the camps to be settled once and for all - otherwise it is going to be raised again and again and again. So in my view it is in the interests of everybody not to exclude them, and certainly we cannot exclude the horrible massacres that took place beyond South Africa's borders. X

Qualification of Members of the Commission: This should be built up a bit by emphasising positive qualities, for example "persons noted for their integrity and wisdom".

As far as members of the indemnity committee are concerned, the Bill should specify the qualities of those members who are not commissioners. In principle, the qualifications should be the same as those of commissioners. Wouldn't it be better if the President appointed the additional members of the committee rather than the Minister of Justice?

Accessibility: I feel a little worried that the provision entitling the Commission to refuse a hearing on grounds of triviality or vexatiousness could have an unduly inhibiting effect on its work. By and large, one envisages the Commission travelling around the country and giving people the maximum possibility to be heard. The Commission could have a clerk whose function it is to order the business of the hearings, and of course the Commission should not be obliged to waste its time listening to matters that clearly fall outside of its competence.

But the openness and accessibility of the Commission and its capacity to travel around the country should be emphasised in the text of the Bill.

Visiting Without Notice Section 6(1)(h): To avoid the allegation that this is a star-chamber Commission that itself can violate human rights by poking its nose into everybody's business anywhere, I would suggest revising the sub-paragraph to read as follows: "To visit any establishment or place freely without giving prior notice if it has reason to believe that the giving of advance warning could frustrate the object of the visit".

Exclusion from Hearings: If the object of 11(5)(b) was to protect witnesses from intimidation, I think this should be directly indicated. At the very least, the Commission should have good grounds for excluding persons from its hearings and these grounds should be indicated in the text of the Bill so that the public realises that the Commission itself will not be able to act in an authoritarian, subjective and high-handed way.

Legal Representation: I am not sure about the constitutionality of 11(6)(a), which permits the Commission to exclude legal representatives. I haven't examined this question or looked at the appropriate provisions in the Constitution. But in any event, it seems to me that unless cross-examination is permitted the value of information given will be reduced. ~~On the other hand~~, people like to have their lawyers with them and will be more likely to reveal the truth if they know that they have a legal representative at their side. If there are good grounds for excluding lawyers, these should be spelt out so that the public knows why.

Typographical Error: 21 subsection (2) - There is clearly an error in the formulation.

Furthermore,