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The Goldstone Commission in South Africa's Transition: Linking Gradual Institutional Change and Information-Gathering Institutions

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A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in Political Science

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Abstract

Used by states to investigate patterns of past human rights abuses, truth commissions have garnered considerable consensus for their value in addressing past harms and repression. Many still tout the South African model as a success story of truth commissions. This dissertation provides answers to two questions. First, what role, if any, did earlier investigative institutions play in shaping South Africa's Truth and Reconciliation Commission (TRC)? The dissertation argues that the Commission of Inquiry for the Prevention of Public Violence and Intimidation, also known as the Goldstone Commission, played a central role in transforming information-gathering measures in South Africa. Second, what were the contributing institutional developments of the Goldstone Commission, and how do we characterize these contributions? The dissertation argues that the Goldstone Commission's founding conditions, its institutional design, and its impartial investigations, created the conditions for the process of gradual institutional change in the Goldstone Commission as a commission of inquiry. The Commission's credibility helped to strengthen information gathering during the negotiating period in South Africa and facilitated further change in information-gathering capacities, including the incorporation of witness protection. The dissertation also traces gradual institutional change in the use of amnesty to situate its eventual implementation as an information-gathering mechanism by the TRC. The South African TRC benefited from the operation of the Goldstone Commission in terms of investigative credibility and institutional experience. This dissertation makes the case that to better understand truth commission design and operation it is necessary to take institutional histories into account.

Keywords

Commissions of inquiry, Commission of Inquiry for the Prevention of Public Violence and Intimidation, Goldstone Commission, gradual institutional change, South Africa, transitional justice, truth commission, Truth and Reconciliation Commission.

Summary for a Lay Audience

This dissertation offers an answer to the question: What role, if any, did earlier investigative institutions play in shaping South Africa's Truth and Reconciliation Commission (TRC)? I argue that the South African TRC was shaped, in part, by an investigative institution, the Commission of Inquiry for the Prevention of Public Violence and Intimidation (also known as the Goldstone Commission), that preceded it. I demonstrate the impact of the Goldstone Commission, examining its contributing institutional developments, and how we characterize these contributions.

Three components of information gathering are studied in detail to explore how the Goldstone Commission helped to undo legacies of repression and, through its operation, laid a strong foundation for the operation of the TRC. These three institutions are the commission of inquiry, witness protection, and amnesty. Each of these institutions had a history of unjust use under the Apartheid regime.

The dissertation argues that the Goldstone Commission's founding conditions, its institutional design, and its impartial investigations, created the conditions for the process of gradual institutional change, in the Goldstone Commission as a commission of inquiry. The Commission's credibility helped to strengthen information gathering during the negotiating period in South Africa and facilitated further change in information-gathering capacities, including the incorporation of witness protection. The dissertation also traces gradual institutional change in the use of amnesty to situate its eventual implementation as an information-gathering mechanism by the TRC.

This dissertation makes the case that to understand truth commission design and operation, it is necessary to take institutional histories into account. Although truth commissions are established to address past harms and injustice, they may rely on institutions that were implicated in past abuse. Using the case of South Africa, this project offers insight into how existing institutions can be adjusted or re-tooled in order to serve ends of truth-seeking. This is significant not only for countries establishing truth commissions after periods of conflict and authoritarian repression but also for countries engaging with questions of justice and redress in established democracies.

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I extend a great deal of thanks and admiration to the people who gave valuable time to talk to me about this period in South Africa's history. I would also like to acknowledge the staff at the various archives I visited in South Africa including: Wits Historical Papers at the William Cullen Library, the South African History Archive, the National Archives of South Africa, Special Collections at the University of Cape Town, the Parliamentary Library of South Africa, and the Nelson Mandela Centre of Memory. As requested by the Nelson Mandela Centre of Memory, "I acknowledge that the research assistance provided by the staff of the Nelson Mandela Centre of Memory does not constitute an endorsement of my work, or any views contained therein, and should not be construed as such. Any conclusions I have reached are my own and do not necessarily reflect the opinions or viewpoints of the Nelson Mandela Centre of Memory." Such a stipulation is equally applicable to all of the archival sites visited; conclusions drawn are my own.

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Through the Department of Political Science at Western, I have made lifelong friends who are always ready to discuss ideas and whose collegiality helped me to stay grounded.

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List of Abbreviations

ANC	African National Congress
APLA	Azanian People's Liberation Army
CIPEV	Commission of Inquiry into the Post-Election Violence
CODESA	Convention for a Democratic South Africa
HRV	Human Rights Violations
IFP	Inkatha Freedom Party
KZP	KwaZulu Police
MK	Umkhonto we Sizwe
NP	National Party
NPA	National Peace Accord
NRC	National Reconciliation Commission
PAC	Pan-African Congress
SACP	South African Communist Party
SADF	South African Defence Force
SAP	South African Police
TEC	Transitional Executive Council
TJRC	Truth, Justice, and Reconciliation Commission
TRC	Truth and Reconciliation Commission
UDF	United Democratic Front
UN	United Nations

Chapter 1

1 Introduction

This project explores how truth-seeking is institutionalized in the aftermath of repression, conflict, and abuse. The institutionalization of truth-seeking is particularly relevant in circumstances in which governments purposefully keep information hidden from the public or fail to acknowledge injustice by keeping information in the shadows. Offering an engagement with, and contribution to, the discussion on information gathering during transitions, this dissertation interrogates the effects of state-led commissions of inquiry on later truth-seeking processes in South Africa.

South Africa's Truth and Reconciliation Commission (TRC) was established in 1995. Implemented after the country's first democratic election in 1994, the TRC was devised as the vehicle through which South Africa and South Africans would address and redress the country's violent past. Violence and repression were pervasive in Apartheid South Africa. In response to the regime's oppression, institutionalized racism, and restrictive discriminatory policies, opposition groups engaged in resistance against the regime. Throughout the 1980s, the Apartheid regime conducted counter-revolutionary warfare against the African National Congress (ANC) and other groups acting in opposition to Apartheid. But by the 1990s the country was in a "stalemate" with the ANC recognizing it was unable to win its struggle against the state and the regime conceding it too costly to continue using force.¹

¹ On the situation as a stalemate see Timothy D. Sisk, "The Violence-Negotiation Nexus: South Africa in Transition and the Politics of Uncertainty," *Negotiation Journal* 9, no. 1 (1993): 78-79. See also, Steven Friedman, ed., *The Long Journey: South Africa's Quest for a Negotiated Settlement* (Johannesburg: Raven Press, 1993), 10-13.

In February 1990, President F.W. de Klerk initiated a number of reforms in a landmark speech. This address formally laid the foundation for negotiations towards an inclusive democracy.² Reforms outlined in this speech included provisions to release Nelson Mandela from prison, unbanning opposition groups including the ANC, and a promise to repeal Apartheid legislation.³ Constitutional negotiations would not begin for almost two years, when in December 1991, the Government and the ANC, among others, agreed to a negotiating process, known as the Convention for a Democratic South Africa (CODESA).⁴ This was just the beginning of a long process of negotiation, which culminated with the 1993 Multi-Party Negotiation Process. Through this process, the parties established an agreement to transitional administration and an Interim Constitution in 1993.⁵ The intervening years saw substantial numbers of fatalities from political violence. Between February 1990 and April 1994, approximately 15,000 people died as a result of political violence.⁶

In late 1991, the negotiating parties in South Africa agreed to the establishment of a commission of inquiry to investigate ongoing violence as a component of the National

² Some negotiations had begun to some degree before the 1990 speech. For an overview on this history see Allister Sparks, *Tomorrow is Another Country* (Sandton: Struik Book Distributors, 1994).

³ "F.W. de Klerk's Speech at the Opening of Parliament 2 February 1990," O'Malley Archives: The Heart of Hope, accessed April 13, 2020, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02104/06lv02105.htm>.

⁴ Friedman, *The Long Journey*, 14-15.

⁵ John Hatchard and Peter Slinn, "The Path Towards a New Order in South Africa," *International Relations* 12, no. 4 (1995): 8-9.

⁶ Adrian Guelke, "Interpretations of Political Violence During South Africa's Transition," *Politikon* 27, no. 2 (2000): 241.

Peace Accord.⁷ For three years, until the democratic election in 1994, the Commission of Inquiry for the Prevention of Public Violence and Intimidation conducted over forty investigations into ongoing violence and made recommendations on measures to avert future violence.⁸ This Commission, also known as the Goldstone Commission, played an important role in the transition.⁹ It uncovered information about the causes of violence and made recommendations to prevent ongoing violence.

In 1995, in the year after the first democratic election, the Government of national unity in South Africa passed legislation for the now famous TRC.¹⁰ The South African TRC, established by the Promotion of National Unity and Reconciliation Act, was mandated to investigate gross violations of human rights between 1960 and 1994.¹¹ It was a comprehensive exercise in truth-seeking in order to establish a record about past violations, “conceived as part of the bridge-building process designed to help lead the nation away from a deeply divided past to a future founded on the recognition of human rights and democracy.”¹² The South African TRC’s innovations in public hearings for

⁷ "South Africa, National Peace Accord, 1991," here after National Peace Accord, 1991. A copy of the accord can be accessed at United Nations Peace Maker, last accessed February 3, 2020, <https://peacemaker.un.org/southafrica-national-peace-accord91>. See also, Timothy D. Sisk, "South Africa's National Peace Accord," *Peace & Change* 19, no. 1 (January 1994): 50-70.

⁸ Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor* (New Haven and London: Yale University Press, 2000), 25-58. *Truth and Reconciliation Commission of South Africa Report: Volume One*, Truth and Reconciliation Commission of South Africa (29 October 1998), Chapter 13, 508.

⁹ The names of the Commission, “Commission of Inquiry for the Prevention of Public Violence and Intimidation” and “Goldstone Commission” are used interchangeably in this analysis so that the significance of its establishment as a commission of inquiry and the role of the Commission’s leadership remain equally present for the reader.

¹⁰ Promotion of National Unity and Reconciliation Act, Parliament of the Republic of South Africa, Act 95-34 (1995).

¹¹ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 2, 25, 29.

¹² *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 4, 48.

testimony and its unique amnesty process captured attention at home and abroad. It helped bring to light information about the past regime's deeds and formally acknowledged information that was already known. This dissertation interrogates the relationship between the Goldstone Commission and the TRC.

1.1 Research Questions and Argument Overview

This dissertation answers two questions. First, what role, if any, did earlier investigative institutions play in shaping South Africa's TRC? The dissertation argues that the Commission of Inquiry for the Prevention of Public Violence and Intimidation played a central role in transforming truth-seeking measures in South Africa, particularly in relation to the investigative institutions that preceded it. The Goldstone Commission's design and investigation credibility facilitated information gathering that distinguished it from earlier commissions of inquiry. In addition, this dissertation demonstrates that institutional elements that supported the Goldstone Commission's information-gathering capabilities were later taken up by the TRC.

The second question asks: what were the Goldstone Commission's contributing institutional developments, and how do we characterize these contributions? I argue that the Goldstone Commission contributed to the institutionalization of truth-seeking by undertaking gradual institutional change, and in so doing, it laid a positive foundation for the TRC. Characterized as a site for the processes of institutional conversion, as outlined by Mahoney and Thelen, the institutional developments of the Goldstone Commission provide an example in which institutions that have been entrenched by a repressive regime

were adjusted to serve different aims, in this case truth-seeking.¹³ These specific modalities were chosen because they are directly related to the project of information gathering. They facilitate the uncovering of information through testimony and investigation.

First, the Goldstone Commission addressed a credibility crisis within the institution of the commission of inquiry. As a product of the transition, the Goldstone Commission was more effectively designed than its predecessors, and both the Government and the leadership of the Commission capitalized on the potential to make changes to the commission's process. The opening of the political transition saw the establishment of new rules by the regime soft-liners. The Goldstone Commission is an example of institutional redeployment under these conditions. Instilled in the language guiding the Commission was an element of consensus and a separate legitimation given its establishment as part of the 1991 National Peace Accord. Its implementation as part of the peace agreement and the political environment shaped the Commission's potential to alter the status-quo. The Government granted many of the requests made by the Goldstone Commission with regards to adjustments in the structure of investigations, increased resources to conduct investigations, protection for witnesses, and the publication of the reports.¹⁴

Second, the Goldstone Commission responded to institutional limitations and identified institutional measures that were valuable for information gathering and which were eventually used by the TRC. The Goldstone Commission developed witness

¹³ James Mahoney and Kathleen Thelen, "A Theory of Gradual Institutional Change," in *Explaining Institutional Change: Ambiguity, Agency, and Power*, ed. James Mahoney and Kathleen Thelen (Cambridge: Cambridge University Press, 2010), 1-37.

¹⁴ For example, on the immediate publication of reports see, Richard J. Goldstone, "Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes," in *Quality Control in Fact-Finding*, ed. Morten Bergsmo (Florence: Torkel Opsahl Academic EPublisher, 2013), 42-43. See also, Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 28-30.

protection measures during its operation, recognizing the limitations in relying on the inadequate existing state witness protection measures. As is demonstrated in Chapters 7 and 8, these changes were possible because of the design of the Commission itself. A process of conversion is evident in the commission of inquiry and its adaptation of witness protection. After it was deployed within the Goldstone Commission and its value demonstrated, the use of witness protection continued within the TRC. Although South Africa's was the first truth commission to include witness protection measures, taking its antecedents into account contextualizes this development in South Africa's institutional history.

Third, the final component, the truth commission's ability to grant amnesty, is widely cited as a successful innovation of the South African TRC, and has garnered significant attention. However, assessing the amnesty process in light of previous indemnity processes and through the negotiating period demonstrates the manner in which amnesty was differently justified and deployed during Apartheid, in the transitional period, and in efforts at redress. The Goldstone Commission's consideration of amnesty-in-exchange-for-information helped to illustrate the potential value in changing the justification of amnesty. The experience of the institution of amnesty during the tenure of the Goldstone Commission highlights the significance of the environment for changing institutional deployment. Critically, the deliberations about amnesty by the Goldstone Commission also suggested the necessity of further truth-seeking.

Tracing earlier investigations in addition to the TRC facilitates an in-depth investigation into information-gathering practices. Information gathering and/or fact-finding are considered key justifications for the implementation of a truth commission. It

is therefore important to clarify how the truth-seeking practices were institutionalized and adjusted over time. The dissertation is making the case that institutional histories may offer important insights into information-gathering processes in transition. The Goldstone Commission played an important role in the transitional period and taking into account this influence deepens an understanding about the development of truth-seeking and information-gathering practices in South Africa.

Like Sitze, who argues that the TRC can only be understood by taking into account colonial applications of indemnity and the colonial use of the commission of inquiry,¹⁵ this dissertation takes as a starting point that the truth commission in South Africa ought to be examined in relation to institutional elements and frameworks that came before. Sitze positions these elements genealogically to reframe the TRC not as “novel”,¹⁶ but as “reiterating the forms of colonial sovereignty and governmentality whose excesses the TRC also exposed and criticized.”¹⁷ He persuasively unpacks the inherent tensions in using an apparatus that entrenched or maintained colonial powers through indemnity practices and commissions of inquiry.¹⁸ This is a valuable interpretation of the structure of the TRC. Sitze’s skepticism of the transitional justice project provokes questions about the underlying assumptions associated with truth commission processes as a potentially unquestioned postcolonial endeavour.¹⁹

¹⁵ Adam Sitze, *The Impossible Machine: A Genealogy of South Africa’s Truth and Reconciliation Commission* (Ann Arbor: The University of Michigan Press, 2013), 3-11. I owe a great deal of gratitude to the person who recommended Sitze’s work upon hearing about my research.

¹⁶ *Ibid.*, 3.

¹⁷ *Ibid.*, 251.

¹⁸ *Ibid.*, 83, 84, 98-127, 188-214.

¹⁹ *Ibid.*, 255.

Whereas Sitze's focus is on interrogating and then repudiating the perceived innovation of the TRC itself, this project shifts the focus to explaining potential change within the institutions, building on the recognition of the institutional continuity. Sitze's observations about the truth commissions genealogy can be used to approach the analysis of the institutionalization of truth-seeking, stretching back beyond the "transition" demarcated by the 1994 election. Here, though the line of argumentation breaks with the critical genealogy thrust of Sitze's work, it keeps in mind the historical linkages and similarities in the process. Rather, it takes as foundational that truth-seeking *relies* on some facilitating institutional framework, like an investigatory commission. Further, the mechanisms that are developed in this regard may be shaped, in terms of transitional forces and institutional characteristics, by their predecessors. Yet Sitze's work pays little attention to the role of the Goldstone Commission. The dissertation assesses how the Commission of Inquiry for the Prevention of Public Violence and Intimidation countered the trends of state-mandated investigations prior to the democratic election in South Africa. It frames this difference as a process of gradual institutional change.

It is helpful to look outside of the boundaries of the transitional justice field to delve into the questions under consideration here. While repressive policies and institutions posed a problem for the investigation of violence in South Africa's transitional period, the eventual implementation of the TRC, and its institutional innovations, can be better understood by taking into account institutional changes during the transitional period. This recognition is not intended to suggest that the repressive policies of Apartheid were re-applied in the transition. Nor does it intend to prove the contrary. Rather, incremental adjustments to the familiar institutional frameworks during the negotiating period, suggests

that the truth-seeking measures that were eventually applied in democratic South Africa are rooted in the somewhat unexpected transformation of a familiar institution.

1.2 Theoretical Framework

This project uses an institutional approach to investigate how truth-seeking was institutionalized in South Africa. The theoretical framework used for this project is historical institutionalism, and particularly, theories of institutional continuity and change. Path dependence is a valuable explanatory concept in this investigation because of the emphasis on the importance of history and sequence in later institutional development.²⁰

Exploring the strength of the TRC as a result of institutional precursors requires observers to lengthen the time frame of analysis. In addition, path dependence helps make sense of the government's use of commissions of inquiry. This type of investigatory practice was well-institutionalized under the Apartheid regime. However, the institutional persistence associated with path dependence does not explain why the Commission of Inquiry for the Prevention of Public Violence and Intimidation was implemented in a manner so markedly different from its predecessors.

Where earlier investigations into violence did little to rectify injustice, and in some ways perpetuated it, the Goldstone Commission remediated issues related to investigation credibility. This had positive longer-term impacts on the TRC. The Goldstone Commission's ability to facilitate these effects resulted from the circumstances of its implementation and operation, in particular the negotiating period that guided the country

²⁰ Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *American Political Science Review* 94, no. 2 (2000): 251-267; Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton and Oxford: Oxford University Press, 2004).

to democracy. Both the context of its emergence, and its incorporation into a negotiated peace agreement lent the Goldstone Commission different credibility to other investigations into violence that preceded it.

This dissertation uses Thelen, and Mahoney and Thelen's theories of gradual institutional change to unpack the process over time. The Commission's establishment, and the implementation of new institutional modalities, can be explained as processes of conversion, which is understood as the deployment of the same institutional structures towards different ends or goals.²¹ In this case, institutions used for maintaining a repressive regime were redeployed as information-gathering institutions.

The theories of gradual institutional change and path dependence also shed light on the return to the inquiry method with the establishment of the South African TRC. Not only did the TRC share certain institutional similarities with the Goldstone Commission, but the Goldstone Commission in some ways helped prepared the groundwork for its establishment. Thus, the persistence of this largely familiar institution was aided by the operations and gradual adjustments made by the Goldstone Commission operating beforehand. This dissertation argues that knowledge about the TRC can be better understood when articulated as a process of institutional continuity and change based on the operating experience of the Goldstone Commission, even though the Commission of Inquiry for the Prevention of Public Violence and Intimidation was not established as purposeful precursor to the TRC.

²¹ Kathleen Thelen, "How Institutions Evolve: Insights From Comparative Historical Analysis," ed. James Mahoney and Dietrich Rueschemeyer (Cambridge: Cambridge University Press, 2003), 208-240; James Mahoney and Kathleen Thelen, "A Theory of Gradual Institutional Change," in *Explaining Institutional Change: Ambiguity, Agency, and Power*, ed. James Mahoney and Kathleen Thelen (Cambridge: Cambridge University Press, 2010), 1-37; Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (Cambridge: Cambridge University Press, 2004).

1.3 Concepts

This project uses Mahoney and Thelen's conceptualization of institutions as "*relatively enduring* features of political and social life (rules, norms, procedures) that structure behavior and that cannot be changed easily or instantaneously."²² Institutions decrease uncertainties by creating and structuring expectations about process and behaviour.²³ The information-gathering and truth-seeking institutions under consideration in this project are the commission of inquiry, witness protection, amnesty, and truth commission. As institutions, commissions of inquiry, witness protection, and truth commissions structure procedures for investigation and processes of information gathering. Each also has associated rules for participation. The institution of amnesty specifies how amnesty can be applied, who decides on its application, and the eligibility criteria for amnesty. The focus of this project is how these institutions, and their comprising rules and process, endured and changed during the time-period under consideration.

For the purposes of this project, it is important to draw a distinction between truth-telling and truth-seeking measures. Although the terms are sometimes used interchangeably, truth-telling places the emphasis more specifically on victims' testimony.²⁴ While such measures are an integral part of many truth-seeking endeavours, the term directs attention away from the other investigative capacities of these tools. In this dissertation, truth-seeking refers to the often symbolic formal polices and processes

²² Mahoney and Thelen, "A Theory of Gradual Institutional Change," 4, emphasis in original.

²³ Robert E. Goodin, "Institutions and Their Design," in *The Theory of Institutional Design*, ed. Robert E. Goodin (Cambridge: Cambridge University Press, 1996), 22.

²⁴ See, for example, Patricia Lundy and Mark McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up," *Journal of Law and Society* 35, no. 2 (2008): 271.

through which states pursue and make available information about human rights violations and repression. Information gathering refers to formal institutions and processes through which states pursue and make available information about violence and human rights violations. Both truth-seeking and information gathering efforts commonly take the form of commissions of inquiry, special investigations, and truth commissions. This project uses Freeman's definition of a truth commission, defining a truth commission as:

an *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.²⁵

The distinction between these institutional mechanisms is taken up further in Chapter 3.

The project focuses on domestic, state-mandated truth-seeking processes: commissions of inquiry and truth commissions. These are distinct from what Bickford identifies as “unofficial truth projects”, which are carried out by non-state actors.²⁶ Bickford argues that these projects may be in lieu of, in preparation for, or in addition to “official” truth seeking-investigations.²⁷ Their value can be linked to the type of process that emerges. When these projects operate instead of truth commissions, they may be the only source of information gathering under repressive governing structures or the chaos of civil war. Acting as a preparatory tool for a truth commission, they can retain and maintain

²⁵ Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006), 18.

²⁶ Louis Bickford, “Unofficial Truth Projects,” *Human Rights Quarterly* 29, no. 4 (2007): 994-1035. See also: Padraig McAuliffe, “Surrogacy and Resistance: Evolving Patterns in Unofficial Truth Commissions and Truth Projects,” in *The Global Impact and Legacy of Truth Commissions*, ed. Jeremy Sarkin (Cambridge: Cambridge University Press, 2019), 269-292.

²⁷ Louis Bickford, “Unofficial Truth Projects,” *Human Rights Quarterly* 29, no. 4 (2007): 1004-1005.

evidence and records in line with a vision toward a future truth commission. A key feature in all of these ‘unofficial truth projects’ is that they do not rely on the support of the state. In fact, the behaviour of the state might compel non-governmental organizations to initiate and undertake these processes.²⁸

Commissions of inquiry and other domestic investigations are also different from investigations convened or carried out by international actors that precede truth commissions, generally the United Nations.²⁹ The United Nations-sponsored investigations, “international commissions of inquiry” or “international fact-finding missions,” are defined as:

Temporary bodies of a non-judicial nature, established either by an intergovernmental body or by the Secretary-General or the High Commissioner for Human Rights, and tasked with investigating allegations of violations of international human rights, international humanitarian law or international criminal law and making recommendations for corrective action based on their factual and legal findings.³⁰

International commissions of inquiry share a name with domestic investigations but require little, if any, institutional support from the government of the state being investigated. A lack of support from governments does not preclude investigations from continuing but does raise challenges of access.³¹ Since these investigations do not use institutions of the

²⁸ Bickford, "Unofficial Truth Projects," 1004-1005; McAuliffe, "Surrogacy and Resistance: Evolving Patterns in Unofficial Truth Commissions and Truth Projects," 282-286.

²⁹ Eric G. Berman, "The International Commission of Inquiry (Rwanda): Lessons and Observations From the Field," *American Behavioural Scientist* 45, no. 4 (2001): 623; Rob Grace, "From Design to Implementation: The Interpretation of Fact-finding Mandates," *Journal of Conflict & Security Law* 20, no. 1 (2014): 27-60.

³⁰ Office of the High Commissioner United Nations Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, United Nations (New York and Geneva, 2015), 7, https://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf.

³¹ *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, 65-65.

state, the locus of path dependence and gradual institutional change are differently embodied, putting them beyond the scope of this project.

1.4 Chapter Outline

Chapter two outlines the methodology for this project. It explores the value of the case study and identifies the utility of process-tracing to explore the comparison of institutional modalities explored in the dissertation. The third chapter provides an overview of the literature on transitional justice and truth commissions. This chapter defines a truth commission, situating its use in the field of transitional justice. The literature review also uses scholarship on commissions of inquiry to draw a distinction between truth commissions and commissions of inquiry. The literature illustrates a conceptualization challenge with these investigative processes in their institutional similarities. The project uses this tension as a starting point to consider the significance of this institutional continuity.

The fourth chapter offers an analytical framework to articulate the relationship between earlier institutional investigations and later truth commission processes. The focus is on the potential explanations offered from a framework rooted in historical institutionalism's path dependence in the context of transitional justice and the process of institutional change. Chapter 4 chapter situates a main contribution and argument of the dissertation. It argues that the operation of earlier commissions, under certain conditions, can engender change in what are considered usually well-entrenched institutions. Contextualizing truth-seeking in this light enables an account of the development of truth-seeking in South Africa that offers additional insight into the design and operation of the South African TRC.

The fifth chapter provides an overview of the case of South Africa. This chapter offers background on the Apartheid system, violence, and the transitional negotiating period. The dissertation focuses on violence investigation and, as such, the framing for the case description focuses on violence under Apartheid and efforts to manage violence, including the National Peace Accord and the subsequent constitutional negotiations. In this chapter, the Commission of Inquiry for the Prevention of Public Violence and Intimidation is introduced along with the Truth and Reconciliation Commission of South Africa. The parameters for articulating the strength of South Africa's TRC are presented in terms of institutional design and efficacy.

In the sixth and seventh chapters, the Commission of Inquiry for the Prevention of Public Violence and Intimidation is analyzed in depth to identify innovations in the application and deployment of this particular commission of inquiry. The chapter argues that the ability of the commission to facilitate incremental change in the legacies of commissions of inquiry in South Africa stemmed from the innovations in the founding Act, and the consensus built into the commission based on its inclusion in the National Peace Accord. In addition, the Goldstone Commission's cultivation of internal credibility demonstrated value in the inquiry. This chapter then articulates the significance of this earlier institution for the later operation of the TRC in terms of credibility and the recognition that further investigation was warranted.

The eighth and ninth chapters use two institutional modalities that are associated with information gathering to explore the impacts of the Commission of Inquiry for the Prevention of Public Violence and Intimidation on gradual institutional change and thereby the Truth and Reconciliation Commission of South Africa. These two chapters explore

witness protection within the Goldstone Commission and amnesty. The purpose of these chapters is not to assess the operation of the individual institutional modalities. Rather, the purpose is to trace institutional continuity and change in the path dependent components of truth-seeking in the South African case.

The eighth chapter demonstrates, with regards to witness protection, that the operation of the Goldstone Commission illuminated a challenge presented by the expectation that people *could* and would participate in these investigative processes. Over the period of its operation, the Commission of Inquiry for the Prevention of Public Violence and Intimidation built up the structures needed so that the powers granted to it could be used to serve the purposes of uncovering information. The design of the truth commission reflects some of the gradual adjustments that resulted from familiarity and experience with earlier information-gathering processes.

The ninth chapter tackles the complex issue of amnesty. This chapter argues that indemnity/amnesty underwent a process of conversion from its initial purpose at the outset of negotiations and eventually for information-gathering purposes at the TRC. Although the processes around indemnity and amnesty preceded and succeeded the Commission of Inquiry for the Prevention of Public Violence and Intimidation, the potential value of information-in-exchange-for-amnesty was articulated by the Goldstone Commission. These changes had significant implications for gathering information; restricting access to information at the beginning and then facilitating access to information at the TRC. This chapter identifies a deep-seated tension in the earlier investigations and TRC with regards to the eventual justifications for information gathering and the available means to do so.

The final chapter presents a concluding analysis of the implications of this research. This chapter identifies the main contribution of this project: articulating an institutional approach to truth-seeking, and identifying how earlier institutions transformed restrictive legacies through processes of gradual institutional change. This approach helps to illuminate the roots of unique institutional elements in the design of the TRC. Furthermore, considering the TRC and associated truth-seeking not only as a mechanism of transitional justice that emerged after the transition but as a project rooted in institutional histories, one can trace the adjustment within earlier truth-seeking efforts and between the Goldstone Commission and the TRC. Exploring transitional justice in light of a process of gradual institutional change is an innovative way to explain the implementation and operational design of truth commissions. The chapter then positions the findings more broadly in the transitional justice literature and identifies potential future avenues for research.

Chapter 2

2 Methodology

This project is a case study, exploring an instance of truth-seeking institutionalization in a political transition. The case under investigation is South Africa between 1990 and 1995. George and Bennett define a case as “an instance of a class of events,” and a case study as “a well-defined aspect of a historical episode that the investigator selects for analysis, rather than the event itself.”¹

The value of a single case study is its ability to interrogate, in detail, an instance of interest.² The nature of the outcome of interest in this project warrants an immersive study to understand, in a comprehensive manner, the processes, and institutional development that shaped the conditions and operation of the truth commission in South Africa. In some ways, this fits within Gerring’s definition of a “single-outcome study,” which he defines as “studies that investigate a bounded unit in an attempt to elucidate a single outcome occurring within that unit.”³ This distinction separates case studies, which try to identify patterns in other cases, from a focus on a single-case itself.⁴ However, Gerring’s analysis focuses on determining causal explanations in a single-outcome.⁵ This dissertation project does not intend to make a specific causal claim about why the relationship exists, but rather

¹ Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge and London: MIT Press, 2005), 17-18.

² John Gerring, "What is a Case Study and What is it Good For?," *The American Political Science Review* 98, no. 2 (2004): 345.

³ John Gerring, "Single-Outcome Studies: A Methodological Primer," *International Sociology* 21, no. 5 (2006): 708.

⁴ *Ibid.*, 707.

⁵ *Ibid.*, 710.

advances a analytic, probabilistic account of the case under investigation.⁶ The case under consideration here can be categorized as a “heuristic” case study as per George and Bennett’s classification.⁷

There are, of course, limitations to the case study approach. Perhaps the most significant of these is an inability to generalize to a broader population.⁸ In addition, small-n research and case studies run the risk of selection bias.⁹ The elements under consideration in this project are specific to the South African case. This is not to suggest that the relationship could not be similarly analyzed in other cases, but that the study presented here is a valuable starting point to prod how the process unfolded in this case. In future research, engaging in a cross-case comparison of the influence of earlier investigations will help to identify conducive or constraining conditions across cases. An understanding of the processes and institutions under investigation in this prominent case is a valuable exercise to identify under-considered components of truth-seeking because the focus is often on truth commissions themselves, rather than the influence of earlier truth-seeking policies.

The decision to focus on the South African case for this study is warranted because of its centrality in the field of transitional justice. The South African case has been selected because it holds a position of notoriety in the transitional justice literature. It has been well-studied, on multiple dimensions, given the popular attention it has received. In the field of

⁶ Gerring distinguishes between descriptive and causal inference, see Gerring, "What is a Case Study and What is it Good For?," 347.

⁷ See George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 75. According to George and Bennett, “Heuristic case studies inductively identify new variables, hypotheses, causal mechanisms, and causal paths.”

⁸ George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 22.

⁹ Barbara Geddes, "How the Cases you Choose Affect the Answers You Get: Selection Bias in Comparative Politics," *Political Analysis* 2 (1990).

transitional justice, much of the research conducted on truth commissions uses the South African model as an example or reference point. Similarly, in practice, the influence of the South African Truth and Reconciliation Commission (TRC) has been widely noted.¹⁰ It stands out given its impact on the field and, in many ways, is considered a “model” in the universe of truth commissions.¹¹ However, much of the theorizing of the South African case has been directed at the operation of the commission, the purpose of the commission, and an assessment of its influence on reconciliation.¹² Less attention has been paid to the connection of the truth commission to past institutional developments in South Africa, and to their potential significance. An investigation into the roots of these elements will deepen the field’s understanding of this well-studied case.

An exploration of the pre-transitional roots of transitional justice features offers further insight into the structure of the South African TRC. It enables an investigation into the component pieces of the truth commission project in South Africa, rather than taking for granted the ‘whole’ of the institution of the TRC. Given the propensity to model truth commissions after successful efforts, the past institutional influence matters for understanding the TRC’s operation.

South Africa is also an interesting case for this investigation because an important component of information gathering emerged prior to the actual creation and

¹⁰ For example, on Liberia see Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice*, The Centre for Humanitarian Dialogue and The International Centre for Transitional Justice (2009), 17-18. On the Kenyan case, see Ronald C. Slye, *The Kenyan TJRC: An Outsider’s View from the Inside* (Cambridge: Cambridge University Press, 2018), 50-51, 64-67.

¹¹ Robert I. Rotberg, "Truth Commissions and the Provision of Truth, Justice, and Reconciliation," in *Truth V. Justice*, ed. Robert I. Rotberg and Dennis Thompson (New Jersey: Princeton University Press, 2000), 6.

¹² James L. Gibson, "The Contributions of Truth to Reconciliation," *Journal of Conflict Resolution* 50, no. 3 (2006): 409-432; Adam Sitze, *The Impossible Machine: A Genealogy of South Africa’s Truth and Reconciliation Commission* (Ann Arbor: The University of Michigan Press, 2013), 2.

implementation of the truth commission. The de Klerk government envisaged and appointed an investigative institution with the capacity to carry out truth-seeking endeavours. This leads to a query about the process of institutionalizing truth-seeking *prior* to the transition and about how this process continued throughout and after the transition itself. An assessment of the information-gathering institutions during the transition can help to trace the lineage of truth-seeking institutionalization in this context.

2.1 Methodological Approach

The within-case analysis is conducted using process tracing. Process tracing enables both confirmatory analysis on necessary and sufficient conditions, and can advance causal explanations.¹³ However, the purpose of employing this tool in this project is a third option identified by Beach and Pedersen—outcome explanation.¹⁴ The purpose in this variant of process-tracing is, “not the theory-centric one of building or testing a generalizable theorized mechanism; instead the aim is to craft a sufficient explanation of the outcome.”¹⁵ The purpose of this analysis is to identify under-considered influencing factors in the design of the TRC, and explain how the Goldstone Commission contributed to the institutionalization of truth seeking.

With this approach, and with the parameters of the transitional justice universe of

¹³ Andrew Bennett and Jeffrey T. Checkel, "Process Tracing: from philosophical roots to best practice," in *Process Tracing: From Metaphor to Analytic Tool*, ed. Andrew Bennett and Jeffrey T. Checkel (Cambridge: Cambridge University Press, 2015), 4. See also: James Mahoney, "The Logic of Process Tracing Tests in the Social Science," *Sociological Methods & Research* 41, no. 4 (2012): 57.

¹⁴ Derek Beach and Rasmus Brun Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (Ann Arbor: University of Michigan Press, 2013), 11-12, 18.

¹⁵ *Ibid.*, 11.

cases, generalizability is not the most valuable way to engage with the case. Comparisons with other cases can be offered, as they are in this study, where valuable linkages can be drawn. However, countries do not follow the same paths in transitions to democracy, from conflict, or in addressing other institutional injustice. They also do not face the same political conditions and constraints. There are sufficient similarities over time in transitions, that middle-range theory is a more fruitful intention in such analysis, recognizing, of course, the limitations in generalization and comprehensiveness therein.¹⁶ This study contributes to a foundation for further study of these phenomena across cases by scholars of transitional justice.

I used primary and secondary documentary evidence to trace the institutional developments. I relied heavily on primary sources collected from multiple archival sites during field work undertaken in South Africa over five months in 2016 and 2017. I analyzed approximately 2,000 pages of archival material from collections housed at Wits Historical Papers, the South African History Archive, the National Archives of South Africa, the Nelson Mandela Centre of Memory,¹⁷ Special Collections at the University of Cape Town Libraries, and the Parliamentary Library for the Government of South Africa.

I began the archival process at Historical Papers at the Willian Cullen Library at Wits University looking for information to contextualize violence and the Goldstone Commission in South Africa. I started with collections like the Independent Board of

¹⁶ Jeffrey T. Checkel, "Mechanisms, process, and international institutions," in *Process Tracing: From Metaphor to Analytic Tool*, ed. Andrew Bennett and Jeffrey T. Checkel (Cambridge: Cambridge University Press, 2015), 91-93; George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 8.

¹⁷ "I acknowledge that the research assistance provided by the staff of the Nelson Mandela Centre of Memory does not constitute an endorsement of my work, or any views contained therein, and should not be construed as such. Any conclusions I have reached are my own and do not necessarily reflect the opinions or viewpoints of the Nelson Mandela Centre of Memory."

Inquiry, press clippings from the South African Institute of Race Relations Collections, and the legislation in South African Government records. From here, I expanded the parameters to better understand the patterns in the Goldstone Commission's operations and the TRC. I consulted a wide range of collections that contained information relating to, but not limited to: the peace process, the Multi-Party Negotiation Process, commissions of inquiry, the Goldstone Commission, the Truth and Reconciliation Commission, and parliamentary records related to the Goldstone Commission. Personal collections of people engaged in these processes, such as those of Alex Boraine at the University of Cape Town's Special Collections, also contained important material about the period under investigation. The collections of non-governmental organizations and local organizing committees contained information that provided chronological accounts of the negotiations and transitions through publications, news clippings, and internal organizational documentation. I also consulted official reports from the Commission of Inquiry regarding the Prevention of Public Violence and Intimidation, other commission reports, and the Report of the Truth and Reconciliation Commission of South Africa.

There are important considerations when using archival material as evidence. It is important to recognize that archives are created and managed by different members of society. As Verne Harris argues, "in any circumstances, in any country, the documentary record provides just a sliver of a window into the event."¹⁸ Power and influence play an important role in the capacity to archive material and the perceived importance of information that 'belongs' in the archives and how archives are used. Returning to Harris

¹⁸ Verne Harris, "The Archival Sliver: Power, Memory, and Archives in South Africa," *Archival Science* no. 2 (2002): 64.

again,

if archival records reflect reality, they do so complicitly, and in a deeply fractured and shifting way. They do not act by themselves. They act through many conduits – the people who created them, the functionaries who managed them, the archivists who selected them for preservation and make them available for use, and the researchers who them in constructing accounts of the past. Far from enjoying an exteriority in relation to the record, all these conduits participate in the complex processes through the record feeds into social memory.¹⁹

In South Africa, powerful forces have influenced the state material that has been available to be archived.²⁰ While the TRC report has been publicized as historical record, other information and its access is managed tightly.²¹ Thus, the availability of information pertaining to government decisions, actions, and processes with regards to the Apartheid state and transition is still sometimes limited. Contemporary discussions continue to debate the necessity of “opening” the Apartheid archives and struggles of individuals and organizations to gain access to information.²² Acknowledging these constraints necessitates recognizing the silent voices, of both perpetrators and victims, that inform and comprise the information available in the archives.

As Harris points out above, the researcher also plays a role in how documents are used. I tried to look widely in the archival collections and to consult a cross-range of collections. Attempts have been made to acknowledge these absences by consulting a range of collections at different archival centres. I made every effort to note the order of

¹⁹ Ibid., 65.

²⁰ On the destruction of records, see: *Truth and Reconciliation Commission of South Africa Report: Volume One*, 201-236. Verne Harris, ““They should have destroyed more”: The Destruction of Public Records by the South African State in the Final Years of Apartheid, 1990-1994,” in *Archives and Justice: A South African Perspective* (Chicago: The Society of American Archivists, 2007).

²¹ See discussions on the South African History Archive website: “The South African History Archive,” accessed February 3, 2020, <http://www.saha.org.za/index.htm>.

²² Author observation of conference proceedings, “Archives and Democracy: A colloquium of civil society,” The University of Witwatersrand, 24 August 2017.

documents in files and collections and to connect chronological points from materials across collections. Practical constraints prevented access to all archives across the country, and the ability to comb through all available collections. I recognize these limitations and attempted to supplement available documentary material with secondary sources and interview material.

I conducted interviews in 2016 and 2017 as the project was taking shape. However, the project developed theoretically in a different direction, in part because of challenges to access information about the initial question under investigation. As such, given the changed focus of the project and the evolution in research design, I did not use the interview data to draw conclusions. While the interviews provided valuable background and contextual information there was not a sufficient number or breadth to empirically assess. Not all participants contacted to conduct an interview were willing to participate. The then-current political environment in South Africa and the natural progression of life also impacted the availability of representative participants. I have relied most heavily on archival sources of information and public documents to draw conclusions such that other researchers can assess and review. However, two of the interviews conducted with the Chairperson of the Goldstone Commission inform some illustrations in Chapter 7.

I conducted nine interviews with actors involved in, or with knowledge of, the negotiations, the Commission of Inquiry for the Prevention of Public Violence and Intimidation, and the Truth and Reconciliation Commission. I identified interviewees based on their expertise on the South African transition and the specific elements under consideration. I conducted interviews in person in Cape Town, Johannesburg, Pretoria, and Ottawa. Each interview lasted between one and two hours. Participants were asked

questions from a framework designed beforehand. Given that the questions were open-ended, follow up questions based on information presented in the interview were often based on the participant's role and area of expertise. In order to conduct interviews, The University of Western Ontario Non-Medical Research Ethics Board provided approval for this project.²³ The terms of the ethics approval were, in some ways, restrictive. For example, I was not permitted to use snowball sampling nor was I allowed to ask questions by email. This is understandable as it pertains to protecting participants. However, it did limit the recruitment of potential interviewees. Despite the challenges, the interviews provided context for the information under exploration here. I am grateful for the time people gave to speak with me. These conversations were a privilege.

²³ The University of Western Ontario, Non-Medical Research Ethics Board, Ethics file number #108564.

Chapter 3

3 Literature Review

This dissertation project focuses on one type of mechanism of transitional justice, the truth commission, to explore institutional continuity and change in transitional settings. This chapter uses literatures of transitional justice and comparative politics as the foundation for the discussion of institutional continuity and change in truth commissions. The next chapter incorporates the literature on institutionalism to position the project's contribution to the literature. This chapter begins with a brief overview of the field of transitional justice before defining and assessing the truth commission specifically. It outlines a number of justifications for truth commissions and identifies, in the literature, several factors that influence the design of truth commission processes. Then, the next section explores the relationship between truth commissions and commissions of inquiry. It sets up the argument that truth commissions are a variant of a type of commission of inquiry, outlining the importance of the institutional lineage. The final section situates specifically the literature on the South African Truth and Reconciliation Commission. Given its notoriety, it has had an important impact on the study of truth commissions themselves.

3.1 Transitional Justice

Transitional justice can be understood as “a set of moral, legal, and political dilemmas involving how best to respond to mass atrocities and other profound injustice in the wake

of periods of conflict and repression.”¹ For many, the field is conceptualized based on the tools or mechanisms that have come to be associated with their use.² These tools include:

Trials, truth commissions, and lustration policies; victim-oriented restorative justice mechanisms, including reparations construction of monuments, and public memory projects; and mechanisms of security and peace, including amnesties and pardons, constitutional amendments, and institutional reform.³

The field has evolved from a largely legalistic approach to justice during or after transitions to democracy to addressing broader components of justice for societies emerging from conflict and abuse.⁴ The field of transitional justice has developed around a shared belief that formally addressing past abuse creates a stronger foundation to rebuild societies and systems.⁵

As theorized initially, transitional justice offered the potential for countries to attempt “extraordinary” measures of justice; Teitel posited that justice mechanisms could be established that might otherwise not be possible during more stable periods.⁶ So the

¹ Dustin N. Sharp, *Rethinking Transitional Justice for the Twenty-First Century: Beyond the End of History* (Cambridge: Cambridge University Press, 2018), 1.

² M. Brinton Lykes and Hugo van der Merwe, "Exploring/Expanding the Reach of Transitional Justice," *International Journal of Transitional Justice* 11 (2017): 372. Sharp, *Rethinking Transitional Justice for the Twenty-First Century: Beyond the End of History*. See also: Secretary General United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004), S/2004/616, (2004), 4.

³ Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington: United States Institute of Peace, 2010), 1.

⁴ Paige Arthur, "How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 359; Zinaida Miller, "Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice," *The International Journal of Transitional Justice* 2 (2008); Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000).

⁵ Arthur, "How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice," 321-367; Louis Bickford, “Unofficial Truth Projects,” *Human Rights Quarterly* 29, no. 4 (2007): 936; Pablo De Greiff, "Theorizing Transitional Justice," *Nomos* 51 (2012): 31-77; Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge: Cambridge University Press, 2017); Diane F. Orentlicher, "‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency," *The International Journal of Transitional Justice* 1 (2007): 10-22; Teitel, *Transitional Justice*.

⁶ Teitel, *Transitional Justice*, 11-26.

“transitional” moment, or the “transitional” period, could facilitate a reconstruction of sorts. Countries in transition could demonstrate a commitment to human rights, and through transitional justice practices they could address and acknowledge the injustices of the previous regime.⁷

Once cemented, the focus of the field of transitional justice has been on what types of justice should be pursued in different transitional situations, and the focus has turned to assessing, and/or advocating for, the range of the application of transitional justice. Early debates framed questions of applicability in terms of what was possible, set alongside was determined to be morally correct.⁸ As the field has become more entrenched, articulations of the early framings have been questioned. The focus on retribution has been critiqued, and the field has, in many ways responded with a broader spectrum of default options.⁹ Critics have voiced and attempted to rectify a ‘top-down’ approach of transitional justice, arguing for more focus on the victims and, perhaps more specifically, the local context of

⁷ Jose Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," *Hastings Law Journal* 43 (1992): 1425-1438.

⁸ See for example: Pablo De Greiff, "Trial and Punishment: Pardon and Oblivion," *Philosophy & Social Criticism* 22, no. 3 (1996): 93-111; Luc Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past," *Law & Social Inquiry* 20, no. 1 (1995): 51-78; Martha Minow, *Between Vengeance and Forgiveness: facing history after genocide and mass violence* (Boston: Beacon Press, 1998); Elin Skaar, "Truth commissions, trials - or nothing? Policy options in democratic transitions," *Third World Quarterly* 20, no. 6 (1999): 1109-1128; Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," *Journal of International Affairs* 52, no. 2 (1999): 647-667; Charles Villa-Vicencio, "Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet," 49, no. 1 (Winter 2000): 205-222. A comprehensive overview is provided in Kritz's three volumes: Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, D.C.: United States Institute of Peace Press, 1995).

⁹ Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34, no. 4 (2007): 411-440; Jennifer J. Llewellyn and Robert Howse, "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission," *The University of Toronto Law Journal* 49, no. 3 (1999): 355-388.

transitional justice processes.¹⁰ Transitional justice mechanisms are frequently, almost automatically, assumed to be appropriate across situations of human rights violations. Despite the entrenchment of the idea of transitional justice internationally, the field is still divided on the effectiveness of transitional processes.¹¹

Evaluations of transitional justice processes often take the form of case studies or small-n comparative analysis in order to account for the specific forces at play in particular settings. Many studies have focused on the operation of particular mechanisms through the study of single cases and comparative studies.¹² Others explore whether the theorized goals of transitional justice, like reconciliation and recognition, are achieved through certain transitional justice processes.¹³ Large-n research exploring the utility or effectiveness of

¹⁰ Patricia Lundy and Mark McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up," *Journal of Law and Society* 35, no. 2 (2008): 265-292.

¹¹ Erin Daly, "Truth Skepticism: An Inquiry into The Value of Truth in Times of Transition," *The International Journal of Transitional Justice* 2 (2008): 23-41; David Mendeloff, "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?," *International Studies Review*, no. 6 (2004): 355-380; Olsen, Payne, and Reiter, *Transitional Justice in Balance*; Oskar N.T. Thoms, James Ron, and Roland Paris, "State-Level Effects of Transitional Justice: What do We Know?," *The International Journal of Transitional Justice* 4, no. 20 (2010): 329-354.

¹² Abena Ampofoa Asare, *Truth Without Reconciliation: A Human Rights History of Ghana* (Philadelphia: University of Pennsylvania Press, 2018); Stephen Brown and Chandra Lehka Sriram, "The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya," *African Affairs* 111, no. 443 (2012): 244-260; Audrey R. Chapman and Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala," *Human Rights Quarterly* 23, no. 1 (2001): 1-43; Mark Ensalaco, "Truth Commissions for Chile and El Salvador: A Report and Assessment," *Human Rights Quarterly* 16, no. 4 (1994): 656-675; Gearoid Millar, "Between Western Theory and Local Practice: Cultural Impediments to Truth-Telling in Sierra Leone," *Conflict Resolution Quarterly* 29, no. 2 (2011): 177-199; Franklin Oduro, "Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana's National Reconciliation Initiative," *The International Journal of Human Rights* 9, no. 3 (September 2005): 327-347; Joanna R. Quinn, "Haiti's Failed Truth Commission: Lessons in Transitional Justice," *Journal of Human Rights* 8, no. 3 (2009): 265-281; Chandra Lehka Sriram, "Wrong-Sizing International Justice - The Hybrid Tribunal in Sierra Leone," *Fordham International Law Journal* 29 (2006): 472-506.

¹³ Bronwyn Leebaw, "Legitimation or Judgement? South Africa's Restorative Approach to Transitional Justice," *Polity* 36, no. 1 (2003): 23-51; Llewellyn and Howse, "Institutions for Restorative Justice," 355-388; Joanna R. Quinn, *The Politics of Acknowledgement: Truth Commissions in Uganda and Haiti* (Vancouver and Toronto: UBC Press, 2010); Stuart Wilson, "The Myth of Restorative Justice: Truth,

transitional justice mechanisms has focused most frequently on outputs or goals of transitional justice: measures of democracy and human rights,¹⁴ or deterrence.¹⁵

The traction that the idea of transitional justice has gained has seen transitional justice mechanisms implemented across a variety of cases and under different operating conditions. State-led transitional justice processes implemented within a country rely on the institutions in place to carry out their work. Even if new institutions are established, like truth commissions, their operation depends on other facets of governance. The extent of this reliance is informed by their mandate. For instance, if a truth commission is established with subpoena powers, other judicial institutions may be necessary to enforce those powers.¹⁶ Sharp points out that the historical roots of the field of transitional justice, heavily influenced by legal practitioners, have resulted in:

an emphasis on a constrained yet institutionally and professionally demanding understanding of justice that some have argued is not consistent with the quality and capacity of state institutions in many postconflict countries, to say nothing of cultural congruence.¹⁷

Sharp's recognition of the institutional weight required to facilitate transitional justice raises important questions about the institutions themselves. Often, the institutional and governance characteristics for legitimate transitional justice institutions to operate are not

reconciliation and the ethics of amnesty," *South African Journal on Human Rights* 17, no. 4 (2001): 531-562.

¹⁴ Olsen, Payne, and Reiter, *Transitional Justice in Balance*. See also, Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (New York: Routledge, 2010).

¹⁵ Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries," *International Studies Quarterly* (2010): 939-963.

¹⁶ With regards to the South African TRC, for example, when a subpoenaed witness failed to appear, criminal sanctions could be brought, as was the case with former President P.W. Botha. See *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 7, 197.

¹⁷ Sharp, *Rethinking Transitional Justice for the Twenty-First Century: Beyond the End of History*, 12.

found in the places where transitional justice is most heavily advocated.¹⁸ For example, institutions, like the rule of law, are necessary to implement prosecutorial transitional justice processes, but are also expected or anticipated ‘ends’ of transitional justice.¹⁹ Continuing in this vein, legitimate prosecutions for human rights violations depend on the capacity of a judicial system to do so. This illustrates somewhat of a disconnect in the transitional justice mechanisms advocated by the international community and that have been the focus of the field of transitional justice.

One debate about how to respond to human rights violations is referred to as the truth versus justice debate that characterized the field of transitional justice in 1990s and 2000s.²⁰ The crux of the debate pertained to the type of justice to be prioritized: that achieved through prosecution or that achieved through investigation and truth. The field’s resolution of the truth versus justice debate gelled around the idea that truth commissions could serve as a middle ground, offering a different, but equally valuable, or complementary type of justice.²¹ Sometimes truth commissions are advocated when trials are not possible, and increasingly they are valued for their own contribution to justice. Rather than engaging in the debate about the trade-offs or complementarity in types of

¹⁸ The institutional characteristics will be addressed further below. See Angela D. Nichols, *Impact, Legitimacy, and Limitations of Truth Commissions* (Cham: Palgrave Macmillan, 2019); Jeremy Sarkin, "Redesigning the Definition a Truth Commission, but Also Designing a Forward-Looking Non-Prescriptive Definition to Make Them Potentially More Successful," *Human Rights Review* (2018): 349-368.

¹⁹ For example De Greiff, "Theorizing Transitional Justice," 47.

²⁰ See for example, Robert I. Rotberg and Dennis Thompson, eds., *Truth V. Justice* (New Jersey: Princeton University Press, 2000).

²¹ See for example, Alex Boraine, "Truth and Reconciliation in South Africa: The Third Way," in *Truth V. Justice*, ed. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 143; Minow, *Between Vengeance and Forgiveness*, 57-61; Naomi Roht-Arriaza, "The New Landscape of Transitional Justice," in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 9.

justice, it is important to underscore that insufficient attention has been paid to the fact that a truth commission is a mechanism that requires a similarly demanding institutional framework to prosecutorial legal responses. While truth commissions may be *politically possible* when prosecutions are not possible, the institutional demands of truth commissions are still extensive.

3.2 Defining a Truth Commission

Definitions of truth commissions do two things. First, definitions delineate truth commissions from other types of investigatory bodies, whether that is commissions of inquiry, “unofficial truth projects”, or international investigations.²² Second, definitions specify the features of truth commissions that refine the universe of cases. This includes, for example, elements such as independence, duration, location, and focus.²³ The importance of agreement on the definition is recognized, particularly as the number of truth commissions increases alongside assessments of their effectiveness.²⁴

Hayner’s definition of a truth commission has anchored the debate on the definition in the field of transitional justice. Hayner offers the following definition:

A truth commission (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their

²² On unofficial truth projects see: Bickford, "Unofficial Truth Projects." See also: Padraig McAuliffe, "Surrogacy and Resistance: Evolving Patterns in Unofficial Truth Commissions and Truth Projects," in *The Global Impact and Legacy of Truth Commissions*, ed. Jeremy Sarkin (Cambridge: Cambridge University Press, 2019), 269-292.

²³ Sarkin, "Redesigning the Definition a Truth Commission," 355-359.

²⁴ Eric Brahm, "What is a Truth Commission and Why Does it Matter?," *Peace & Conflict Review* 3, no. 2 (2009): 1-14; Geoff Dancy, Hunjoon Kim, and Eric Wiebelhaus-Brahm, "The Turn to Truth: Trends in Truth Commission Experimentation," *Journal of Human Rights* 9, no. 1 (2010): 47; Sarkin, "Redesigning the Definition a Truth Commission," 351.

experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review.²⁵

Criticisms of this definition highlight the conflation of procedural characteristics and the outcomes of truth commission process. For example, Hayner's definition is critiqued because it does not specify independence.²⁶ Others criticize the necessity of completing a report.²⁷

In other definitions, Wiebelhaus-Brahm argues that there is an over-prescription of certain goals, like democratic consolidation, and certain features, like public hearings which are not necessarily constitutive elements of truth commissions.²⁸ A narrower definition is offered by Freeman:

A truth commission is an *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.²⁹

Freeman's definition recognizes the evolution of the idea of a truth commission from a commission of inquiry. It also focuses on the 'victim-centered' nature of a truth commission. The potential for a truth commission to be able to address victims' needs rests

²⁵ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2002), 11-12.

²⁶ Sarkin, "Redesigning the Definition a Truth Commission," 352.

²⁷ Dancy, Kim, and Wiebelhaus-Brahm, "The Turn to Truth: Trends in Truth Commission Experimentation," 48.

²⁸ Brahm, "What is a Truth Commission and Why Does it Matter?," 4, 5.

²⁹ Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006), 18.

on moral theorizing about restoring equality and dignity.³⁰ Each of these values seeks to create a space where the marginalized narratives are given voice.

Sarkin argues that part of the challenge in the definitional debate is the recognition that definitions struggle to capture the characteristics of truth commissions of the past, for comparative analytical purposes, and the normative features of truth commissions that may guide their establishment in the future. He offers a distinction between these two dimensions, outlining a “backward-looking” and “forward-looking definition” of a truth commission. The “backward-looking” definition provided by Sarkin is:

(1) a temporary investigative institution that (2) focuses on understanding past violence and human rights abuse and its causes, which can focus also on on-going events if necessary; (3) usually investigates patterns of violence that took place over a (usually relatively recent) period of time and the reasons for why they occurred; (4) ordinarily issues a final report with recommendations; (5) is officially authorized, empowered, or sanctioned by the State, but may be established by an intergovernmental organisation or United Nations where the state is unwilling or unable to do so.³¹

The purpose of the backward-looking definition, according to Sarkin, is that “if a [truth commission] is too narrowly defined, it can exclude some institutions that should be classified as [truth commissions].”³² Sarkin’s backward-looking definition is sufficiently broad to capture most past variants. The caveats or exceptions provided in this definition help to unify the cases of the past that have garnered consensus as being a truth commission before the term came into widespread use.

³⁰ Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation Through Truth* (New York: St. Martin’s Press, 1997); De Greiff, “Theorizing Transitional Justice,” 31-77; André du Toit, “The Moral Foundations of the South African TRC: Truth as Acknowledgement and Justice as Recognition,” in *Truth V. Justice*, ed. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 122-140; Murphy, *The Conceptual Foundations of Transitional Justice*.

³¹ Sarkin, “Redesigning the Definition a Truth Commission,” 354.

³² *Ibid.*, 354.

Presenting these three definitions illustrates that although there is a general consensus on the idea of the truth commission, specific elements are still debated. Each definition resembles the practice of a commission of inquiry applied to human rights violations. Elements like gathering information and intending to create a report are usually also expected of commissions of inquiry. Freeman's definition specifies the truth commission as a type of commission of inquiry explicitly. Freeman's definition of a truth commission is used in this project because of this embeddedness, which enables an interrogation of the relationship between the concepts of commission of inquiry and truth commission.

3.3 Why are Truth Commissions Used?

Generally, truth commissions are supposed to uncover information about past injustices, or, as Rotberg puts it, "to uncover the past in order to answer questions that remain unanswered."³³ A broad range of intentions, goals, and expectations have been associated with truth commission processes. Justifications for using truth commissions during transitions from authoritarianism, conflict, or mass human rights violations can be separated into three thematic categories. First, they may be deployed as "fact-finding" tools to uncover and acknowledge information about violence. Second, they are justified as a means to achieve justice through acknowledgement and restorative practices. A third explanation for their adoption centres on their being the result of political bargaining. These categories are not mutually exclusive; indeed, most truth commissions are envisioned as means to achieve justice and access information. However, it is helpful to separate out

³³ Robert I. Rotberg, "Truth Commissions and the Provision of Truth, Justice, and Reconciliation," in *Truth V. Justice*, ed. Robert I. Rotberg and Dennis Thompson (New Jersey: Princeton University Press, 2000), 3.

some of the reasons why states may opt to implement truth commissions to more clearly map the perceived benefits.

3.3.1 Information Gathering

Truth commissions are designed to uncover and collect information about repression, abuse, and conflict that is either not public, or not publicly acknowledged.³⁴ Of truth commissions, Crocker suggests that “their chief virtue is discerning overall patterns, institutional context, and, to a lesser extent, the general causes and consequences of atrocities.”³⁵ Truth commissions gained recognition as effective tools to identify the nature of crimes and whereabouts of victims in countries that relied on purposefully secretive repression tactics. Teitel describes transitions in Latin America, for example, as “decades of military dictatorship and brutal repression, involving widespread abductions, detention, torture and disappearances, all carried out in the name of ‘national security’ and in *absolute secrecy*.”³⁶ According to Teitel:

The repression in 1970s Latin America revealed a singularly coercive state power—to make the body disappear, making citizens vanish, rendering them *desaparecidos*. During Argentina’s military rule, more than 10,000 persons were abducted, detained, and tortured, vanishing without a trace. Like the secrecy of the abduction and detention, the victim’s ultimate disappearance is endemic to the ‘impunity crime.’ Every step of the military’s process—kidnapping, detention, and torture, culminating in murder—is denied by the disappearances.³⁷

The secretive nature of state repression propped up these types of regimes. Similarly, in the South African context, the ‘hidden’ mechanisms of state repression oftentimes meant that

³⁴ On truth and acknowledgement see du Toit, “The Moral Foundations of the South African TRC,” 132-135.

³⁵ David A. Crocker, “Truth Commissions, Transitional Justice, and Civil Society,” in *Truth V. Justice*, ed. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 101.

³⁶ Teitel, *Transitional Justice*, 77, my emphasis.

³⁷ *Ibid.*, 77.

the perpetration of crimes and the location of victims left those close to the murdered or disappeared without answers. Thus, the potential ability for the new regime and the public to gain information about repression and violence carried out under the previous regime is identified as one of the benefits of choosing a truth commission in South Africa. For example, the South African TRC report states:

We know now what happened to Steve Biko, to the Pebco Three, to the Cradock Four. We now know who ordered the Church Street bomb attack and who was responsible for the St James' Church massacre. We have been able to exhume the remains of about fifty activists who were abducted, killed and buried secretly.³⁸

In the aftermath of such violence, truth commissions offered a useful approach for uncovering information. As Popkin and Roht-Arriaza outline, "while most people had at least some inkling that human rights violations were occurring, the nature of the violations themselves—especially of disappearances and killings by anonymous 'death squads'—entailed secrecy and deniability."³⁹ The goal of truth commissions convoked in these environments was to "compile and present a historical record of the scope, means, and victims of the prior human rights violations."⁴⁰ In these contexts, truth commissions offered an effective means to access information about atrocities while being able to maintain relative political stability, a theme that is considered further below.

Truth commissions are used to gather information about the abuses specified within a truth commission's mandate. Exactly how this is achieved differs across cases. Much

³⁸ *Truth and Reconciliation Commission of South Africa Report: Volume One*, 7.

³⁹ Margaret Popkin and Naomi Roht-Arriaza, "Truth as Justice: Investigatory Commissions in Latin America," *Law & Social Inquiry* 20, no. 1 (Winter 1995): 81.

⁴⁰ *Ibid.*, 93.

attention is focused on public hearings on truth commission processes.⁴¹ However, information and facts are collected and collated through other means. Information can be gathered through statement takers who record testimonies from individuals.⁴² Statement takers may travel to different affected communities to record testimonies.⁴³ In addition, many truth commissions use investigation teams to corroborate information. These can function in addition to statement takers to ensure the record reflects the ‘facts’ as accurately as possible. In South Africa, for example, the TRC used investigation units to corroborate statements provided in applications for amnesty, among other investigations.⁴⁴ State records may be available to the new regime, and these may contain information about past policies and tactics that have not previously been made public. However, in some cases like South Africa, important state records have been destroyed by the outgoing regime before a truth commission is ever convoked.⁴⁵ Truth commissions also use existing

⁴¹ For a table identifying which truth commissions had public hearings see Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006), 318-325. See also, Hayner, *Unspeakable Truths*, 218-220. In other cases, the value placed on public hearings or testimony is questioned. See for example, Millar, "Western Theory and Local Practice," 177-199; Gabrielle Lynch, *Performances of Injustice: The Politics of Truth, Justice and Reconciliation in Kenya* (Cambridge: Cambridge University Press, 2018), 124-148.

⁴² Joanna R. Quinn and Mark Freeman, "Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa," *Human Rights Quarterly* 25, no. 4 (Nov. 2003): 1135; Lars Buur, "Monumental Historical Memory: Managing Truth in the Everyday Work of the South African Truth and Reconciliation Commission," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* ed. Deborah Posel and Graeme Simpson (Johannesburg: Witwatersrand University Press, 2002), 78-80.

⁴³ *Nunca Mas (Never Again): A Report by Argentina's National Commission on Disappeared People*, (London Faber and Faber in association with *Index on Censorship*, 1986), 430-433.

⁴⁴ Buur, "Monumental Historical Memory: Managing Truth in the Everyday Work of the South African Truth and Reconciliation Commission," 72-75; Piers Pigou, "False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002), 50-59.

⁴⁵ On the destruction of records in South Africa, see for example, Verne Harris, "'They should have destroyed more': The Destruction of Public Records by the South African State in the Final Years of

research or research conducted by the commission from to contribute to the development of reports.⁴⁶

When operating at their best, truth commissions are valuable information gathering and disseminating institutions. Compiling and releasing findings from proceedings enables the period under investigation to be contextualized within a narrative that can work to locate the voices and experiences of the oppressed and dislodge a discourse of oppression. What is significant in these normative representations is the importance placed on the collection and compilation of testimonies in the outputs of truth commission processes. Within these collections emerge debates on the validity and malleability of the framing exercised by truth commissions.

The value of information in times of transition is linked to several overarching ideas including justice and acknowledgement. Foundationally, though, the idea of truth itself can be difficult to conceptualize based on the intersection of perspectives, power, beliefs, and meaning. Contestation of the idea of truth is pervasive. In their consideration on the relationship between truth and reconciliation, Daly and Sarkin identify that truth is neither “objective” nor “neutral,” making it difficult to communicate and difficult to communicate accurately.⁴⁷

Apartheid, 1990-1994," in *Archives and Justice: A South African Perspective* (Chicago: The Society of American Archivists, 2007), 305-333; Hayner, *Unspeakable Truths*, 227-228.

⁴⁶ Janet Cherry, John Daniel, and Madeleine Fullard, "Researching the 'Truth': A View from Inside the Truth and Reconciliation Commission," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002), 17-36; Hayner, *Unspeakable Truths*, 52-53.

⁴⁷ Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia: University of Pennsylvania Press 2007), 146-147.

Important questions have been raised regarding whether the truth ascertained by truth commissions can be truly representative of the facts. Chapman and Ball suggest that, “in many ways, truth commissions ‘shape’ or socially construct rather than ‘find’ the truth.”⁴⁸ They base this reasoning on the necessary decisions truth commissions have to make to present the information collected through the truth commission process. Often, in transitional justice literature, the conceptual challenge of truth is demonstrated through the South African TRC’s decisions and discussions of the type of “truth” found in its report: truth that is “factual or forensic,” “personal or narrative,” “social or ‘dialogue,’” and “healing and restorative.”⁴⁹ With these distinctions, the commission sought to overcome the challenges of contestation that are inherent in transitional processes by acknowledging the value of each.

It is not necessary here to delve further into the constructivist nature of “truth”. The project takes as a starting point that the truth is malleable, and that many shapes can be made from the information investigated and uncovered. Parsing between variants of truth, as the South African TRC did, is helpful in mitigating the critiques about the value of the process itself based on the type of information presented by investigations. In this way, distinctions could be made between information about particular facets of investigations compared to information that emerged from individual testimony based on a person’s lived experience without subordinating one to the other. It is necessary at the outset to acknowledge the complexity of truth and truth commissions because similar charges can be made with regard to other investigative processes. The investigative institutions that

⁴⁸ Chapman and Ball, "Truth of Truth Commissions," 8.

⁴⁹ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 5, 110.

precede truth commissions, like the one under consideration in this project, do not face the same symbolic demands made of truth commissions. Yet, the constructed critiques of the nature of truth are important for this project because of the way emergent facts or hidden facts influence governing and transition.

The field of transitional justice has focused centrally on the idea of truth as a means of justice. One foundational text, Kritz's *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, includes a section on "Documenting the Former Regime: Commissions of Inquiry" in its analysis of the considerations and prospects for the addressing the past.⁵⁰ In these early discussions, Popkin and Roht-Arriaza, recognized four goals of such truth or investigatory commissions that help to situate their theorized value. In their evaluation, the authors identified the following goals:

Creating an authoritative record of what happened; providing a platform for the victims to tell their stories and obtain some form of redress; recommending legislative, structural, or other changes to avoid repetition of past abuses, and establishing who was responsible and providing a measure of accountability for the perpetrators.⁵¹

The use of truth commissions has increased steadily from the 1980s onwards, in pursuit of these goals.

3.3.2 Justice and Acknowledgement

As the use of truth commissions has increased, more attention has been paid to the relationship between truth and justice. Truth commissions can operate as embodiments of justice demonstrated through lenses of acknowledgement and restorative justice. A crucial

⁵⁰ Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, D.C.: United States Institute of Peace Press, 1995).

⁵¹ Popkin and Roht-Arriaza, "Truth as Justice," 80.

distinction is made between knowledge and acknowledgement that sets up the utility of truth commissions in various contexts. With reference to South Africa, du Toit outlines that “even under the prior regime the truth of ongoing political atrocities or human rights violations such as torture are in a sense already *known*... Officially, though, the occurrence of these violations is often denied categorically.”⁵² Truth commissions offer a means through which societies can acknowledge the past and access narratives of conflict experience. Acknowledgment and narrative play an important role in understanding “justice as recognition.”⁵³

The theorized value of truth on its own, and truth-as-justice frame information about past abuses as valuable to individuals and the transition. A ‘right to truth’ has been cemented at the international level. In December 2013, the United Nations General Assembly adopted resolution A/RES/68/165 Right to Truth. The resolution “*Recognizes* the importance of respecting and ensuring the right to truth so as to contribute to ending impunity and to promote and protect human rights.”⁵⁴ The truth commission is explicitly recognized as a tool through which this can be achieved.⁵⁵ One fundamental rationale in the development of the ‘right to truth’ is the recognition that the people victimized by past repression, and the people left behind without information about what happened to loved

⁵² du Toit, "The Moral Foundations of the South African TRC," 133, emphasis in original.

⁵³ Ibid., 136.

⁵⁴ United Nations General Assembly, 68/165 Right to the truth, A/RES/68/165, (2013), 3, emphasis in original.

⁵⁵ Ibid., 3-4.

ones should, at the very least, be given some information about their fates.⁵⁶ The justifications go beyond this information focused endeavour.

In transitional situations, the idea of truth is bounded in concepts of change, acknowledgement and non-repetition. The characterization of truth as acknowledgment stems from the reasoning that the repressive and abusive policies and actions may have been known, but denied.⁵⁷ Boraine states that in the South African case, “the search for truth and the recording of that truth exorcised the fantasy of denial that makes transformation impossible.”⁵⁸ As Hayner identifies, “for some victims and survivors, therefore, a truth commission does not so much tell them new truth as formally recognize and acknowledge the what has before been denied.”⁵⁹ Furthermore, acknowledging by investigating and publicizing information may help to circumvent future denial or politicization of the past.⁶⁰ In addition, in countries where violence and secrecy structured regimes, that maintained control using repressive tactics, making public information about these practices demonstrates a transparency shift—a move away from the old methods of control.⁶¹

⁵⁶ Rotberg, "Truth Commissions and the Provision of Truth, Justice, and Reconciliation," 3. For detailed analysis of legal requirement see: Sam Szoke-Burke, "Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies," *Berkeley Journal of International Law* 33, no. 2 (2015): 532-535.

⁵⁷ Hayner, *Unspeakable Truths*, 20.

⁵⁸ Boraine, "Truth and Reconciliation in South Africa: The Third Way," 151.

⁵⁹ Hayner, *Unspeakable Truths*, 21.

⁶⁰ Daly and Sarkin, *Reconciliation in Divided Societies*, 148; Hayner, *Unspeakable Truths*, 21.

⁶¹ Daly and Sarkin, *Reconciliation in Divided Societies*, 142.

Minow suggests that the “narrative project” of a truth commission enables a more comprehensive account of a regime’s history.⁶² The critical element, as du Toit suggests, is not simply being able to tell one’s story, but that it can enable the exercise of “justice as recognition” that acknowledges equality “as equal sources of truth and bearers of rights.”⁶³ du Toit also acknowledges the importance of “*narrative truth*” in truth commission processes.⁶⁴ According to du Toit, “what is at stake when victims are enabled to ‘tell their own stories’ is not just the specific factual statements, but the right of framing them from their own perspectives and being recognized as legitimate sources of truth with claims to rights and justice.”⁶⁵ The acknowledgement potential from truth commissions enables the possibility of justice often sought in transitional justice processes. Proponents of truth commissions also advocate their use for their ability to generate elements of restorative justice.

The focus on the restorative aspects of truth commissions is rooted in earlier debates in the field which assessed the justice element of truth-seeking and truth commissions. In attempts to explain the utility of truth commissions, alongside or in lieu of prosecutions, scholars appraised the intrinsic value of truth commissions, pointing to their potential as arbiters of restorative justice. Often presented as a counter to hegemonic representations of justice as retributive, restorative justice shifts the focus. Llewellyn defines restorative justice as:

Fundamentally concerned with restoring relationships harmed by wrongdoing to ones in which all parties enjoy and accord one another equal dignity, respect, and

⁶² Minow, *Between Vengeance and Forgiveness*, 60.

⁶³ du Toit, "The Moral Foundations of the South African TRC," 136.

⁶⁴ *Ibid.*, 136.

⁶⁵ *Ibid.*, 136.

concern. Restorative justice understands wrongdoing in terms of the resulting harms; restoring relationships requires addressing the harm(s) experienced by all the parties involved in the wrongdoing.⁶⁶

Llewellyn argues that restorative justice aims to restore relationships, viewing harm caused by crime as a harm to relationships.⁶⁷ A shift in truth commission applicability is evident especially since the South African TRC, which has been evaluated as a mechanism of restorative justice.⁶⁸ Rather than focusing on the effects of not having prosecutions, using a restorative justice approach focused attention on the value of using a truth commission. The TRC offered a better option for reconciliation and societal mending in transitions.⁶⁹

3.3.3 Compromise and political constraints

An element of negotiation undergirds a number of transitions that end up using truth commissions as a tool to address past wrongs.⁷⁰ Early studies pointed to the structural constraints on selecting certain mechanisms over others. For example, societies may have opted to implement truth commissions because of the potential spoiler effects of power holders who have the ability to derail transitions should they have to face prosecution. Orentlicher outlines this puzzle faced by many Latin American countries undergoing

⁶⁶ Jennifer J. Llewellyn, "Restorative Justice in Transitions and Beyond: The Justice Potential of Truth-Telling Mechanisms for Post-Peace Accord Societies," in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, ed. Tristan Anne Borer (Notre Dame: University of Notre Dame Press, 2006), 91.

⁶⁷ Llewellyn, "Restorative Justice in Transitions and Beyond," 93.

⁶⁸ Jonathan Allen, "Between Retribution and Restoration: Justice and the TRC," *South African Journal of Philosophy* 20, no. 1 (2001): 22-41; Leebaw, "Legitimation or Judgement? South Africa's Restorative Approach to Transitional Justice," 23-51; Llewellyn and Howse, "Institutions for Restorative Justice," 355-388; Rosemary Nagy, "Reconciliation in Post-Commission South Africa: Thick and Thin Accounts of Solidarity," *The Canadian Journal of Political Science* 43, no. 2 (2002): 323-346.

⁶⁹ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 1, 9.

⁷⁰ du Toit, "The Moral Foundations of the South African TRC," 122.

transitions to democracy. Despite the transfer of power to democratically elected governments, “armed forces continued to occupy an autonomous realm of power with the potential for imperiling their countries’ fragile transition if the new government breached their citadel of impunity.”⁷¹ With criminal prosecution perceived as the necessary response to repression, some analysts perceived truth commissions as a manageable possibility when trials were difficult or detrimental to pursue.⁷²

In this conceptualization, truth commissions are viewed as a political compromise achieved at the expense of criminal prosecution.⁷³ Political constraints or destabilizing forces may necessitate the development of processes of acknowledgement that do not threaten the peace or stability that may have been achieved in transition.⁷⁴ Identifying the pattern of truth commission selection as an output of structural conditions does not detract from the utility of these institutions. As articulated above, theorizing restorative possibilities and acknowledgement as processes of justice can persuasively alter the perception of a trade-off.⁷⁵

Despite the ability to justify truth commissions as useful tools in their own right, there remains a semblance of their selection-as-compromise in some cases. Anecdotal accounts of negotiation processes are useful sources of evidence here. Villa-Vicencio

⁷¹ Orentlicher, “Settling Accounts’ Revisited,” 11.

⁷² Boraine, “Truth and Reconciliation in South Africa: The Third Way,” 143; Llewellyn and Howse, “Institutions for Restorative Justice,” 356; Minow, *Between Vengeance and Forgiveness*, 58; Orentlicher, “Settling Accounts’ Revisited,” 12-13.

⁷³ David Dyzenhaus, “Debating South Africa’s Truth and Reconciliation Commission,” *The University of Toronto Law Journal* 49, no. 3 (1999): 312.

⁷⁴ Alexandra Barahona de Brito, *Human Rights and Democratization in Latin America: Uruguay and Chile* (New York: Oxford University Press, 1997), 5, 6.

⁷⁵ See for example: Roht-Arriaza, “The New Landscape of Transitional Justice,” 1-16.

suggests that in South Africa, “to have insisted on prosecution would have been to perpetuate war.”⁷⁶ In Liberia, Hayner identifies that while amnesty was not formally written into the peace agreement, it was generally accepted among those involved in the negotiations that ‘a witch hunt’ associated with the idea of criminal prosecution was not going to happen. A truth commission was a useful compromise. She identifies that “the trade-off between a tribunal and a TRC seems to have been explicit in everyone’s minds. ‘We chose a TRC because we didn’t want a war crimes tribunal. A tribunal would be seen as witch-hunting’, was a typical comment.”⁷⁷ In Sierra Leone, a blanket amnesty was offered to all combatants and the peace agreement included provisions for the creation of a truth commission.⁷⁸

The structural constraints that favour the adoption of truth commissions also likely influence the operation of the commission. The normative dimensions of truth commissions can come into tension with the development of the truth commission in practice. There often seems to be an element of altruism placed onto descriptions or discussions of truth commission processes. In practice, while their use is advocated heavily, a verdict on their utility and influence in achieving their intended outcomes has not clearly emerged.

⁷⁶ Villa-Vicencio, "Why Perpetrators Should Not Always be Prosecuted," 209.

⁷⁷ Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice*, 15.

⁷⁸ Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, United States Institute of Peace (Washington, February 2005), 4. See also, Truth and Reconciliation Commission: The Truth and Reconciliation Commission Act, Sierra Leone, (2000).

3.4 Truth Commission Efficacy

There is little consensus about how truth commissions should be evaluated in the transitional justice literature.⁷⁹ Evaluation has proven challenging given that truth commissions are negotiating different environments. Some evaluate truth commissions based on their outputs, or influences on measures like human rights, democratization, and reconciliation.⁸⁰ Or, shifting to the procedures of a truth commission, Wiebelhaus-Brahm suggests that elements like the number of victims heard or hearings conducted are valuable indicators of truth commission success.⁸¹ The flexible metrics for evaluating truth commission processes temper the assessments of their impact. Without being able to specify benefits and shortcomings across cases, it is difficult to evaluate conditions and factors that lead to success across cases.

Two factors that appear to have garnered agreement for their impact on truth commission operation are political will and resources. Political will has been identified as a key informing factor of truth commission operation. Brahm argues that the temporary nature of truth commissions means that they “rely on moral suasion, pressure from civil society and the international community, and the political will of politicians to see most of their impact realized.”⁸² In some instances, a dearth of political will is suggested to be a

⁷⁹ Michal Ben-Josef Hirsch, Megan MacKenzie, and Mohamed Sesay, "Measuring the impacts of truth and reconciliation commissions: Placing the global 'success' of TRCs in local perspective," *Cooperation and Conflict* 47, no. 3 (2012): 386-403.

⁸⁰ Olsen, Payne, and Reiter, *Transitional Justice in Balance*. On reconciliation, see James L. Gibson, "The Contributions of Truth to Reconciliation," *Journal of Conflict Resolution* 50, no. 3 (2006): 409-432.

⁸¹ Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*, 9.

⁸² Eric Brahm, "Uncovering the Truth: Examining Truth Commission Success and Impact," *International Studies Perspective* 8 (2007): 8-29.

crucial factor in explaining the failure of certain truth commissions.⁸³ With regards to the Kenyan truth commission, Lanegran argues that “technical issues such as selection processes are not [as] important as a broader challenge quite well known to observers of truth commissions: political will to support an active truth seeking project.”⁸⁴ Despite the frequent recognition that political will impacts truth commission processes, as will be discussed below, insufficient has been paid to how information-gathering institutions work within these constraints and how political will can be cultivated.

The operation of truth commissions is also impacted by resources allocated to the actual carrying out of the work of the truth commission. Financial contributions and constraints are identified by many truth commission observers and scholars as significant. While on the surface this is to be expected, there are still pressures to convoke these institutions and funding often comes from a variety of domestic and international sources. Truth commissions are expensive, but as Chapman and Ball identify, there can be a range of operating costs. Over the tenure of its operation, the South Africa TRC received approximately \$33 million, in comparison to Haiti’s commission which had to operate on just over \$1 million.⁸⁵ Despite this, Hayner identifies that observers critiqued the South African TRC for being “insufficiently resourced.”⁸⁶ Similar claims are made about the Haitian truth commission and others.⁸⁷ Brahm suggests that funding likely affects the

⁸³ Quinn, "Haiti's Failed Truth Commission," 272. See also: Lydiah Kemunto Bosire and Gabrielle Lynch, "Kenya's Search for Truth and Justice: The Role of Civil Society," *The International Journal of Transitional Justice* 8 (2014): 256.

⁸⁴ Kimberly Lanegran, "The Kenyan Truth, Justice and Reconciliation Commission: The Importance of Commissioners and Their Appointment Process," *Transitional Justice Review* 1, no. 3 (2015): 44.

⁸⁵ Chapman and Ball, "Truth of Truth Commissions," 16-17.

⁸⁶ Hayner, *Unspeakable Truths*, 216.

⁸⁷ Chapman and Ball, "Truth of Truth Commissions," 16-17; Hayner, *Unspeakable Truths*, 216.

impact of truth commissions. He suggests that “well-funded truth commissions seem likely to be better able to hire more staff and, consequently, to investigate a greater number of cases and do so more thoroughly. As a result, the truth reflected will likely be more comprehensive.”⁸⁸ This is significant because it increases truth-seeking capabilities. In terms of human resources, Hayner suggests that:

Perhaps more than any other single factor, the person or persons selected to manage a truth commission will determine its ultimate success or failure. Several commissions have run into serious problems due to weak management, leading to staff divisions, misdirected or slow-to-start investigations, and limited support.⁸⁹

The design of commissions has to incorporate decisions that outline such dimensions as who should serve, the number of commissioners, their location, their role and focus, and expected time commitment.⁹⁰ Like financial challenges, the selection of commissioners has been implicated in the underperformance of truth commissions.⁹¹

Undoubtedly, these two categories, political will and resources, are related. A lack of political will may be demonstrated or entrenched by not providing adequate financial or human resources to carry out the component activities of a truth commission. Similarly, governments may appoint personnel to the commission who may be more sympathetic to their cause. There are, though, also resource considerations that may emerge less from a concerted effort to undermine the process, than from the reality of operating in a political environment of competing needs in times of transition.⁹²

⁸⁸ Brahm, "Uncovering the Truth," 30.

⁸⁹ Hayner, *Unspeakable Truths*, 211.

⁹⁰ Brahm, "Uncovering the Truth," 31; Chapman and Ball, "Truth of Truth Commissions," 17-20; Lanegran, "The Importance of Commissioners," 44-49; Quinn and Freeman, "Lessons Learned," 1128.

⁹¹ Lanegran, "The Importance of Commissioners," 44; Quinn, "Haiti's Failed Truth Commission," 273.

⁹² Hayner, *Unspeakable Truths*, 217.

Although these factors have been identified as difference makers, their absence is easier to determine than their presence. Identifying a lack of political will is important to beginning to understand what explains success in truth commission operations, but as Brinkerhoff suggests, “political will exhibits a latent quality; it is not visible separate from some sort of action. Measuring it can only be done indirectly.”⁹³ With regards to transitional justice and truth commissions, less attention has been paid to how to cultivate political will.⁹⁴ This is problematic because advocates of transitional justice are succeeding in entrenching practices of transitional justice across the world. While the intention is morally justified, the push to implement truth commission processes does not adequately account for leadership or environments that lack the capacity or will to undertake these processes with intentions of justice or reconciliation. Despite the recognition of potential problems with ill-conceived or weakly supported truth commissions, their general framework is fairly standardized.

Scholars are turning to the institutional components of truth commissions. Nichols points to components of legitimacy—authority, a break with the past, and transparency—as key factors that affect truth commission operation and impact.⁹⁵ Characteristics that are linked to institutional efficacy are valuable indicators of success because they do not depend on certain design features. Framing success in terms of the institutional legitimacy helps navigate the problem that truth commissions are established in different contexts and

⁹³ Derick W. Brinkerhoff, "Assessing Political Will for Anti-Corruption Efforts: An Analytic Framework," *Public Administration and Development* 20 (2000): 241.

⁹⁴ Phuong N. Pham, Niamh Gibbons, and Vinck Patrick, "A Framework for Assessing Political Will in Transitional Justice Contexts," *The International Journal of Human Rights* (2019): 1-17

⁹⁵ Nichols, *Impact, Legitimacy, and Limitations of Truth Commissions*, 31-39.

thus have different institutional starting points. Similarly, Sarkin's efforts to better define truth commissions offers a helpful metric for evaluation, shifting the focus from outcomes to institutional dimensions.⁹⁶ Sarkin argues that it is the institutional dimensions of truth commission design that set up truth commissions for success:

The best chance of success is one that is independent, publically supported and accessible to everyone, especially usually marginalised and excluded groups. A [truth commission] needs to be created after research and dialogue with all actors. It needs to be well structured and individually tailored to deal with the issues of the country in question.⁹⁷

This definition of success, or the most likely features to achieve success, accounts for the diversity of situations in which truth commissions are established but relies on expectations about well-functioning institutions. This helps to account for the recognition that there are significant differences in truth commission design and operation across cases.⁹⁸ These metrics are revisited in Chapter 5 to substantiate the success of the South African TRC.

It is necessary to acknowledge a critical tension with truth commission operations. The recognition that transitional justice processes need to be adjusted for individual contexts is ubiquitous in the field. Yet, despite these claims, there is a core group of transitional justice mechanisms that are advocated for, and implemented, in varied contexts.⁹⁹ Procedural elements of truth commissions can be altered to accommodate

⁹⁶ Sarkin, "Redesigning the Definition a Truth Commission," 352.

⁹⁷ *Ibid.*, 365-366.

⁹⁸ Sarkin, "Redesigning the Definition a Truth Commission," 350. Sarkin cites Dimitrijevic who offers an insightful investigation into the value of truth commissions across different contexts. This is an important normative point that underscores the search for truth across cases. See: Nenad Dimitrijevic, "Justice Beyond Blame: Moral Justification of (The Idea of) A Truth Commission," *The Journal of Conflict Resolution* 50, no. 3 (2006): 368-382.

⁹⁹ See for example, "Truth Seeking: Elements of Creating an Effective Truth Commission," ed. Eduardo Gonzalez and Howard Varney (Brasilia: Amnesty Commission of the Ministry of Justice of Brazil; New York: International Center for Transitional Justice: International Center for Transitional Justice, 2013).

different local needs or wants. For example, the design of truth commissions can be tailored to particular contexts with choices involving whether testimonies will be given in public or private; whether perpetrators will be named in reports, and in the selection of commissioners.¹⁰⁰ However, the variation in structure of these processes, designed to achieve particular goals pertaining to justice, truth, and reconciliation are what have made them desirable in transitional situations in the first place.

The above analysis points to truth commissions as transitional projects. Despite the recognition that conditions shape some particular designs of truth commissions in practice, the transitional justice literature often presents truth commissions as a product of the decision to pursue transitional justice. Distinguishing the ‘menu’ or toolbox of transitional justice and analyzing or assessing these institutions as components of transitional justice often results in their presentation as appearing or emerging as a unique response to transitions; as neatly contained instruments.

Beattie’s account of what he terms the German Bundestag commission, two commissions of inquiry created by the German government in 1992 and 1995, offers an important analysis of the influence of historical evolution on the process of truth-seeking.¹⁰¹ These commissions, the Commission of Inquiry for the Assessment of History and Consequences of the SED Dictatorship in Germany (1992-1994) and the Commission of Inquiry on Overcoming the Consequences of the SED Dictatorship in the Process of

¹⁰⁰ Hayner, *Unspeakable Truths*, 210-233.

¹⁰¹ Andrew H. Beattie, "An Evolutionary Process: Contributions of the Bundestag Inquiries into East Germany to an Understanding of the Role of Truth Commissions," *The International Journal of Transitional Justice* 3 (2009): 229-249.

German Unity (1995-1998), were established by the German Parliament.¹⁰² These commissions were established by the German government to provide a thorough investigation into the Communist regime and opposition to it and relied heavily on research.¹⁰³ The membership of both Commissions were parliamentarians with representation reflective of parliamentary composition, and external experts.¹⁰⁴

Beattie explains the unique elements of the Bundestag commission based on the contextual elements that informed its establishment. For example, he suggests that the lack of victim testimony ought not detract from its value as a truth commission, but should he acknowledged that in light of the existing records of the regime, the commission operated on the basis of a “more discursive, analytical, evaluative and symbolic understanding.”¹⁰⁵ Beattie argues that the commission’s adjustments in light of tensions regarding how to achieve its mandate help to explain the development of the process itself.¹⁰⁶ This account of the Bundestag commission is important because it identifies a different explanatory pathway to explain the design of a truth-seeking process.

Beattie contends that accounting for the Bundestag Commission’s emergence “over time is crucial, for such bodies are not static, inert institutions but rather events and processes whose evolution is not automatic.”¹⁰⁷ This is significant because it acknowledges how earlier influences shaped the design of truth commissions. Specifically, this

¹⁰² Ibid., 52-53.

¹⁰³ Beattie, "An Evolutionary Process," 234-235.

¹⁰⁴ Beattie, "An Evolutionary Process," 232; Hayner, *Unspeakable Truths*, 52.

¹⁰⁵ Beattie, "An Evolutionary Process," 238.

¹⁰⁶ Ibid., 239-240.

¹⁰⁷ Ibid., 231.

demonstrates how institutions can be repositioned to respond to emergent needs. This is important because it demonstrates an element of agency and institutional agency in the process of truth-seeking. Truth commissions may have some standard features, by definition, but how they are designed or undertake their work retains an element of flexibility.

To be sure, scholars do not ignore the context or structural dynamics at play, but insufficient is paid to the role of how histories and earlier institutional arrangements matter for truth commissions. Many analyses recognize the influence of judicial and security institutions affecting the operation of truth commission processes and in this way embed truth commissions within specific contextual dynamics. But, frequently the analysis begins without reference to how information or truth-seeking may have been carried out prior to political transition. The mechanics and optics of these processes may not be conducive to legitimate truth-seeking practices, but taking them into account can help to illustrate in what ways history matters.

3.5 Institutional foundations

This section explores what it is that sets truth commissions apart from other domestic inquiries into violence but why these elements may help us understand later truth commission operation. It argues that the shared features like investigations, the collection of testimonies, reports of findings and, often, policy recommendations make establishing a marked distinction between these categories of investigation difficult. This section outlines that the difference between truth commissions and other investigative processes is the symbolic rhetoric of justice associated with their use. Given that the value imposed on

the truth commission has entrenched their use to redress past injustice, their institutional lineage is more compelling in understanding the operational effects.

3.5.1 Commissions of inquiry

In non-transitional political spaces, commissions of inquiry are used by governments to address critical or concerning events/incidents in an official, non-judicial capacity. Commissions of inquiry are a means to uncover information and identify shortcomings in existing government or societal practice. A commission of inquiry falls under the umbrella of public inquiries, which may take different forms under different government systems, but that share similar features.¹⁰⁸ Salter defines a public inquiry as “any body that is formally mandated by a government, either on an *ad hoc* basis or with reference to a specific problem, to conduct a process of fact-finding and to arrive at a body of recommendations.”¹⁰⁹ With regard to information gathering specifically, Stanton suggests that commissions of inquiry “investigate an issue by gathering a broad spectrum of information in order to see the larger context that gave rise to the problem.”¹¹⁰ These conceptualizations highlight the investigative purposes of inquiries that resemble truth commissions.

Manson and Mullan suggest that defining a commission of inquiry is usefully done by focusing on the mandate an investigation receives. This includes:

all forms of inquiry directed to inquire into, and report on, the circumstances and causes of an event or series of events, or an issue of public importance... the

¹⁰⁸ Freeman, *Truth Commissions and Procedural Fairness*, 54-55.

¹⁰⁹ Liora Salter, "The Two Contradictions in Public Inquiries," *Dalhousie Law Journal* 12, no. 3 (1989): 175.

¹¹⁰ Kim Stanton, "Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry," *Canadian Journal of Law and Society* 27, no. 1 (2012): 84.

common feature is whether the vehicle is intended to be an element in the development of public policy by uncovering facts and generating recommendations.¹¹¹

In Canada, New Zealand, and Britain, commissions of inquiry are often categorized into two broad types: those that investigate conduct and those that inform policy.¹¹² However, as Salter suggests, “at stake in almost all inquiries is public confidence in institutions with a public purpose, and thus is a matter fraught with political consequences. In short, almost all inquiries are policy inquiries, at least in some respects.”¹¹³ By setting up inquiries of this sort, governments have a venue through which to identify shortcomings and rectify policy and institutions. Inwood and Johns characterize commissions of inquiry as “extra-governmental institutions” that are “established specifically to address issues beyond the existing branches of government and are invoked when the regular machinery of government or policy process is broken or fails.”¹¹⁴ While dissatisfaction or an emergent issue may inform the implementation of a commission, the existence of these factors does not always result in the initiation of an investigation.¹¹⁵

Significant attention has been paid to how commissions affect changes in policy in democratic states. Inwood and Johns investigate how the institutional design of

¹¹¹ Allan Manson and David Mullan, "Introduction," in *Commissions of Inquiry: Praise or Reappraise*, ed. Allan Manson and David Mullan (Toronto: Irwin Law, 2003), 4.

¹¹² K.J. Keith, "Commissions of Inquiry: Some thoughts from New Zealand," in *Commissions of Inquiry: Praise or Reappraise*, ed. Allan Manson and David Mullan (Toronto: Irwin Law, 2003), 156.

¹¹³ Liora Salter, "The Complex Relationship Between Inquiries and Public Controversy," in *Commissions of Inquiry: Praise or Reappraise* ed. Allan Manson and David Mullan (Toronto: Irwin Law, 2003), 186.

¹¹⁴ Gregory J. Inwood and Carolyn M. Johns, "Why Study Commissions of Inquiry," in *Commissions of Inquiry and Policy Change: A Comparative Analysis*, ed. Gregory J. Inwood and Carolyn M. Johns (Toronto: University of Toronto Press, 2014), 8.

¹¹⁵ See for example, Raanan Sulitzeanu-Kenan, "Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry," *British Journal of Political Science* 40 (2010): 613-634.

commissions of inquiry in Canada influences policy changes.¹¹⁶ Rather than identifying specific combinations of factors that lead to policy change, the authors identify different factors that structure commissions of inquiries—ideas, institutions, actors, and relations—to map the impact on policy change, differentiating between “transformative and direct,” “transformative but diffuse,” and “marginal and limited” policy changes.¹¹⁷

In a study on pension commissions, Marier similarly explores the policy changes that resulted from investigations. Marier differentiates those with strong policy outputs that are accepted by the government or, “policy engineers,” from those whose outputs are not the policy accepted by the government for the issue under investigation, or, “alarm raisers.”¹¹⁸ A further distinction is made among those with minimal short-term policy impact but with longer term influential ideas, or “idea shakers”, and those that do not result in change, or “a source of the status quo.”¹¹⁹ Marier identifies specific variables that are related to a commission’s influence: a commission’s membership, terms of reference, independence (with support), institutional environment, and the viability of the report (in political, economic, and administrative terms).¹²⁰ The study of policy influence from commissions of inquiry is important because it demonstrates the impacts of the design of the commission themselves. By identifying features of commissions, and the conditions under which these components influence the effectiveness of commissions, the

¹¹⁶ Gregory J. Inwood and Carolyn M. Johns, "Commissions of Inquiry and Policy Change: Comparative Analysis and Future Research Frontiers," *Canadian Public Administration* 59, no. 3 (2016): 382-404.

¹¹⁷ Inwood and Johns, "Commissions of Inquiry and Policy Change," 391.

¹¹⁸ Patrik Marier, "The Power of Institutionalized Learning: the uses and practices of commissions to generate policy," *Journal of European Public Policy* 16, no. 8 (2009): 1209-1210.

¹¹⁹ *Ibid.*, 1209-1210, 1214.

¹²⁰ *Ibid.*, 1210-1211.

significance of the institutional design component of investigatory commissions is highlighted. It also demonstrates a similarities to such adjudications of truth commissions as discussed above.

The rhetoric around commissions of inquiry can often be cynical. Justifications or explanations for the appointment of inquiries may centre on avoiding addressing particular issues. As Schwartz points out, “it is a paradoxical fact that a government can use public inquiries to deflect political accountability.”¹²¹ Marier categorizes efforts to delay, avoid, and influence support for particular policy ideas as partisan motivations for the appointment of inquiries.¹²² Governments create the mandates and as such can choose the scope of the investigation, the people to carry out the investigation, and a general timeframe.¹²³ In situations where public or political crises are the impetus for the implementation, investigations can be riskier, as the response from the public can be much less certain.¹²⁴

Despite the rhetoric associated with commissions/investigations as simply doing something, a symbolic dimension of commissions of inquiry has been identified. Parker and Dekker identify a symbolism of processes in investigations. They argue that investigations themselves help to illustrate that the government is working as it should. Additionally, Parker and Dekker suggest that investigation and deliberation into crises or

¹²¹ Bryan Schwartz, "Public Inquiries," in *Commissions of Inquiry: Praise or Reappraise* ed. Allan Manson and David Mullan (Toronto: Irwin Law, 2003), 448.

¹²² Marier, "The Power of Institutionalized Learning: the uses and practices of commissions to generate policy," 1208.

¹²³ Schwartz, "Public Inquiries," 448.

¹²⁴ Arjen Boin, Paul 't Hart, and Allan McConnell, "Conclusions: The politics of crisis exploitation," in *Governing After Crisis: The Politics of Investigation, Accountability and Learning*, ed. Arjen Boin, Paul 't Hart, and Allan McConnell (Cambridge: Cambridge University Press, 2008), 285-303.

disasters enables “meaning-making” of the events.¹²⁵ Ashforth describes commissions of inquiry as “schemes of legitimation” wherein commissions play a discursive role in shaping state power.¹²⁶ By engaging in investigation, soliciting feedback from experts and compiling a report, the state produces “a realm of discourse in the terms of which the knowledge necessary for power can be discovered and expressed.”¹²⁷ His argument about the state’s value of commissions of inquiry “beyond their expressed purposes” is particularly compelling given his recognition that “although governmental inquiries typically engage in fact-gathering and argumentation in order to produce policy-oriented recommendations, their labours rarely produce policy results commensurate with the effort and expense of inquiry.”¹²⁸ Here, the parallels between investigatory commissions and truth commissions become increasingly apparent.

3.5.2 Conceptual challenge of truth commissions

The institutional foundations of truth commissions are often overshadowed by the framing of truth commissions as a unique way to achieve a moral requisite of transitional justice. As a tool that has garnered consensus as a morally acceptable option during periods of “extraordinary” politics, to use Teitel’s phrasing, truth commissions are often presented as

¹²⁵ Charles F. Parker and Sander Dekker, "September 11 and postcrisis investigation: exploring the role and impact of the 9/11 commission," in *Governing After Crisis: The Politics of Investigation, Accountability and Learning*, ed. Arjen Boin, Allan McConnell, and Paul 't Hart (Cambridge: Cambridge University Press, 2008), 272.

¹²⁶ Adam Ashforth, "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms," *Journal of Historical Sociology* 3, no. 1 (1990): 6, 12-13.

¹²⁷ *Ibid.*, 18.

¹²⁸ *Ibid.*, 1.

an emergent phenomenon of the 1980s.¹²⁹ The similarity in the institutional skeletons that frame truth commissions and commissions of inquiries is evident from early analyses of truth commissions. This overlap is apparent both in terminology and lineage.

Some of the earliest investigations that fall within the realm of ‘truth commissions’ were also referred to as “investigatory commissions”.¹³⁰ As these types of investigations emerged, they became valuable as alternatives to what Popkin and Roht-Arriaza refer to as “‘normal’ investigatory channels.”¹³¹ The justification for using truth commissions has focused more on how they could negotiate a path contiguous to judicial processes without destabilizing the transitions and less on how their institutional predecessors may be implicated in their use.

Hayner acknowledges that there are other types of investigations distinct from truth commissions and suggests that these non-truth commission forms of inquiry may better serve the needs of investigation. Presenting a variety examples from Australia, the US, and Canada, Hayner identifies that “there are a range of other kinds of official inquiries into past human rights abuses that have not been understood as truth commissions, but they have served a very important role and may be a better approach than a truth commission, in some moments and in some contexts.”¹³² How these processes affect truth-seeking warrants further attention and this project engages with this gap, recognizing the institutional lineage.

¹²⁹ Teitel, *Transitional Justice*, 6.

¹³⁰ Popkin and Roht-Arriaza, "Truth as Justice," 81.

¹³¹ *Ibid.*, 82.

¹³² Hayner, *Unspeakable Truths*, 14.

Freeman observes that “commonwealth commissions of inquiry greatly resemble the modern truth commission.”¹³³ His observation of commissions in Uganda, Zimbabwe, Nepal, Sri Lanka, and Nigeria is that “in their particular contexts, they resembled something older and more familiar: standard commissions of inquiry into public controversies.”¹³⁴ Freeman classifies truth commissions as one type of “*ad hoc* national human rights-related commissions of inquiry.”¹³⁵ He distinguishes between four other types—“event-specific, thematic, sociohistorical, and institutional.”¹³⁶ Commenting on each of these variations, Freeman differentiates them from truth commissions based on the centrality of victims in the event-specific and thematic variants. Freeman argues that the time elapsed between violence or crises and investigations distinguishes truth commissions from commissions of inquiry, the latter of which tend to be more immediate. In addition, the breadth of institutions under consideration by a truth commission compared separates it from an institutional commission of inquiry which tends to have a narrower focus.¹³⁷ For Hayner, what sets apart a truth commission is the “their intention of affecting the social understanding and acceptance of the country’s past, not just to resolve specific facts.”¹³⁸ This distinction is one way that analysts differentiate between the two investigating bodies.

Stanton, however, makes a strong case that truth commissions are a “specialized form of commission of inquiry,” in her study explaining why truth commissions are not

¹³³ Freeman, *Truth Commissions and Procedural Fairness*, 23.

¹³⁴ *Ibid.*, 23.

¹³⁵ *Ibid.*, 53.

¹³⁶ *Ibid.*, 53-58.

¹³⁷ *Ibid.*, 54, 56, 57.

¹³⁸ Hayner, *Unspeakable Truths*, 11.

frequently established in established democracies.¹³⁹ Stanton acknowledges that, generally, two features set truth commissions apart from commissions of inquiry: a truth commission's "symbolic acknowledgement of historic injustices and its explicit social function of public education about those injustices."¹⁴⁰ Suggesting that it is the context or implications of the type of environment that truth commissions are usually implemented that hinders their adoption by democratic regimes, not the design or operational distinctiveness, Stanton argues that when undertaken in a certain way, the commission of inquiry can achieve what a truth commission is expected to achieve. Thus, Stanton argues that while the "social influence" and the symbolic nature of the truth commission set it apart from the commission of inquiry, this need not be the case.¹⁴¹ Rather Stanton suggests:

The truth commission is expected to do explicitly what a commission of inquiry is capable of doing but which it is not obliged to do: to acknowledge the existence of the historical injustices and to embark upon a process that educates the public about those injustices in order to prevent recurrence... whichever form is used, both are capable of fulfilling this social function.¹⁴²

That the commission of inquiry *can* fulfill the functions associated with a truth commission is a reasonable assessment of its institutional similarities to the truth commission. The operational features of both forms of inquiry are similar and thus it is persuasive that through an engaging and socially focused investigation, acknowledgement can occur through the commission of inquiry.

¹³⁹ Kim Pamela Stanton, "Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies" (Doctor of Juridical Science University of Toronto, 2010), 7.

¹⁴⁰ Stanton, "Truth Commissions and Public Inquiries," 24.

¹⁴¹ *Ibid.*, 15, 28, 29.

¹⁴² *Ibid.*, 29.

Stanton's conceptualization is specific to established democracies, but the argument is applicable more broadly, in terms of the distinction between the commission of inquiry and truth commission (and less so the focus on the democratic adoption). To moderate this characterization to the context under consideration in this dissertation, the relationship between pre-transitional commissions of inquiry and post-transitional truth commissions, the negative fulfillment of mandates, or the negative experience with commissions of inquiry is also likely to bear on the truth commission process. Thus, the question here is not whether it is *possible* for commissions of inquiry to fulfill the role associated with truth commissions, but how the earlier operation of a commission of inquiry affects the operation of a truth commission in both potentially positive and negative ways.

Even in advanced democracies, commissions of inquiry are not necessarily 'game-changers'. Boin et al. identify that the learning that emerges from investigations after crises is varied and difficult.¹⁴³ Critically, other factors informing the environment at the time of crises and associated investigations can change how the public, and the government, respond.¹⁴⁴ For example, to expect significant change from governments that are investigating human rights abuses in which they are known to be, or discovered to be, complicit, raises serious doubts about their ability to investigate violations and violence. However, such investigations are still likely to have some effect—be they positive or negative—on later truth commissions should they be convoked.

¹⁴³ Arjen Boin, Allan McConnell, and Paul 't Hart, "Governing after crisis," in *Governing After Crisis: The Politics of Investigation, Accountability and Learning*, ed. Arjen Boin, Allan McConnell, and Paul 't Hart (Cambridge: Cambridge University Press, 2008), 14.

¹⁴⁴ *Ibid.*, 18-19.

Freeman recognizes the relationship between commissions of inquiries as predecessors of truth commissions. Freeman identifies parallels in the existing legislation for inquiries and the legislation for truth commissions in countries that had a history of commissions. Importantly, though, Freeman identifies that “their long experiences with commissions of inquiry also made the countries cognizant of the commissions’ habitual limitations,” which helps to explain why governments sought new legislation for the creation of truth commissions in these environments.¹⁴⁵ The significance of this pattern suggests an important potential influence of previous commissions on truth commission processes. By framing this project using a definition of a truth commission that characterizes it as a variation on the commission of inquiry, the potential that commissions of inquiry are implemented in a more skeptical vein, or in a repressive manner, must be addressed.

3.5.3 Institutional histories

Under certain conditions, commissions of inquiry or investigations are implemented with little output, and with potentially negative effects. Governments have initiated investigations into abuse or violations under both democratic and repressive regimes.¹⁴⁶

Such investigative commissions may be initiated under conditions that are not necessarily conducive to a credible investigation; for example, by a government complicit in violence or that purposefully undermines investigatory processes. Additionally, countries that

¹⁴⁵ Freeman, *Truth Commissions and Procedural Fairness*, 24.

¹⁴⁶ Richard Carver, "Called to Account: How African Governments Investigate Human Rights Violations," *African Affairs* 89, no. 356 (July 1990): 391-415; Brian Grodsky, "Justice Without Transition: Truth Commissions in the Context of Repressive Rule," *Human Rights Review*, no. 9 (2008): 281-297.

frequently use commissions of inquiry may undermine the value of such investigations.¹⁴⁷

This may be problematic for truth-seeking practices. The case of South Africa is taken up in more detail in from Chapter 5 onward. Other examples are presented here to illustrate situations in which commissions of inquiry may impact truth-seeking measures. For instance, a report evaluating the National Reconciliation Commission (NRC) in Ghana, suggests that the practice of using commissions of inquiry to “discredit preceding administrations” impacted the operation of the NRC as a transitional justice mechanism, identifying that “it has been argued that the Commission did not do enough to break with the legacy of these past commissions.”¹⁴⁸

In Zimbabwe, for example, the government implemented the Commission of Inquiry into the Matabeleland Disturbances to investigate violence perpetrated by the military against civilian populations in the Matabeleland district. Not only did the government not release the report from this commission, the government’s denial of 1500 civilian deaths meant that family members of the victims were unable to claim compensation.¹⁴⁹ Zimbabwe’s case is instructive in this regard because it demonstrates the use of a commission of inquiry that had little impact on information gathering or dissemination for the people affected.

¹⁴⁷ For example, Marier identifies that, “overusing commissions can backfire and send a signal that a government is incapable of governing.” See Marier, “The Power of Institutionalized Learning: the uses and practices of commissions to generate policy,” 1220.

¹⁴⁸ Nahla Valji, *Ghana’s National Reconciliation Commission: A Comparative Assessment*, International Center for Transitional Justice (September 2006), 11.

¹⁴⁹ Priscilla B. Hayner, “Fifteen Truth Commissions —1974 to 1994: A Comparative Study,” *Human Rights Quarterly* 16, no. 4 (1994): 617-618.

While Hayner argues that the government did not release the report allegedly based on fear of increasing violence between ethnic groups, Grodsky's interpretation is that the contents of the report were simply "inconvenient" for then President Robert Mugabe.¹⁵⁰ The government's refusal to release this report is unsurprising, given its use of repression. Carver argues that "the government was able to use the formation of the Commission as a device to divert criticism, at the same time as escaping any awkward consequences."¹⁵¹ The Zimbabwean example illustrates engagement with a commission or investigation that, though seemingly investigated, had little in the way of desire to uncover and rectify systemic or institutional shortcomings. In the Zimbabwean case, human rights abuses continued to be committed in the decades of Mugabe's rule.¹⁵² Mugabe was only succeeded in Zimbabwe in 2017, after coming to power in 1980.¹⁵³

The Zimbabwean case provides an illustration of the types of investigations that may be undertaken without intention of redress to begin to situate the discussion of the institutional lineage. While Zimbabwe has not implemented a truth commission, it demonstrates the undermining potential of investigations in contexts of human rights violations. This type of influence is problematic when a truth commission is under consideration or later established. Earlier commissions of inquiry may undermine the potential information gathering or symbolic acknowledgement anticipated with a truth

¹⁵⁰ Brian Grodsky, "Justice Without Transition: Truth Commissions in the Context of Repressive Rule," *Human Rights Review*, no. 9 (2008): 285; Hayner, "Fifteen Truth Commissions," 617.

¹⁵¹ Carver, "Called to Account," 395.

¹⁵² Rhoda E Howard-Hassmann, "Mugabe's Zimbabwe, 2000–2009: Massive Human Rights Violations and the Failure to Protect," *Human Rights Quarterly* 32, no. 4 (2010): 898-920.

¹⁵³ *Ibid.*, 898-920.

commission. It is this type of pattern that is under consideration in this project. The Kenyan case is unpacked briefly here as an example.

In Kenya, a somewhat unconstructive history of commissions of inquiry preceded the truth commission. Some accounts suggest that this continuity of institutions affected the perception of the truth commission. Significant in this case is the use of commissions of inquiry in Kenya in such a way as to obfuscate responsibility for government misdeeds or perpetration of violence.¹⁵⁴ As Lynch identifies, “commissions of inquiry in post-colonial Kenya have become a performance of state power in a blunter sense, namely, the power to investigate and respond to problems, but also dismiss and ignore them if that suits vested interests.”¹⁵⁵ This lineage has been identified as important in understanding the Truth, Justice, and Reconciliation Commission (TJRC) that followed.

According to Lynch, there was a concern among people in Kenya that “in the absence of a political transition, the TJRC would likely replicate previous commissions of inquiry in that it would write a detailed report that would then be relegated to dusty shelves.”¹⁵⁶ In terms of operation, this lineage appears to have been reiterated with the TJRC. Bosire and Lynch speak to the “credibility crisis” of the TJRC.¹⁵⁷ Factors contributing to this crisis included little support from civil society organizations at the time, and the problematic appointment of the chairperson, who had been implicated in

¹⁵⁴ Brown and Sriram, "The Big Fish Won't Fry Themselves," 250.

¹⁵⁵ Lynch, *Performances of Injustice: The Politics of Truth, Justice and Reconciliation in Kenya*, 109.

¹⁵⁶ *Ibid.*, 110.

¹⁵⁷ Bosire and Lynch, "Kenya's Search for Truth and Justice," 258.

allegations of past abuses.¹⁵⁸ Hayner suggests that advocacy groups critiqued the legislation enacting the truth commission for being unclear and the institution itself not impartial.¹⁵⁹ Furthermore, a scandal on the appointed leadership of the Commission affected the perception of its operations.¹⁶⁰

In the Kenyan case, a commission of inquiry was established at the same time as the agreement to establish a truth commission. The Commission of Inquiry into the Post-Election Violence (CIPEV), also known as the Waki Commission, was implemented as a component of the Kenya National Dialogue and Reconciliation. The negotiating parties agreed to CIPEV, and another commission into electoral irregularities, the Independent Review Committee, on March 4, 2008.¹⁶¹ The Waki Commission itself completed its investigations, issued its report and even built in mechanisms to try and ensure its recommendations would be heeded. As Brown and Sriram outline, the Waki Commission attempted to prevent its recommendations from being ignored. It did this by including a ‘stick’ should the government not implement the recommendations; the Waki Commission provided a list of alleged perpetrators to Kofi Annan and the other international mediators to give to the International Criminal Court.¹⁶² This is significant because there was a

¹⁵⁸ Bosire and Lynch, "Kenya's Search for Truth and Justice," 258-269. On the appointment of Bethuel Kiplagat, see also, Ronald C. Slye, *The Kenyan TJRC: An Outsider's View from the Inside* (Cambridge: Cambridge University Press, 2018), 84-162.

¹⁵⁹ Hayner, *Unspeakable Truths*, 73-74.

¹⁶⁰ Slye, *The Kenyan TJRC: An Outsider's View from the Inside*, 84-162.

¹⁶¹ Elena Naughton, "Chapter 6: Kenya Case Study," in *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* (International Center for Transitional Justice and the Kofi Annan Foundation, June 2014), 65.

¹⁶² See Brown and Sriram, "The Big Fish Won't Fry Themselves," 250-251.

recognition that the recommendations might be ignored, which raises questions about what the truth commission project could be expected to achieve.

The institutional lineage for investigations or truth-seeking is compromising in the Kenyan case. The Waki Commission's efforts to mitigate these experiences are compounded by another commission that was established specifically to determine whether a "truth commission was necessary for Kenya," five years earlier in 2004.¹⁶³ After broad consultation with the Kenyan population and research into other countries that had established truth commissions, the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, presented over twenty recommendations outlining the necessity of a truth commission and the operational parameters advocated based on these consultations.¹⁶⁴ This is significant because this case demonstrates how the *need* for truth-seeking might be set apart from the *willingness or commitment* to truth-seeking.

Canada, with its Truth and Reconciliation Commission, established in 2008 to investigate the abuses of the Indian Residential School system, provides another example of a country that has used commissions of inquiries and established a truth commission.¹⁶⁵ Some commissions of inquiry may set a positive example for truth commissions that follow, as Stanton argues in the case of the Mackenzie Valley Pipeline Inquiry carried out

¹⁶³ Makau Mutua, "Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission," *Buffalo Human Rights Law Review* 10, no. 3 (2004): 15.

¹⁶⁴ Mutua, "Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission."

¹⁶⁵ For a brief overview of the Canadian TRC see: Ravi de Costa, "Discursive Institutions in Non-Transitional Societies: The Truth and Reconciliation Commission of Canada," *International Political Science Review* 38, no. 2 (2016): 185-199; Hayner, *Unspeakable Truths*, 72-73.

by Thomas Berger, and the Truth and Reconciliation Commission in Canada.¹⁶⁶ As an instance of the pattern under consideration in this dissertation, this example is illustrative of the potential for commissions of inquiry to act as a means to change structural components of investigations rather than perpetuate the status quo. Although established as an investigation into the potential effects of a pipeline in 1974, and not established as a formal investigation into violence, the inquiry resulted in an interrogation of the structural and cultural dimensions of the relationship between Canada and Indigenous people in the North.¹⁶⁷

Stanton's focus is on the social function, the public education dimension, of both commissions and the innovative way that Berger conducted the Inquiry. The Inquiry held community hearings in communities that would be impacted by the pipeline, broadcasted hearings and sought to educate non-Indigenous people about the potential effects and existing injustices facing Northern communities.¹⁶⁸ Berger also identifies that funding was made available to Indigenous groups to participate in the Inquiry's hearings.¹⁶⁹ Important for this discussion is Stanton's recognition that "many of Berger's innovations were incorporated into subsequent inquiries," although these did not transform other political shortcomings with either the inquiries that followed, or the government's response to

¹⁶⁶ Stanton, "Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry," 81-99; Stanton, "Truth Commissions and Public Inquiries."

¹⁶⁷ Stanton, "Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry," 81-99.

¹⁶⁸ Stanton, "Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry," 85-86, 89, 94-95; Thomas R. Berger, "Canadian Commissions of Inquiry: An Insider's Perspective," in *Commissions of Inquiry: Praise or Reappraise*, ed. Allan Manson and David Mullan (Toronto: Irwin Law, 2003), 17.

¹⁶⁹ Berger, "Canadian Commissions of Inquiry: An Insider's Perspective," 16.

historical injustices against Indigenous people.¹⁷⁰ This is still significant because it demonstrates both the continued use of the commission of inquiry and the ability to enhance the process.

Although the Canadian TRC was established decades after Berger released his report, Stanton suggests that the Mackenzie Valley Pipeline Inquiry had lessons for the Canadian TRC with respect to how to engage this social function of education and engagement.¹⁷¹ Stanton also identifies the legacy of the Mackenzie Valley Pipeline Inquiry on the Royal Commission on Aboriginal Peoples that followed, and the eventual TRC suggesting that Berger's report "began to lay the groundwork for their legacy to be discussed in public life."¹⁷² This brief example cannot explore the depths of structural injustice imposed on Indigenous people in Canada, nor can it elucidate all the instances in which government investigations or inquiries fundamentally oppressed Indigenous people. However, this example illustrates the potential for negative experiences with investigative institutions to be addressed in order to lay a foundation for future investigations.

These examples illustrate that institutional lineage may both enable and constrain truth-seeking measures that follow earlier investigative efforts. Experiences with measures of truth-seeking that serve as window-dressings, or as obfuscation, may set a different foundation for later truth-seeking measures that are used as a method of transitional justice. Alternatively, the commission of inquiry may itself be a vector of change. This dissertation engages this observation to explore this pattern in South Africa. Before moving to the

¹⁷⁰ Stanton, "Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry," 87.

¹⁷¹ Ibid., 87-92.

¹⁷² Ibid., 97.

discussion that explores this relationship as it plays out in the South African case, and the conditions under which negative histories can be adjusted, it is necessary to briefly discuss the colonial roots of the commission of inquiry.

3.5.4 Colonial histories

The commission of inquiry also has a colonial legacy. As such, conceptualizations of commissions/investigations can be understood as structures that aim to perpetuate the status quo. In this vein, they may do little to address structural factors that contribute to crises or investigations, but are rather framed as a legitimating tool. Balint, Evans, and McMillan identify that commissions can reinforce the status quo without dismantling structural inequality. The authors argue that “official discourses created through such commissions serve to produce and reproduce racialized identities that legitimise elite power and interests.”¹⁷³ At the same time, such commissions work to commit legacies of violence to the past, failing to acknowledge ongoing structural injustice.¹⁷⁴

Commissions of inquiry established by the Apartheid state in South Africa offer a clear example of this. The Theron Commission, officially called the Commission of Enquiry into Matters Relating to the Coloured Population Group, presented recommendations that could be construed as an attempt to rectify some of the inequalities under Apartheid in 1976. Waldmeir’s reading of this is as follows:

So another government commission - that unlikely but effective instrument of change - was set up to study the problem. And in the very week that Soweto began to burn, it issued its report. Professor Erika Theron’s commission recommended that the National Party restore to coloureds what it had taken away in the heyday of Apartheid - direct

¹⁷³ Jennifer Balint, Julie Evans, and Nesam McMillan, "Justice Claims in Colonial Contexts: Commissions of Inquiry in Historical Perspective," *Australian Feminist Law Journal* 42, no. 1 (2016): 81.

¹⁷⁴ *Ibid.*, 82.

representation in Parliament... No one, not least Professor Theron, was suggesting that whites would have to live with, or learn with, coloureds.¹⁷⁵

While Waldmeir offers this as a demonstration of marginal change, the underlying power structures of Apartheid remained entrenched, since the state's power over its racially delineated groups of citizens did not change. While acknowledging the recommendation for direct political representation, the perpetuation of classification according to racialized categories continues the injustice of Apartheid. Ashforth's "scheme of legitimation"¹⁷⁶ is clearly represented here in the normalized reproduction of the discourse of Apartheid's population classification and segregation.

Adam Sitze traces the roots of the truth commission in South Africa through its colonial legacies. By focusing on South Africa's use of commissions of inquiry prior to the TRC, Sitze explores the possibility that the TRC may not have been a departure from the status quo, although it is often claimed to be so. Sitze frames this discussion in critical Foucauldian terms, questioning the representation of the truth commission as a break with the colonial institutions of Apartheid.¹⁷⁷ Sitze's treatment of the truth commission and previous commissions is an illuminating account of power and hegemony in government inquiries in South Africa. This work draws parallels between the institutions and offers an account of the historical lineage of the truth commission's influence in light of the influence of earlier investigations.¹⁷⁸

¹⁷⁵ Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* (New Brunswick, N.J: Rutgers University Press, 1998), 31.

¹⁷⁶ Ashforth, "Reckoning Schemes of Legitimation," 1-22.

¹⁷⁷ Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (Ann Arbor: The University of Michigan Press, 2013), 193, 254.

¹⁷⁸ On amnesty for example, Sitze, *The Impossible Machine*, 23-49.

If truth commissions are a type of commission of inquiry, the presence of an earlier investigatory commission could be expected to alter the expectations and operation of the later commission, since it provides a template for what to expect and how to operationalize a mandate, among other things. For example, if regimes and civil society have practice implementing such investigations, they may be better equipped to carry out the investigation on a larger scale. Yet, if the state has engaged numerous commission/investigations as more of a façade to appease international or public audiences, it seems plausible to continue this line of behaviour, particularly if there is continuity in regime structures.

3.6 South Africa and the Truth Commission Literature

South Africa's TRC has been "hailed in many parts of the world as a new model for confronting a troubled and divisive history."¹⁷⁹ Rotberg claims that the "South African commission has become the model for all future commissions."¹⁸⁰ South Africa's TRC also is the first of Hayner's "Five Strongest Truth Commissions."¹⁸¹ The South African TRC is one of the most well-known and heavily studied among the universe of cases of truth commissions. According to Freeman, "it was only with the experience of the South African TRC in the mid-1990s that truth commissions, for the first time, attained a worldwide prominence... to this day the South African TRC remains the most well-known

¹⁷⁹ Deborah Posel and Graeme Simpson, "The Power of Truth: South Africa's Truth and Reconciliation Commission in Context," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* ed. Deborah Posel and Graeme Simpson (Johannesburg: Witwatersrand University Press, 2002), 2.

¹⁸⁰ Rotberg, "Truth Commissions and the Provision of Truth, Justice, and Reconciliation," 6.

¹⁸¹ Hayner, *Unspeakable Truths*, 27.

truth commission.”¹⁸² The operation of the South African TRC has influenced the adoption and design of truth commissions elsewhere. This is significant because much of the knowledge of truth commissions that been developed and assessed has relied heavily on this case. As Brahm notes, “much of what we do know about truth commissions comes from a small subsample of cases, most notably South Africa’s Truth and Reconciliation Commission (TRC), which raises questions about the generalizability of truth commission expectations.”¹⁸³ The conditions of its emergence were unique, as is the case in all countries in transition.

The themes under consideration in earlier parts of this chapter and as representative of the literature are particularly important for the South African TRC. While there is a significant literature on the South African TRC process, less attention has been paid to the significance of the historical institutional developments for truth-seeking in South Africa. This project makes a contribution to the literature on truth commissions by taking into account historical influences. Looking further back highlights additional explanatory factors in understanding how the South African TRC was able to operate with the successful institutional efficacy that it did. This ties into to a second contribution, which is to probe the influence of the prominence of the TRC itself in shaping the transitional justice literature. This is not to say that the TRC should not receive the praise or stature that it has secured, but rather to demonstrate how earlier unique and institutionally embedded features facilitated the TRC in the form that it took. In this way, this research joins existing literature

¹⁸² Freeman, *Truth Commissions and Procedural Fairness*, 26.

¹⁸³ Brahm, "Uncovering the Truth," 17.

that dismantles assumptions or expectations that other countries can construct a similarly effective/effaced truth commission.

Descriptive, empirical and theoretical work on truth commissions has centred significantly on the South African TRC. The influence of the South African TRC has been examined and articulated in terms of the increased adoption of truth commissions, particularly in African countries.¹⁸⁴ In addition, analyses identify the influence in terms of design choices that countries make in establishing truth commissions. For instance, public hearings in truth commission processes gained significant notoriety based on their impact in the South African TRC process.¹⁸⁵ The South African TRC's approach to amnesty has influenced discussions elsewhere. Hayner's report on the peace process in Liberia points to the South African experience as a reference point for discussions on amnesty.¹⁸⁶ Slye suggests that elements dealing with amnesty in the Kenyan Truth, Justice, and Reconciliation Commission, were "cut and pasted from the South African legislation."¹⁸⁷ This, despite the fact that the two commissions dealt with the question of amnesty very differently.¹⁸⁸ While Freeman suggests that the South African TRC serves as a "starting point" for discussions on truth commission design in other countries, its impact on the

¹⁸⁴ See for example, Sarkin, "Redesigning the Definition a Truth Commission," 350. Dancy et. al. also point out the adoption of the word 'reconciliation' in the names of truth commissions after South Africa's TRC, Dancy, Kim, and Wiebelhaus-Brahm, "The Turn to Truth: Trends in Truth Commission Experimentation," 56.

¹⁸⁵ Freeman, *Truth Commissions and Procedural Fairness*, 25-26; Laura K. Taylor and Alexander Dukalskis, "Old Truths and New Politics: Does Truth Commission 'publicness' impact democratization?," *Journal of Peace Research* 49, no. 5 (2012): 673; Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*, 31.

¹⁸⁶ Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice*, 17.

¹⁸⁷ Slye, *The Kenyan TJRC: An Outsider's View from the Inside*, 65.

¹⁸⁸ Slye, *The Kenyan TJRC: An Outsider's View from the Inside*, 64-67. The key difference being that the Kenyan TJRC could recommend but not grant amnesty.

discourse and practice of truth-seeking is significant.¹⁸⁹ Quantitative analyses of truth commission use, and effects, include the South African TRC as a dummy variable to account for its influence.¹⁹⁰ The TRC's role in the development of the field is crucial to understanding the bases of many assumptions about truth commissions.

Despite the South African TRC's weight in the field, there are still significant gaps in our understanding about the impacts of truth commissions, *even* in the South African case. The influence and notoriety of the TRC persists despite what Borer describes as "aspiration with empiricism."¹⁹¹ The impacts of the South African TRC remain unclear in terms of the TRC's influence on measures like reconciliation, democratization, and human rights.¹⁹² There is still little consensus on the impacts of the TRC on South African society. Despite the numerous investigations, there are still gaps in understandings of the more micro-level processes of the truth commission.¹⁹³ While many have worked to elucidate the complex innovations, impacts, and challenges of the truth commission, less attention

¹⁸⁹ Freeman, *Truth Commissions and Procedural Fairness*, 26, n. 95.

¹⁹⁰ Steven D. Roper and Lilian A. Barria, "Why Do states Commission the Truth? Political Considerations in the Establishment of African Truth and Reconciliation Commissions," *Human Rights Review* 10 (2009); Taylor and Dukalskis, "Old Truths and New Politics." Others, however, like Kim, focus on more broad geographical and transnational influences. See Hun Joon Kim, "Why Do States Adopt Truth Commissions After Transition?," *Social Science Quarterly* 100, no. 5 (2019).

¹⁹¹ Tristan Anne Borer, "Reconciling South Africa or South Africans? Cautionary Notes from the TRC," *African Studies Quarterly* 8, no. 1 (2004): 20.

¹⁹² See for example, Fanie du Toit, "A Broken Promise? Evaluating South Africa's Reconciliation Process Twenty Years On," *International Political Science Review* 38, no. 2 (2017): 169-184; Brandon Hamber, "'Ere their story die': Truth, Justice and Reconciliation in South Africa," *Race & Class* 44, no. 1 (2002): 61-79; Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*; Gibson, "Contributions of Truth to Reconciliation," 409-432.

¹⁹³ One valuable example of a work that focuses on the individual and internal components of the TRC is the collection from Deborah Posel and Graeme Simpson, eds., *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002).

has been paid to the development and emergence of the TRC, specifically in light of the continuation of the previous regime.

The treatment of the TRC as a ‘miracle’ or ‘novel’ institution in studies or accounts of its operations reproduce a tautological account of its emergence. The *idea* for a truth commission is recognized as emerging prior to the 1994 election.¹⁹⁴ But, the influence of earlier commissions and investigatory bodies is not well attended, Sitze’s exploration aside.¹⁹⁵ As discussed above, Freeman recognizes the institutional similarities, and that countries’ previous experience elucidated limitations in their use, but the focus of his analysis is on assessing fairness in truth commission processes.¹⁹⁶ Other references to earlier commissions of inquiry point to the relevance of the internal investigations carried out by the African National Congress in the early 1990s that were conducted before the truth commission was established.¹⁹⁷

This project focuses on these earlier influences on the truth commission process. In line with du Toit’s recognition that the literature on reconciliation in South Africa often neglects important political developments in the earlier 1990s as the transition began, this project engages with this time period to identify how this period matters for understanding the truth commission.¹⁹⁸ In so doing, it speaks to the literature on truth commissions more

¹⁹⁴ Hayner, *Unspeakable Truths*, 27; Boraine, "Truth and Reconciliation in South Africa: The Third Way," 144.

¹⁹⁵ The entirety of Sitze’s book addresses these themes, Sitze, *The Impossible Machine*.

¹⁹⁶ Freeman, *Truth Commissions and Procedural Fairness*, 24.

¹⁹⁷ Marianne Geula, "South Africa’s Truth and Reconciliation Commission as an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society," *Boston University of International Law Journal* 18 (2000): 63-64; Boraine, "Truth and Reconciliation in South Africa: The Third Way," 144.

¹⁹⁸ du Toit, "Broken Promise?," 170.

broadly by clarifying how these earlier developments created conditions more favourable to truth commission. This is important because, as one ICTJ report states, sometimes truth commission “successes have been presented as a panacea, and some country experiences, especially South Africa’s, have been seen as universally applicable.”¹⁹⁹ To be sure, the recognition that truth commissions ought to be constructed based on specific contextual factors and not transplanted is frequently recognized. However, specifying more clearly the process and highlighting that the timeframe of influence ought to be extended furthers this discussion.

There is a question of periodization that affects these considerations. The confluence of norms around transitional justice more recently shifts some pressures for accountability to external and international actors as transitional justice has become institutionalized and spurred transnational advocacy efforts.²⁰⁰ The contemporary presence of transnational advocacy groups and experts on transitional justice adds additional interests to considerations of transitional justice.²⁰¹ Given that the South African case influenced the debate and adoption of truth commission processes and that it was implemented prior to the normative uptake, these considerations may be less problematic for this project as it is framed. To be sure, there was international presence in civil society

¹⁹⁹ "Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?," (International Center for Transitional Justice and the Kofi Annan Foundation, June 2014), 89.

²⁰⁰ Jelena Subotić, "The Transformation of International Transitional Justice Advocacy," *The International Journal of Transitional Justice* 6, no. 1 (2012): 107, 112-114. See also, Jelena Subotić, "The Paradox of International Justice Compliance," *The International Journal of Transitional Justice* 3, no. 3 (2009): 362-383.

²⁰¹ Jamie Rowen, "Searching for Truth," in *Searching for Truth in the Transitional Justice Movement* (Cambridge: Cambridge University Press, 2017); Subotić, "The Transformation of International Transitional Justice Advocacy," 106-125.

discussions about the prospect for truth commissions.²⁰² However, the scale of the South African influence and the expertise developed from academics and practitioners has increased, leading to the consolidation of a what Theiden has referred to as a transitional justice “industry”.²⁰³ This illustrates the value in better understanding the process and relationship under consideration in this project.

Conclusion

This chapter has defined the truth commission and explained its use as a tool of transitional justice. The chapter identified how the literature on the South African TRC has shaped the field and associated assumptions about truth commissions. The chapter also used the literature on commissions of inquiry and truth commissions to position the difference between a truth commission and a commission of inquiry, albeit arguing that the truth commission is indeed a variation of a commission a commission of inquiry. With this recognition, the chapter explored examples in which commissions of inquiry have preceded formal truth-seeking processes and suggested importance in further understanding this relationship. The next chapter explores the potential relationships between earlier investigative practices and truth commissions, presenting a theoretical framework rooted in historical institutionalism, to specify the explanatory value of path dependence and incremental institutional change.

²⁰² See for example, Alex Boraine and Janet Levy, eds., *The Healing of a Nation?* (Cape Town: Justice in Transition, 1995).

²⁰³ Kimberly Theidon, "Editorial Note," *The International Journal of Transitional Justice* 3, no. 3 (2009): 296. See also Rowen, "Searching for Truth," 6; Subotić, "The Transformation of International Transitional Justice Advocacy," 117.

Chapter 4

4 Theoretical Framework

The previous chapter identified similarities in the institutional framework of commissions of inquiry and truth commissions. These similar institutional features are theoretically interesting in light of the potential for truth-seeking processes to retain positive or negative attributes from previous experiences with commissions of inquiry. Many of the historical institutionalist explanations of institutional operation broadly recognize the persistence of institutional practices once adopted, based on increasing returns that make change more difficult once a certain path is chosen.¹ As Thelen recognizes, these explanations are “intuitively attractive” and help to explain why institutions often seem to be resistant to change.² This historical institutional framework of path dependence helps to situate the problem of entrenchment of investigative practices under different regimes but does not satisfactorily account for the change under consideration in this project.

Instead, theories of incremental change can be used to help explain how institutions that used the same institutional framework facilitate adjustments to strengthen information-gathering measures. In order to explain changes in institutional configurations once established and entrenched, analysts identify changes in environmental features, the incorporation of actors with sufficient resources, different ideas and interests, or unforeseen

¹ James Mahoney, "Path Dependence in Historical Sociology," *Theory and Society* 29 (2000): 512; Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *American Political Science Review* 94, no. 2 (2000): 252.

² Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (Cambridge: Cambridge University Press, 2004), 27-28.

emergent issues as explanatory factors for gradual institutional change.³ This approach highlights institutions as a site of contestation, not simply accepted practice.⁴ The empirical chapters that follow in the dissertation demonstrate that the successful development of the truth-seeking process in South Africa can be explained in part as a process of gradual institutional change. Framed as a process of incremental institutional change, changes made to the design of the Commission of Inquiry for the Prevention of Public Violence and Intimidation contributed to the successful redeployment of information-gathering measures leading up to the TRC by rebuilding credibility in the commission of inquiry in the transitional period, and, through the adoption of witness protection measures. The most celebrated component of the TRC, amnesty, is also explored as a process of incremental institution change. In each of these institutional modalities, existing institutions are put to work in different ways than how they had been used by the Apartheid regime, in this case, to strengthen information-gathering capacities.

This chapter begins with a discussion of the transitional environments in which truth commissions are established, articulating theoretical justification for truth commissions and the influence of the transitional setting on their implementation. The next section analyzes the theoretical underpinning of institutional continuity within the historical institutionalist school of thought. The third and final section introduces theories

³ James Mahoney and Kathleen Thelen, "A Theory of Gradual Institutional Change," in *Explaining Institutional Change: Ambiguity, Agency, and Power*, ed. James Mahoney and Kathleen Thelen (Cambridge: Cambridge University Press, 2010), 1-37; Wolfgang Streeck and Kathleen Thelen, "Introduction: Institutional Change in Advanced Political Economies," in *Beyond Continuity: Institutional Change in Advanced Political Economies*, ed. Wolfgang Streeck and Kathleen Thelen (New York and Oxford: 2005), 1-31.

⁴ Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan*, 32.

of incremental institutional change and demonstrates how the model of conversion helps to explain changes in the Commission of Inquiry for the Prevention of Public Violence and Intimidation and articulates a potential impact on the TRC.

4.1 The Canvas for Transitional Truth-seeking

Existing theoretical accounts for the establishment and design of truth commissions can be characterized as functionalist. A functionalist perspective usually takes as a starting point that institutions can be explained based on their apparent purpose for existing.⁵ In other words, institutions exist in the form that they do in order to solve particular problems. On the surface, truth commissions fit this characterization easily. Truth commissions are established for a particular purpose, such as truth-seeking and redress. Ideally, they are designed by actors to meet that purpose.⁶ Because of their narrowly defined mandates—both in duties and scope—taking the truth commission as a rationally designed institution of redress, is in some ways, warranted.

However, as Pierson outlines, functionalist accounts do not adequately consider three potential issues that affect institutional development and design. First, those establishing institutions may not be acting in terms of efficacy or rationality necessarily. Second, short-term payoffs in institutional development may have unintended consequences for later institutional operation. Third, there is no guarantee that those

⁵ Paul Pierson, "The Limits of Design: Explaining Institutional Origins and Change," *Governance: An International Journal of Policy, Administration and Institutions* 13, no. 4 (2000): 477.

⁶ Subotić notes that this instrumentalism has expanded beyond the pursuit of justice and into the realms of peacebuilding and democratization. See, Jelena Subotić, "The Transformation of International Transitional Justice Advocacy," *The International Journal of Transitional Justice* 6, no. 1 (2012): 122.

establishing institutions get it right at the beginning.⁷ Similarly, in thinking about truth commission processes, a functionalist approach does not enable an accounting for truth commissions that are established without sufficient political will or as instrumental political maneuvers.⁸

The transitional setting also influences how truth-seeking and information gathering can be undertaken. Theoretically, members of an outgoing regime are likely to be interested in minimal accountability measures for past human rights violations, and as Skaar recognizes, want to “avoid being given public blame for the violations.”⁹ Significantly, in transitional settings, there is an element of flux or flexibility in political conditions, including the institutional configurations.¹⁰ O’Donnell and Schmitter identify that the rules shaping transitions are usually still those imposed by the previous regime, and that a transition is recognizable when these rules begin to be adjusted to extend rights guarantees.¹¹ Critically, however, as Thelen observes, it is important to recognize that institutions persist in spite of transitions.¹²

⁷ Pierson, "The Limits of Design: Explaining Institutional Origins and Change," 483.

⁸ On instrumental dimensions of transitional justice more broadly see Jelena Subotić, "The Paradox of International Justice Compliance," *The International Journal of Transitional Justice* 3, no. 3 (2009): 362-383.

⁹ Skaar, "Truth commissions, trials - or nothing? Policy options in democratic transitions," 1111.

¹⁰ Guillermo O’Donnell and Philippe C. Schmitter, "Tentative Conclusions about Uncertain Democracies," in *Transitions from Authoritarian Rule: Prospects for Democracy*, ed. Guillermo O’Donnell, Philippe C Schmitter, and Laurence Whitehead (Baltimore and London: The Johns Hopkins University Press, 1986), 3.

¹¹ O’Donnell and Schmitter, "Tentative Conclusions about Uncertain Democracies," 6, 15.

¹² Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan*, 7.

Also, Krasner makes this point suggesting that one of the things that makes institutions meaningful is that they do not always change with changes in environment. See Stephen D. Krasner, "Sovereignty: An Institutional Perspective," *Comparative Political Studies* 21, no. 1 (1988): 81.

The crucial element here is that the process of transition opens the possibility for change, although which institutions change and how they change is not universal.¹³ Thus, the setting matters in the impetus to pursue information because outgoing regimes or powerholders have an interest in not exposing past deeds. The commitment to a truth commission, or the political will to facilitate truth-seeking, is influenced, at least in part, by the actions and behaviour of the old regime.

The opening of a transitional space thus provides an opportunity for different ideas, conceptualizations of rules, and institutional praxis. These rules may represent popular demands, or may reflect a recognition of the need for reform from the “soft-liners” in a regime, in order to maintain regime durability.¹⁴ Many accounts of the South African transition focus on the role of elites in negotiating the transition, with both the National Party (NP) leadership and the African National Congress (ANC) leadership recognizing there were few other pathways forward without negotiation.¹⁵ Others do highlight different factors in precipitating the transition, but the transition itself is still identified as an elite-led process. Wood, for example, investigates South Africa as a case of ‘transition from

¹³ Geddes reminds us that the difficulties for “theoretical synthesis” in explanations for transitions to democracy is that the types of autocratic regime from which transitions are occurring also differ. See Barbara Geddes, “What Do We Know About Democratization After Twenty Years?,” *Annual Review of Political Science* 2 (1999): 121. This logic extends to the discussion here given that transitional justice measures are established in different types of transitions.

¹⁴ O’Donnell and Schmitter, “Tentative Conclusions about Uncertain Democracies,” 15-16.

¹⁵ See, Hermann Giliomee, “Democratization in South Africa,” *Political Science Quarterly* 110, no. 1 (1995): 83-104; Johannes Rantete and Hermann Giliomee, “Transition to Democracy through Transaction?: Bilateral Negotiations between the ANC and NP in South Africa,” *African Affairs* 91, no. 365 (1992): 515-542. For an overview of transitional arguments see: David R. Howarth, “Paradigms Gained? A Critique of Theories and Explanations of Democratic Transition in South Africa,” in *South Africa in Transition: New Theoretical Perspectives*, ed. David R. Howarth and Aletta J. Norval (New York: St. Martin’s Press), 182-214.

below,' identifying the role of the masses in pressuring towards a transition.¹⁶ Price focuses on the economic structural conditions impelling the parties toward negotiation.¹⁷

This project focuses on institutional persistence and change during the transition period. Concentrating on successive negotiated agreements and their associated institutional deployment means that the transitional explanations that focus on the political elite and associated institutional structures is beneficial for framing the patterns under investigation. The theoretical framing begins with the recognition that South Africa's transition was negotiated by elites and that the measures towards the eventual democratic election were negotiated arrangements, agreed to successively until consensus could be reached on transitional arrangements themselves. The case is treated as a pacted transition.¹⁸

In pacted transitions, the increased maneuverability of the elite actors theoretically enables greater bargaining potential and guarantees of participation.¹⁹ This is particularly relevant to the study here because of the origins of the Commission of Inquiry for the Prevention of Public Violence and Intimidation within a pact, the National Peace Accord. A pact is defined by O'Donnell and Schmitter as:

An explicit, but not always publicly explicated or justified, agreement among a select set of actors which seeks to define (or, better, to redefine) rules governing

¹⁶ On popular pressures, see, Elisabeth Jean Wood, "An Insurgent Path to Democracy: Popular Mobilization, Economic Interests, and Regime Transition in South Africa and El Salvador," *Comparative Political Studies* 34, no. 8 (2001): 862-888.

¹⁷ Robert M. Price, *The Apartheid State in Crisis: Political Transformation in South Africa 1975-1990* (Oxford: Oxford University Press, 1991).

¹⁸ See Timothy D. Sisk, "The Violence-Negotiation Nexus: South Africa in Transition and the Politics of Uncertainty," *Negotiation Journal* 9, no. 1 (1993): 77-94.

¹⁹ Paige Arthur, "How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 346.

the exercise of power on the basis of mutual guarantees for the ‘vital interests’ of those entering into it.²⁰

Elite-driven models focus on the decision-making influence of those in positions of power. This perspective reflects the belief that “the origins of democracy are to be found in political choices rather than in structural conditions—and these choices are made by elites.”²¹ This is important because although transitional decisions are influenced by the structural and economic realities of the political realm at the time, the agency of elites in making agreements and compromises, in addition to the potential to renege, can change or alter the trajectory of political transitions.

Pertinent to this discussion is the manner in which the transitional space enables the prospect of reform. de Klerk, in his moves to liberalize and dismantle the Apartheid system, can be characterized in O’Donnell and Schmitter’s terminology as a “soft-liner”; working within the regime to make changes toward transition.²² The transitional environment characterized by ongoing negotiations contributed to an overlapping space of governance and negotiation that persisted from 1990 to the eventual election in 1994. Offering an analysis of the potential pathways for a transition to democracy in 1992, Van Zyl Slabbert suggests that “there [was] nothing inevitable, nor arbitrary, about the transition in South Africa – it came about by deliberate political choice.”²³ Giliomee also identifies a purposeful characterization stating that the National Party, “deliberately

²⁰ O’Donnell and Schmitter, "Tentative Conclusions about Uncertain Democracies," 37.

²¹ This is Arthur’s analysis of O’Donnell and Schmitter and the Transitions Project, see Arthur, "How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice," 346.

²² Horwath discusses this in Horwath, "Paradigms Gained? A Critique of Theories and Explanations of Democratic Transition in South Africa," 195.

²³ Frederik Van Zyl Slabbert, *The Quest for Democracy: South Africa in transition* (London: Penguin Books, 1992), 30.

embarked on a process that would end white minority rule.”²⁴ The process of negotiations that began in 1990 and culminated in the 1993 Interim Constitution, which helped to facilitate the democratic election of 1994, thus opened a period of domestic politics which saw the structures of governance being used to respond to emergent issues in the negotiation period—including state-initiated investigations. These were the conditions that facilitated the establishment of the Commission of Inquiry for the Prevention of Public Violence and Intimidation. The decision to implement this information-gathering institution, and the design of the process had impacts that continued through the transitional period and its aftermath.

4.2 Institutional Continuities

The historical institutional approach adopted for this study enables a better understanding of the persistence of institutional patterns through the transitional period in the form of a commission of inquiry. It also offers a framework for exploring how information-gathering institutions shape, and are shaped by, past use. Finally, it enables a way to account for gradual change in institutions that persisted through Apartheid and the transition. An historical institutionalist account is specifically useful as it expands the time-horizon under investigation and, in so doing, allows for the incorporation of potentially overlooked variables in explaining strengths in South Africa’s truth-seeking process.

Historical institutionalist accounts of continuity and change highlight two important features in expectations about institutional behaviour. First, historical institutionalism recognizes that “history matters” in understanding later political

²⁴ Giliomee, "Democratization in South Africa," 83.

developments. Second, the literature on institutional persistence and change highlights a recognition that, once established, institutional practices are entrenched and become more resistant to change.²⁵ These theoretical underpinnings help to articulate the applicability of historical institutionalism to the pattern identified in the previous chapter: although the truth commission is often deployed in a symbolically-laden and contextually specific manner, conceptually, it looks similar to, and borrows heavily from its institutional relative, the commission of inquiry. Taking more centrally the possibility that institutions may persist in transitional politics offers a different lens to consider factors influencing the operation of truth commissions.

Within the historical institutionalist approach, stability is framed in terms of path dependence. Path dependence is rooted in the idea that decisions and actions made at an earlier point in time shape later decisions—based on positive feedback which makes it difficult to alter a path once a certain one is chosen.²⁶ Positive feedback and institutional “stickiness” are central causal factors in institutions maintaining structure and stability over time.²⁷ As Pierson suggests, the key causal mechanism at play in this explanation is rooted in the notion of “stickiness”:

Exploring the sources and consequences of path dependence helps us to understand the powerful inertia or ‘stickiness’ that characterizes many aspects of political development – for instance, the enduring consequences that often stem from the emergence of particular institutional arrangements.²⁸

²⁵ Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," 252.

²⁶ Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton and Oxford: Oxford University Press, 2004), 21.

²⁷ *Ibid.*, 11, 21, 40, 41, 43, 52.

²⁸ *Ibid.*, 11.

Path dependence as a framing mechanism is useful in this context because it re-frames common assumptions about the establishment of truth commissions. It lengthens the time periods considered important from transition and post-transition periods to include elements in the pre-transitional phase that may have been overlooked in how truth commissions are structured.²⁹ In addition, the stickiness of institutions helps to explain why investigative practices take similar shapes. Arguably, these earlier political institutions remain remarkably significant. Unless states experience full-fledged collapse or are placed under United Nations trusteeship, it is only possible to construct a transition using whole parts or pieces of these already existing institutions. As much as ethically and morally there is an urgent need to move away from corrupt or exclusive institutions, in many cases these are *the very* institutions charged with constructing transitional justice processes. Or else, it is through these institutions that incremental change is initiated towards peace and/or democracy. Advancing an argument that implicates the role of earlier institutional developments in the later functioning of truth commission processes seems somewhat incompatible with the “transitional” nature of their intended use, but the persistence of the investigatory institution over time warrants more attention.

If patterns of path dependence are taken as a theoretical starting point for understanding the persistence of inquiries in relatively different environments, how then can the differences in their use be explained? Commissions of inquiry were used by the Apartheid regime to reinforce the Apartheid system, and also used during the transitional period to begin to address the legacies of that same system. The Goldstone Commission did this somewhat effectively and thus it is necessary to account for some variant of change.

²⁹ See Pierson on time horizons, Pierson, *Politics in Time*, 20.

Accounts of relatively rapid changes associated with path dependence are framed as critical junctures, which are defined as:

relatively brief episodes during which: (a) the range of possible outcomes that might take place in the future briefly but dramatically expands; and (b) events occur that quickly close off future possibilities and set into motion processes that track specific future outcomes.³⁰

While the initiation of a political transition in South Africa may well be characterized as a critical juncture, this decisive moment did not bring about the implementation of an entirely new institutional configuration to investigate violence. Instead, the government returned to existing models of commissions of inquiry that were in many ways delegitimized by the Apartheid regime. Despite this persistence, the Commission of Inquiry for the Prevention of Public Violence and Intimidation was able to operate in a manner very different to its predecessors. This was in part based on the design of the Commission. Other innovations emerged through its operations. Further, its innovations had important influences on later truth-seeking process. This tension suggests a need to direct more focus to the institutions for investigation and information gathering to explain why, despite institutional persistence, the Commission of Inquiry for the Prevention of Public Violence and Intimidation operated more credibly.

Incremental accounts of institutional change developed by Mahoney and Thelen as well as Streeck and Thelen argue that change can occur more gradually than is often afforded by proponents of critical junctures.³¹ Rather than seeing change as a result of moments of

³⁰ Giovanni Capoccia, "Critical Junctures," in *The Oxford Handbook of Historical Institutionalism*, ed. Karl Orfeo Fioretos, Tulia Gabriela Faletti, and Adam D. Sheingate (Oxford: Oxford University Press, 2016), 77.

³¹ Streeck and Thelen, "Introduction: Institutional Change in Advanced Political Economies," 1-31; Mahoney and Thelen, "A Theory of Gradual Institutional Change," 1-37.

significant change, this approach to understanding institutional development focuses on the process of gradual and cumulative changes over time to explain changes in institutional composition and purpose. The value of the incremental change framework, in part, lies in its complementarity to the observations of path dependence. Institutions change gradually *because* they persist over time. How this change occurs in light of the persistent or entrenched nature of institutions is demonstrated in the below discussion of theories of incremental change.

4.3 Redeployment and Adjustment: Theories of Gradual Institutional Change

Turning to historical institutional theories of incremental change offers a compelling lens to explain how an earlier investigative institution was deployed with a similar institutional framework to previous commissions of inquiry but contributed to the strength of the South African TRC, rather than repeating status-quo operations. Gradual or incremental change approaches to institutional change identify how and why institutional arrangements can be adjusted, in spite of the persistence of institutions. Thelen argues that path dependence still informs incremental change explanations, but “embed[s] these elements in an analysis of ongoing political contestation over institutional outcomes.”³² In doing so, incremental change frameworks highlight the processes through which institutional arrangements persist, yet are renegotiated periodically in ways that alter their form and functions, or continued use.

³² Kathleen Thelen, "How Institutions Evolve: Insights From Comparative Historical Analysis," ed. James Mahoney and Dietrich Rueschemeyer (Cambridge: Cambridge University Press, 2003), 213.

This incremental change approach explains change in more gradual patterns, and offers insight into the smaller adjustments that are made to institutions that allow them to adapt or alter their function or purpose. Thelen, and, Mahoney and Thelen offer four models or variations to explain incremental change in institutions: “displacement,” “drift,” “layering,” and “conversion.”³³ As is articulated below, the mechanics of conversion help to explain institutional persistence and redeployment of information-gathering institutions in South Africa.

Displacement is conceptualized by Mahoney and Thelen as “the removal of existing rules and the introduction of new ones.”³⁴ During the transitional period in South Africa, many of the institutional rules for information gathering stayed formally the same. As the coming chapters illustrate, although other Apartheid legislation was repealed, the effects on information gathering cannot be characterized as displacement because these remained intact. In processes of layering, existing institutional features continue to operate and structure relationships and decisions, but additional rules and features are added to these structures.³⁵ Layering “occurs when new rules are attached to existing ones, thereby changing the ways in which the original rules structure behavior.”³⁶ Analysts point to the addition of private pension rules in addition to public pension systems as an example of layering.³⁷ In this example, although a public system often remains in place, the addition

³³ Mahoney and Thelen, "A Theory of Gradual Institutional Change," 1-37; Thelen, "How Institutions Evolve: Insights From Comparative Historical Analysis," 213.

³⁴ Mahoney and Thelen, "A Theory of Gradual Institutional Change," 15.

³⁵ Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan*, 35. See also, Mahoney and Thelen, "A Theory of Gradual Institutional Change," 16.

³⁶ Mahoney and Thelen, "A Theory of Gradual Institutional Change," 16.

³⁷ Thelen, "How Institutions Evolve: Insights From Comparative Historical Analysis," 226-227.

of a private system can change the behaviour of individuals and associated interest groups, which will ultimately introduce change to the institution itself.³⁸ In the South African case under consideration, the tension is that the same institutions were deployed and redeployed, despite the transitional opening that may have facilitated the incorporation of new institutions that might illustrate other variations of change.

Drift and conversion neither remove old rules, nor do they see new rules implemented. Rather, these incremental change processes occur when the impact or enactment of the existing rules changes.³⁹ Drift occurs when institutional configurations are not adjusted to reflect changes in the environment.⁴⁰ Institutional arrangements have different impacts because of the changed context.⁴¹ Onoma argues that the development of land-buying companies in Kenya is an example of “drift.”⁴² The initial purpose of the land-buying companies was to enable Kenyans to purchase land that became available, yet remained unaffordable, as settlers left in 1960s and 1970s. However, as Onoma explains, in the years that followed, these companies were taken over by fraudsters who continued to engage in land transactions, which turned out to be false, channeling money into political campaigns and becoming tools to pressure shareholders for political support.⁴³ In this example, the manipulation of the land title process was worsened by democratization given

³⁸ Thelen, "How Institutions Evolve: Insights From Comparative Historical Analysis," 226-227.

³⁹ Mahoney and Thelen, "A Theory of Gradual Institutional Change," 16-18.

⁴⁰ *Ibid.*, 17.

⁴¹ *Ibid.*, 17.

⁴² Ato Kwamena Onoma, "The Contradictory Potential of Institutions: The Rise and Decline of Land Documentation in Kenya," in *Explaining Institutional Change: Ambiguity, Agency, and Power*, ed. James Mahoney and Kathleen Thelen (Cambridge: Cambridge University Press 2010), 78.

⁴³ *Ibid.*, 78-82.

the political value in fraudulent land holdings.⁴⁴ The mechanics of ‘drift’ illustrate how institutions created for one purposes can end up serving entirely different ends.

Conversion is defined as a change in goals, where institutional rules themselves are not changed.⁴⁵ In this variant of incremental institutional change the “rules remain formally the same but are interpreted and enacted in new ways.”⁴⁶ Institutional ambiguities can be used by well-positioned actors to change how institutional elements are implemented. As Mahoney and Thelen argue, “lacking the capacity to destroy an institution, institutional challengers may be able to exploit its inherent ambiguities in ways that allow them to redirect it toward more favourable functions and effects.”⁴⁷

In each of these variations, Mahoney and Thelen identify the role that actors have within particular institutional settings and the degree of ambiguity in the institution in order to explain the type of change that occurs. In settings where actors have the power and capability to change institutional configurations, layering and drift are possible. When actors are not positioned to make outright changes to institutions and rules, ambiguity in the design may enable actors to make adjustments in how institutions are deployed.⁴⁸ Mahoney and Thelen argue that high or strong veto capabilities exist when actors have “access to institutional or extra-institutional means of blocking change.”⁴⁹ When there are

⁴⁴ Onoma, "The Contradictory Potential of Institutions: The Rise and Decline of Land Documentation in Kenya," 88.

⁴⁵ Mahoney and Thelen, "A Theory of Gradual Institutional Change," 17.

⁴⁶ *Ibid.*, 17.

⁴⁷ *Ibid.*, 18.

⁴⁸ *Ibid.*, 10-14.

⁴⁹ *Ibid.*, 19.

no such capabilities to prevent or block change, gradual institutional change is likely to take place through displacement and conversion. Whether institutional change takes the form of displacement or conversion depends on the degree of ambiguity in interpreting or enforcing the rules.⁵⁰ Low levels of space for interpretation and low veto capabilities are associated with displacement. High levels of interpretation and low levels of ambiguity are associated with conversion.⁵¹

The four types of incremental institutional change are also differentiated based on their treatment of existing institutions and response to external environments.⁵² Two of these, displacement and layering, include the introduction of new rules or institutions.⁵³ Displacement is considered to occur when new rules are introduced and old ones removed.⁵⁴ Since displacement involves the replacement of an old institution by a new one, its explanatory utility is limited for this discussion. Each of the institutions under consideration in the project—the commission of inquiry, witness protection, and amnesty—were adjusted, but not replaced outright.

In the South African case under consideration, conversion offers a useful and relevant framework for assessing and explaining both the persistence of the commission of inquiry as an institution of information-gathering, and a process of gradual change, given the difficulty in changing the ‘locked-in’ institutional arrangements that structure state-led

⁵⁰ Mahoney and Thelen, "A Theory of Gradual Institutional Change," 19.

⁵¹ *Ibid.*, 19.

⁵² *Ibid.*, 15.

⁵³ *Ibid.*, 16-17.

⁵⁴ Mahoney and Thelen, "A Theory of Gradual Institutional Change," 16; Streeck and Thelen, "Introduction: Institutional Change in Advanced Political Economies," 19.

investigations. The context of institutional enactment, including the circumstances of decision makers, influenced both the opening for change or persistence and the type of incremental change that may be attempted. This is significant for understanding change in the institutionalization of information-gathering measures because of the balance of power of the negotiating parties. In the transitional space under examination, neither side had strong veto capabilities given the negotiating environment and the persistent potential to derail the process without agreement and concession. This is not to suggest that there were no attempts to push their own interests, but rather that the negotiation environment itself was constrained by the shared pursuit of a democratic dispensation, thereby making some degree of change more likely.

The value of the framing of conversion depends on the fact that the commission of inquiry was well-entrenched and “sticky” before and during South Africa’s transition. As will be explored in Chapters 6 and 7, the recurrent use of commissions of inquiry under Apartheid and the decision to adopt another commission to investigate violence during the transition demonstrate the persistence of the institution. In this case, the characteristics of conversion, the deployment of the same institutional rules but with sufficient ambiguity for actors to make adjustments, helps make sense of the emergence of a change-inducing commission of inquiry that remained housed in the existing institutional structures. Conversion helps to explain how the flexibility and opportunity in the opening of the transition were used to implement a familiar institution that was sufficiently malleable because of the changing environment. This opportunity was seized by Commission leadership in order to investigate ongoing violence. The effects of this gradual change are

evident in the Goldstone Commission's mediating of the shortcomings of the commission of inquiry as an institutional practice.

In addition, once the Commission of Inquiry for the Prevention of Public Violence and Intimidation was deployed, the process of conversion continued to be identifiable in its operation. The Commission engaged other measures to change the way information gathering was carried out. As such, once established, the Commission underwent its own change variations; using the structures of the commission of inquiry to facilitate witness protection. Additionally, conversion is valuable in explaining how the institutions of indemnity and amnesty were used in different ways during the transitional period. As will be demonstrated in Chapter 9, the institution of amnesty itself did not change, but rather, was used by actors in different ways to achieve different ends. Thus, the persistence of indemnity/amnesty throughout the negotiations and through to the truth commission process presents, on the surface, as institutional continuity, but when unpacked, the justification for the use of this institutional modality suggests a gradual variation over time.

4.4 Institutional Design

The framework of path dependence and gradual institutional change situates the institutional continuities and the environment conducive to change in the institutions under consideration. Another important element in locating the potential for gradual change within the information-gathering institutions is the design of the Commission of Inquiry for the Prevention of Public Violence and Intimidation at the time of its implementation in the early 1990s. The notion of institutional design is also important in understanding the adjustments that were made to the institution during its operation. The establishment of the Goldstone Commission within the negotiation period in South Africa helps to explain the

opportunity for gradual institutional change, but it is also important to recognize the importance of institutional design. The mandate for the Commission of Inquiry for the Prevention of Public Violence and Intimidation was influenced by the Government's shift to negotiations which, in turn, helped to facilitate gradual institutional change.

In his overview of institutional design, Goodin relies on the following definition of design: "the creation of an actionable form to promote valued outcomes in a particular context."⁵⁵ The potential for institutions to be designed in specific and varied ways to meet social and political needs is a dominant concern in institutional theorizing. For instance, institutional design has been identified as one contributing factor in managing ethnically divided societies through constitutional engineering.⁵⁶

Institutional design matters because of the important role institutions play in prescribing and facilitating interactions, making "behavior more stable and predictable."⁵⁷ Characteristics of design influence how well an institution can perform its intended role, and, what Goodin refers to as the "'goodness of fit' between the designed object...and the larger context in which it is set."⁵⁸ The malleability of institutional design is an important consideration in the discussion of institutional persistence and change.

⁵⁵ Goodin uses Bobrow and Dryzek's definition, see Goodin, "Institutions and Their Design," 31.

⁵⁶ Stefan Wolff, "Post-Conflict State Building: the debate on institutional change," *Third World Quarterly* 32, no. 10 (2011): 1777-1802; Sven Gunnar Simonsen, "Addressing Ethnic Divisions in Post-Conflict Institution Building: Lessons from Recent Cases," *Security Dialogue* 36, no. 3 (2005): 297-317; Henry E. Hale, "Divided We Stand: Institutional Sources of Ethnofederal State Survival and Collapse," *World Politics* 56 (2004): 165-193; Arend Lijphart, "Constitutional Design for Divided Societies," *Journal of Democracy* 15, no. 2 (2004): 96-109.

⁵⁷ Goodin, "Institutions and Their Design," 22.

⁵⁸ *Ibid.*, 33-34.

Goodin suggests that institutional design matters not only in relation to the institution doing what is intended of it, but also in relation to the larger context in which institutions are embedded.⁵⁹ In this way, Offe's recognition that changing context results in critiques or the recognition of insufficiencies in existing institutions helps to explain adjustments or changes in design.⁶⁰ However, Offe acknowledges that there are several ways for institutions to be altered, or tweaked, either in response to broader pressures or in order to survive.⁶¹ Although the persistence of institutions can be seen as an indicator of an institution that is well-established with regard to its domain or environment,⁶² change in the environment or social pressures may lead to changes in institutional design. This is important for understanding the design of the Goldstone Commission given the state's initial efforts to begin dismantling Apartheid.

Similar to explanations of institutional persistence through path dependence, theoretical accounts of institutional design recognize the importance of earlier institutional developments in shaping later iterations or redesigning institutions.⁶³ A critical issue however, is the degree of intentionality in the design of institutions and the locus of this change.⁶⁴ Offe recognizes, for example, that it is rare that an individual is pinpointed for

⁵⁹ Goodin, "Institutions and Their Design," 37.

⁶⁰ Claus Offe, "Designing Institutions in East European Transitions," in *The Theory of Institutional Design*, ed. Robert E. Goodin (Cambridge: Cambridge University Press, 1996), 223-225.

⁶¹ *Ibid.*, 219-220.

⁶² Goodin talks about the evolutionary parallels that are often used to explain a good fit to their environment based on institutional survival, Goodin, "Institutions and Their Design," 25.

⁶³ Goodin, "Institutions and Their Design," 30.

⁶⁴ *Ibid.*, 27-30.

their establishment of particular variations of institutions.⁶⁵ Rather, design decisions emerge from a combination of previous experience, fit within contextual needs, and the interaction of accidents or unintended consequences.⁶⁶ Pierson also identifies that “actor-centered rationalism” and other functionalist accounts for institutional emergence and design are insufficient for explaining design outcomes over time because of the interaction effects of other influencing factors.⁶⁷ However, how institutions are structured influences how they achieve what it is they were implemented to do. The very possibility of influencing design or adjusting institutions suggests some potential for intentionality in design choices, acknowledging the interaction and unintended consequences that are also at play.⁶⁸

Components of institutional design are addressed here because design alterations were made in the creation of the Commission of Inquiry for the Prevention of Public Violence and Intimidation. While the institution of the commission of inquiry itself persisted, this specific iteration was designed with different powers, ostensibly to address ongoing violence. The potential for the Goldstone Commission to carry out information gathering in a credible fashion can be explained, in part, by these institutional design features, as is argued in Chapter 7. Although certain institutional features were incorporated into the original legislation for the Commission of Inquiry for the Prevention of Public Violence and Intimidation, an engagement with these design elements *and* the

⁶⁵ Offe, "Designing Institutions in East European Transitions," 214-215.

⁶⁶ Goodin, "Institutions and Their Design," 28-30.

⁶⁷ Pierson, *Politics in Time*, 103-132.

⁶⁸ Goodin, "Institutions and Their Design," 28.

characteristics that enabled the introduction of gradual institutional change required a recognition of the appropriate means and mechanisms to do so. Components of initial institutional design, and efforts made to undertake incremental change reflected past experience with these institutional modalities and the changing societal pressures on this particular information-gathering institution. In addition, effective choices in the design of these information-gathering institutions seem to have played a role in the design of the later truth commission process.

Conclusion

This chapter has identified how institutional theorizing in terms of path dependence and gradual institutional change structure this project. The chapter argues that the transitional environment shaped the potential for institutional continuity and change. It argues that the persistence of the commission of inquiry and eventually the adoption of a truth commission suggests path dependence in institutions. Yet, the successful implementation of truth-seeking measures at the TRC is a development that should also be understood as gradual institutional change, specifically a process of conversion.

The next chapter provides a brief overview of the case of South Africa and its institutions for truth-seeking. Chapters 6 and 7 demonstrate that path dependence helps account for the persistence of investigatory bodies over time. However, as these chapters illustrate, while a path dependent framing helps to explain South Africa's recurrent turn to commissions of inquiry, it does not adequately account for the adjustments made to the Commission of Inquiry for the Prevention of Public Violence and Intimidation in its deployment and operation nor its component institutional modalities. These considerations are taken up in the chapters that follow.

Chapter 5

5 South Africa: Context and History

The previous two chapters have established two elements that undergird the analysis of gradual institutional change in information-gathering institutions for this investigation of the South African case. First, Chapter 3 identified a tension in the literature in conceptualizations of truth commissions and commissions of inquiry and potential patterns in their successive use. Second, Chapter 4 articulated the theoretical value in this line of investigation into gradual change and the institutionalization of truth-seeking.

This chapter provides a brief overview of South Africa's Apartheid system, the political transition, and the information-gathering and truth-seeking institutions established during and after the transition.¹ There are many different possible narratives that could explain the Apartheid state and the eventual democratic transition. Not all of these can be explored in a study of this length. As such, the chapter is structured around violence and the responses to violence during Apartheid and during the transition. The chapter begins by considering the nature of Apartheid and resistance to it, and then identifies the state's response to that resistance. The chapter then provides an overview of the peace and

¹ The Apartheid system and other policies were developed, implemented, and maintained based on determinations of race. With regards to terminology, following Gibson, I point to Stephen R. Graubard's commentary in the preface to a journal's issue about South Africa. Graubard writes, "Editorial note: In South Africa as in the United State, racial terminology is politically charged—and constantly changing. Many of the author in this issue observe the South African convention of dividing the country's population into four facial categories: white (of European descent), colored (of mixed ancestry), Indian (forebears from the Indian subcontinent), and African. The official nomenclature for "Africans" has itself varied over the years, changing from 'native' to 'Bantu' in the middle of the apartheid era, and then changing again to 'black' or, today 'African/black.' All of these terms appear in the essays that follow." See Stephen R. Graubard, "Preface to the Issue "Why South Africa Matters"," *Daedalus* 130, no. 1 (2001): VIII. See also, James L. Gibson, "The Contributions of Truth to Reconciliation," *Journal of Conflict Resolution* 50, no. 3 (2006): 410-411, footnote 417.

constitutional negotiations that effectively brought about the end of Apartheid. The chapter ends with a discussion of the two institutions examined in this work: the Commission of Inquiry for the Prevention of Public Violence and Intimidation and the Truth and Reconciliation Commission of South Africa.

5.1 Apartheid, Conflict, and Violence

Apartheid refers to the “system of institutionalised racism and racial social engineering” in South Africa.² The National Party in South Africa implemented Apartheid as a policy in 1948, although racism existed in the political system prior to Apartheid’s formal adoption.³ The purported purpose of Apartheid was to ensure the strength and survival of the minority white Afrikaner population and the white population more broadly.⁴ Systematic legislation prevented the black majority from participating in political and economic structures. Apartheid policies were precisely legislated to create and reinforce racial segregation and dominance. In some ways, Apartheid policies drew upon or solidified earlier segregationist policies, although the National Party developed other elements that contributed to the totality of the system after their election in 1948.⁵ The systematic exclusion depended on the state’s ability to ensure its policies permeated all levels of society. Broad legislative

² Deborah Posel, "The Apartheid Project, 1948–1970," in *The Cambridge History of South Africa*, ed. Robert Ross, Anne Kelk Mager, and Bill Nasson (Cambridge: Cambridge University Press, 2011), 319.

³ Saul Dubow, *Apartheid, 1948-1994*, First ed. (Oxford: Oxford University Press, 2014), 11; Kristin Henrard, "Post-Apartheid South Africa: Transformation and Reconciliation," *World Affairs* 166, no. 1 (2003): 37.

⁴ Posel, "The Apartheid Project, 1948–1970," 321-322.

⁵ See Dubow, *Apartheid, 1948-1994*, 37. South Africa, since its union had been built on policies of exclusion and segregation. While Apartheid as a comprehensive policy was implemented in 1948, systemized racism had already been institutionalized to some degree.

developments affected personal freedoms, shaped society spatially, and created cleavages and disadvantage for the duration of the regime.

One of Apartheid's undergirding pieces of legislation was the Population Registration Act of 1950.⁶ The law stipulated that "a white person, a coloured person or a native, as the case may be, and every coloured person and every native whose name is so included shall be classified by the Director according to the ethnic or other group to which he belongs."⁷ By cementing racial categories, laws could then be enforced based on a person's skin colour. These and other laws and policies dictated all facets of peoples' lives. The legislation, Sitze suggests, "criminalized the very existence of ordinary Africans..."⁸ Restrictions limited where the black population could live and when and under what conditions black people could travel into designated white areas.⁹ Legislation dictated racially specific educational institutions, demarcated hospitals, and prohibited relationships between races. Signs delineated spaces and services that were designated for whites only—from post offices, to public transport, and most places in between.¹⁰ These restrictive policies stripped the majority of the population of political and civil rights and entrenched a disparate socio-economic system.

⁶ Van Zyl Slabbert notes that the other legislation depends on this piece of implementation, see Frederik Van Zyl Slabbert, *The Last White Parliament* (Johannesburg: Jonathan Ball Publishers and Hans Strydom Publishers, 1985), 43.

⁷ Union of South Africa, Population Registration Act 1950, §5.

⁸ Adam Sitze, "The Opposite of Apartheid: Further Notes on Mandela and the Law," *Discourse* 40, no. 2 (2018): 149.

⁹ For a comprehensive discussion of Apartheid laws see John Dugard, *Human Rights and the South African Legal Order* (Princeton, New Jersey: Princeton University Press, 1978).

¹⁰ Dugard, *Human Rights and the South African Legal Order*, 63.

To enforce Apartheid policies and maintain this prescribed order, a heavy state bureaucracy and security establishment developed.¹¹ Posel captures the intersections between enforcement and governance under Apartheid:

For an African person, all the minutiae of everyday life – where and with whom they lived, worked, had sex, travelled, shopped, walked or sat down, what they owned and consumed – were governed either by issue of appropriate permits or passes or by public prohibitions and proscriptions. So, encounters with police, charged with enforcing the racial boundaries that animated these regimes of surveillance, were inevitable, and breaches of the myriad regulations were legion.¹²

State institutions, the bureaucracy, and policing expanded to enforce Apartheid policies. Opposition and resistance to the structures of oppression endured as Government entrenched regulation and enforcement.

With varying levels of organization, opposition to Apartheid developed early on. Apartheid resistance and opposition organizations including the African National Congress (ANC), the Pan-African Congress (PAC), and the United Democratic Front (UDF), for example organized and campaigned against the government with different approaches (violent and non-violent), levels of organization, and impact. In general, early largely non-violent means including strikes, sit-ins, and protests characterized early opposition to Apartheid laws. The Campaign for the Defiance of Unjust Laws of 1952 is one example.¹³ During this campaign, volunteers broke Apartheid laws to go to jail, rather than pay the fines associated with the criminalized acts they had committed.¹⁴ Dubow identifies that

¹¹ Dubow, *Apartheid, 1948-1994*, 37, 60.

¹² Posel, "The Apartheid Project, 1948–1970," 347.

¹³ Dubow, *Apartheid, 1948-1994*, 42.

¹⁴ Anne Kelk Mager and Maanda Mulaudzi, "Popular Responses to Apartheid: 1948-c. 1975," in *The Cambridge History of South Africa*, ed. Robert Ross, Anne Kelk Mager, and Bill Nasson (Cambridge: Cambridge University Press, 2011), 372.

“the hope was that by inviting arrest and imposing intolerable burdens on the state’s capacity to police its own regulations, the system would be rendered inoperable.”¹⁵ The government responded to the campaign not by loosening Apartheid restrictions but rather with a re-entrenchment through the passage of laws that strengthened the Government’s hand in responding to resistance.¹⁶

The intersection of the forces of control and opposition is embodied in the 1960 Sharpeville massacre, a critical turning point in South Africa’s history. A demonstration organized by the Pan-Africanist Congress to protest the pass laws resulted in 69 deaths and hundreds of injuries after the South African Police (SAP) opened fire on the crowd. Though the gathering was large, the protesters were unarmed. Many had been shot in the back, prompting the TRC to make the finding that “police deliberately opened fire on an unarmed crowd...the SAP failed to give the crowd an order to disperse...the police failed to facilitate access to medical and/or other assistance to those who were wounded immediately after the march.”¹⁷ This police response to protest was not novel, but the Sharpeville massacre had significant impacts.¹⁸ Frankel suggests that:

The massacre was not, in the end, simply a question of the white police ‘getting at’ the people... On the contrary, Sharpeville is an example of wider moments in the universal experience where the political rulers and their ruled have been locked into tension, antagonism and irremediable conflict, elements which so frequently form the tragic backdrop to human atrocities.¹⁹

¹⁵ Dubow, *Apartheid, 1948-1994*, 43.

¹⁶ Dubow, *Apartheid, 1948-1994*, 43-45. As Dubow outlines, despite non-violence underpinning this demonstration of collective action resulted in violence, and the ANC decided to end the campaign.

¹⁷ *Truth and Reconciliation Commission of South Africa Report: Volume Three*, Truth and Reconciliation Commission of South Africa (29 October 1998), Chapter 6, 537.

¹⁸ Tom Lodge, "Voices from a Massacre," in *Sharpeville: an Apartheid Massacre and its Consequences* (Oxford: Oxford University Press, 2011), 23-26.

¹⁹ Philip Frankel, *An Ordinary Atrocity: Sharpeville and Its Massacre* (New Haven and London: Yale University Press, 2001), 12-13.

The government responded to the events at Sharpeville by criminalizing opposition through the banning of organizations deemed to be threats (including the ANC and PAC); a formal inquiry into the massacre through a Commission of Inquiry;²⁰ and the passing of indemnity legislation for state actors involved.²¹ The consensus of analysts is that after Sharpeville, Apartheid resisters decided that non-violent collective action was not likely to dismantle Apartheid.²²

In the year following Sharpeville, the ANC formed a separate wing, Umkhonto we Sizwe (MK), with which to engage in armed struggle against the state.²³ In the initial stages, MK directed its campaign of violence against the Apartheid state at symbolic government infrastructure.²⁴ The rebellion against the regime became increasingly violent.²⁵ Rallies, protests, and bombings were accompanied by profound violence targeting those alleged to

²⁰ Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (Ann Arbor: The University of Michigan Press, 2013), 177-178.

²¹ Stephen R. Davis, *The ANC's War Against Apartheid: Umkhonto We Sizwe and the Liberation of South Africa* (Bloomington, IN: Indiana University Press, 2018), 4. See also: *Truth and Reconciliation Commission of South Africa Report: Volume One*, Volume 1, Chapter 13, 458-459.

²² See: Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation Through Truth* (New York: St. Martin's Press, 1997), 122; Dubow, *Apartheid, 1948-1994*, 72; Davis, *The ANC's War Against Apartheid*, 50-51; Mager and Mulaudzi, "Popular Responses to Apartheid: 1948-c. 1975," 396; Allister Sparks, *Tomorrow is Another Country* (Sandton: Struik Book Distributors, 1994), 23.

The TRC report of Sobukwe's Testimony also reflects this relationship: *Truth and Reconciliation Commission of South Africa Report: Volume Two*, Truth and Reconciliation Commission of South Africa (29 October 1998), Chapter 1, 11.

²³ Davis, *The ANC's War Against Apartheid*, 3-5.

²⁴ *Ibid.*, 3-5.

²⁵ In general, two narratives have emerged surrounding the MK's activities and they will not be evaluated here. These are complex and multifaceted with significant power influences. Much of the literature portrays the ANC and MK's armed response to Apartheid as a necessary fight against an illegitimate state. In a counter-narrative, others have described the violence as a people's war—a type of guerilla war modeled on the Vietnam war. For example see, Anthea Jeffrey, *People's War: New Light on the Struggle for South Africa* (South Africa: Jonathan Ball Publishers, 2009).

be allied with the government.²⁶ The state responded by driving police and security forces beyond the mere enforcement of Apartheid's rule to the adoption of a counter-revolutionary approach that brought with it differing degrees of repression.

During the late 1980s, the security forces in South Africa had wide powers and reach. As the nature of the conflict between the state and opposition forces shifted, the state's tools to enforce order and respond to opposition forces shifted. In the public eye, the ebb and flow of opposition and uprisings saw police and security forces gain significant power in their ability to arrest and detain without trial.²⁷ Both 'regular' and covert policing operations demonstrated elements of violence. From the mid 1980s to the early 1990s, the security apparatus of the state developed the capabilities required to carry out organized and effective counter-insurgency operations often beyond the purview of the public. As Ellis states, "both Police and army were in time to create units, or adapt existing ones, to carry out the job of undertaking internal repression of the robust nature which the government required."²⁸ Vlakplaas, for example, was a covert police operation that conducted targeted assassinations, comprising the 'hit squads' of Apartheid.²⁹

The pattern of violence changed with the initiation of the transition period. Guelke notes that "the period of the transition was [the] bloodiest in South Africa's existence as a

²⁶ Davis, *The ANC's War Against Apartheid*, 5; see also, Jeffrey, *People's War: New Light on the Struggle for South Africa*.

²⁷ Stephen Ellis, "The Historical Significance of South Africa's Third Force," *Journal of Southern African Studies* 24, no. 2 (1998): 266.

²⁸ *Ibid.*, 274.

²⁹ Anurima Bhargava, "Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission," *Columbia Law Review* 102, no. 5 (2002): 1319; Piers Pigou, "The Apartheid State and Violence: What Has the Truth and Reconciliation Commission Found?," *Politikon* 28, no. 2 (2001): 212; Sparks, *Tomorrow is Another Country*, 175.

political entity.”³⁰ Political violence encroached on most elements of society through violent conflicts between opposing groups, assassinations, state and non-state attacks on civilians, and the destruction of infrastructure. It is estimated that approximately 15,000 people died in political violence in the negotiation and transition period, between February 1990 and April 1994.³¹ This number does not include the deaths that occurred through opposition and state response during the preceding decades of armed resistance. Violence increased dramatically during the transitional years.³²

Classifying political violence during the transition in terms of dominant actors engaged in conflict assists in analyzing institutional responses to it. Guelke identifies four categories of violence during the transition: “aggressive action by the security forces; conflict between the Inkatha Freedom Party (IFP) and the ANC; racial attacks by the Azanian People’s Liberation Army (APLA)...; and the spoiler violence by the extreme right.”³³ These categories are not mutually exclusive nor do they capture the pervasiveness of violence within society. The value in this framing is a narrower scope to discuss the investigative institutional developments that followed because they illustrate the breadth of actors and associated violence. The conflict between the ANC and IFP, the security

³⁰ Adrian Guelke, "Interpretations of Political Violence During South Africa's Transition," *Politikon* 27, no. 2 (2000): 241.

³¹ *Ibid.*, 241.

³² Peter Gastrow, *Bargaining for Peace: South Africa and the National Peace Accord* (Washington, D.C.: United States Institute of Peace, 1995), 77; Guelke, "Interpretations of Political Violence," 241; *Truth and Reconciliation Commission of South Africa Report: Volume Two*, Chapter 7, 585.

³³ Adrian Guelke, *Rethinking the Rise and Fall of Apartheid: South Africa and World Politics* (New York; Basingstoke, UK: Palgrave Macmillan, 2005), 179.

The TRC Report separates political violence based on actors as well, including: Security Forces, the Homelands, the White Right Wing, the Liberation Movements, and the ‘Third Force’. See “Political Violence in the era of Negotiations and Transition 1990-1994,” *Truth and Reconciliation Commission of South Africa Report: Volume Two*, Chapter 7.

forces, and the third force are examined briefly below. This is not an exhaustive account of political violence in South Africa's transition, these are representations to contextualize the institutional responses that are discussed in the next chapters.

The violence between the ANC and IFP was a conflict over potential political power for black South Africans.³⁴ ANC supporters and IFP supporters engaged in conflicts, clashes, and raids.³⁵ Most often this violence took place within South Africa's townships,³⁶ where both groups created self-defence units.³⁷ In some cases, violence erupted between ANC-aligned residents and IFP aligned workers housed in accommodation for workers, known as hostels, in the township areas.³⁸ In his study of the Thokoza and Katlehong townships, Kynoch describes the violent interaction between IFP aligned hostel residents and ANC residents in the township: "political marches and funerals were frequently interrupted by fighting; train and taxi commuters were slaughtered; prominent officials

³⁴ Guelke, "Interpretations of Political Violence," 250; Gary Kynoch, "Reassessing Transition Violence: Voices from South Africa's Township Wars, 1990-4," *African Affairs* 112, no. 447 (2013): 285. There are competing explanations for this violence, for an overview see, Guelke, "Interpretations of Political Violence," 245-250.

³⁵ Philip Bonner and Noor Nieftagodien, "The Truth and Reconciliation Commission and the Pursuit of 'Social Truth': The Case of Kathorus," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* ed. Deborah Posel and Graeme Simpson (Johannesburg: Witwatersrand University Press, 2002), 182-187; Kynoch, "Reassessing Transition Violence," 284.

³⁶ Segregation policies under Apartheid dictated where different populations lived. Townships were the urban areas designated for the black population. These communities were significant sites of separation, segregation, under-development and conflict. See Posel, "The Apartheid Project, 1948-1970," e.g. 324, 329; 319-368 for a holistic discussion; Hilary Sapire, "Township Histories, Insurrection and Liberation in Late Apartheid South Africa," *South African Historical Journal* 65, no. 2 (2013): 176. Townships continue to house much of the population in post-Apartheid South Africa.

³⁷ On Self-Defence Units and Self-Protection Units see: Guelke, "Interpretations of Political Violence," 248; Bonner and Nieftagodien, "The Truth and Reconciliation Commission and the Pursuit of 'Social Truth': The Case of Kathorus," 195.

³⁸ The Goldstone Commission's committee investigating hostels identified that it was only certain hostels and not all hostels that were implicated in violence. Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Interim Report on the Violence in Hostels," 21 September 1992.

were assassinated; and, on many occasions, state police and soldiers contributed to the violence.”³⁹ Investigations and the compilation of accounts of violence suggests that the conflict between the ANC and IFP is difficult to disentangle from the influence and support from state security forces. In numerous examples there is a web of complicity that complicates the representation of violence.

The security forces, comprising the police and the military, were associated with elements of the political violence that accompanied the South African transition. The security forces were implicated in transitional violence by providing weapons to the IFP, using problematic (and often fatal) tactics of crowd control, and failing to sufficiently investigate violence.⁴⁰ Political detainees continued to die in police custody.⁴¹ Protests were dangerous for participants; the TRC Report indicates that “killing by the security forces, primarily in the course of public order policing, numbered 518 between July 1991 and June 1993.”⁴² Beyond these tactics, the security forces were accused of participating in, and instigating violence, as a part of allegations of a “third force,” which had significant implications for investigations into violence. An example in which these elements are represented can helpfully elucidate the types of concerns associated with violence in the

³⁹ Kynoch, "Reassessing Transition Violence," 291.

⁴⁰ *Truth and Reconciliation Commission of South Africa Report: Volume Two*, Chapter 7, 585, 605. See also *Truth and Reconciliation Commission of South Africa Report: Volume Six*, Truth and Reconciliation Commission of South Africa (2003). Brewer's historical investigation of the SAP includes elements of the transitional violence. See, John D. Brewer, *Black and Blue: Policing in South Africa* (Oxford: Clarendon Press, 1994), 318-319, 328-329. Bubenzer provides an in depth analysis on the prospect for prosecution after the TRC. In this discussion, a lack of evidence available to prosecute members of the security forces is identified as a continuing challenge. See: Ole Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process* (Leiden: Martinus Nijhoff Publishers, 2009), 208-209.

⁴¹ See *Truth and Reconciliation Commission of South Africa Report: Volume Two*, Chapter 7, 588-589. Brewer, *Black and Blue: Policing in South Africa*, 325.

⁴² *Truth and Reconciliation Commission of South Africa Report: Volume Two*, Chapter 7, 585, 591.

South African transition, though one example does not portray the breadth of the issues. The Boipatong massacre can be used to illustrate these various elements of police involvement and negligence. Considerable attention has been paid to this event, but accounts and findings differ. The purpose in presenting this example is to illustrate the components and complexity of the violence.

The Boipatong Massacre occurred on June 17, 1992, when armed hostel dwellers from the KwaMadala hostel attacked residents in Boipatong killing 45 people and injuring 22 people.⁴³ In the TRC's reporting of the incident, it is alleged that the police role in this violence included charges that the police were called to the scene and did not intervene, had been tipped off ahead of time and did not intervene, that police were near the centres of violence as the group carried out the attack, and that the police completed poor investigations.⁴⁴ Accounts of the police's role in the attack vary; implicated in this variation is the lack of concrete evidence of police involvement but eyewitness accounts recalled police vehicles near to, and white men participating in, the violence. Both accounts have been probed.⁴⁵

⁴³ The number of casualties is different in different sources, these are the TRC Report number *Truth and Reconciliation Commission of South Africa Report: Volume Three*, Chapter 6, 689. Ellis, for instance says 38 people were killed. See Ellis, "The Historical Significance of South Africa's Third Force," 289. For journalistic accounts of the massacre see: Greg Marinovich and Joao Silva, *The Bangbang Club: Snapshots from a hidden war* (New York: Basic Books, 2000), 74-78; Sparks, *Tomorrow is Another Country*, 140-141.

⁴⁴ *Truth and Reconciliation Commission of South Africa Report: Volume Three*, Chapter 6, 683, 684, 685, 687, 689.

⁴⁵ James G.R Simpson, "Boipatong: The Politics of a Massacre and the South African Transition," *Journal of Southern African Studies* 38, no. 3 (2012): 632-633; Sparks, *Tomorrow is Another Country*, 141. Kynoch also cites Simpson pointing to evidence that "ANC officials went around Boipatong instructing residents not to speak to police or outsiders." See Kynoch, "Reassessing Transition Violence," 288.

The police investigation of the Boipatong massacre was itself problematic. James Simpson identifies that even after the attack, “no immediate effort was made to investigate its causes, beyond escorting a detective photographer.”⁴⁶ The Goldstone Commission conducted an investigation assisted by two international experts: a judge and policing expert.⁴⁷ The latter, P.A.J. Waddington, investigated allegations of police involvement in the massacre.⁴⁸ The admission that police had taped over the recordings from the night of the massacre increased suspicion of police involvement.⁴⁹ Waddington’s report outlined extensive policing inadequacies and incompetence, but did not find evidence of police complicity.⁵⁰ Sixteen KwaMadala residents were convicted for “involvement in the massacre.”⁵¹

The massacre at Boipatong illustrates one type of violence that accompanied the transition and the complex interaction of police in the violence. Witness accounts and follow up investigations differed in the perception about the role of police. The police were implicated not only in the violence but also in the conduct of the investigation, giving the

⁴⁶ Simpson, "Boipatong: The Politics of a Massacre and the South African Transition," 640.

⁴⁷ Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor* (New Haven and London: Yale University Press, 2000), 31-32.

⁴⁸ Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 32; Simpson, "Boipatong: The Politics of a Massacre and the South African Transition," 640-641.

⁴⁹ Simpson, "Boipatong: The Politics of a Massacre and the South African Transition," 641.

⁵⁰ Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 32; Simpson, "Boipatong: The Politics of a Massacre and the South African Transition," 640; *Truth and Reconciliation Commission of South Africa Report: Volume Three*, Chapter 6, 688.

⁵¹ *Truth and Reconciliation Commission of South Africa Report: Volume Three*, Chapter 6, 687. Again, the numbers are somewhat inconsistent, Graeme Simpson identifies that 17 people applied for, and were granted, amnesty. See Graeme Simpson, "'Tell no Lies, Claim No Easy Victories': A Brief Evaluation of South Africa's Truth and Reconciliation Commission," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, ed. Deborah Posel and Graeme Simpson (Johannesburg: Witwatersrand University Press, 2002), 236.

air of bias or indifference. This is significant when considering that investigations during the transitional period and in the preceding years relied upon the police.

James Simpson notes that “the Boipatong massacre is broadly viewed as evidence of a *third force*, comprising elements within the state security working covertly and illegally to undermine the ANC and its allies.”⁵² This view persists despite the different conclusions drawn by Waddington and the TRC. However, Boipatong is a symbolic reference point in the discussions of violence in South Africa and the third force is a persistent thread in these discussions.⁵³

Discourse around the involvement of a “third force” in violence in South Africa emerged in the early 1990s.⁵⁴ The third force remained a central feature on the discourse of violence before and during the transition. The “third force” refers to the belief that violence and destabilization efforts were being carried out covertly, particularly by the government, to weaken opposition. Ellis characterizes the third force as “state-organised or state-connected covert and clandestine networks” that developed from the mid 1980s.⁵⁵ It was “a nexus of SADF and Police units experienced in covert warfare.”⁵⁶ At the time, efforts to establish the existence of a third force proved elusive. However, as investigations continued, evidence emerged of the security forces’ involvement in violence. The

⁵² Simpson, “Boipatong: The Politics of a Massacre and the South African Transition,” 626, emphasis in original.

⁵³ Kynoch, “Reassessing Transition Violence,” 287; Simpson, “Boipatong: The Politics of a Massacre and the South African Transition,” 641.

⁵⁴ Ellis, “The Historical Significance of South Africa’s Third Force,” 261.

⁵⁵ *Ibid.*, 264.

⁵⁶ *Ibid.*, 293.

Commission of Inquiry for the Prevention of Public Violence and Intimidation played a central role in uncovering evidence in this regard.⁵⁷

Guelke criticizes the TRC report's focus on the third force to interpret political violence as an effort to weaken the ANC's hold on power because it does not account for persistent political violence after the election and the government's response to violence during the ongoing negotiations.⁵⁸ Ellis' account, tracing the third force, suggests that specific security force units were involved in a centralized manner, but this organizational structure waned in 1992.⁵⁹ Even without agreement on the extent of these operations, the allegations of a third force affected the perception of violence in the transitional period and the associated investigations.

The state's perceived and actual role in carrying out violence and its role in violence through collusion or improper investigations are critical issues for understanding the state-mandated investigations that inquired into these allegations. Negotiating the past will be an ongoing venture for South Africa, and the contested narratives of violence will continue to be part of the conversation.⁶⁰ It is the institutional mechanisms that developed around the violence that are the focus here. The nature of the violence between the ANC and IFP, and the role of police in that violence are important to take into account in the establishment of investigative institutions to address these issues. As is illustrated below, some of the

⁵⁷ Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 51-53.

⁵⁸ Guelke, "Interpretations of Political Violence," 246, 252.

⁵⁹ Ellis, "The Historical Significance of South Africa's Third Force," 293.

⁶⁰ Guelke, "Interpretations of Political Violence," 251; Deborah Posel, "The TRC Report: What Kind of History? What Kind of Truth?," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, ed. Deborah Posel and Graeme Simpson (Johannesburg: Witwatersrand University Press, 2002), 150-151.

components of the National Peace Accord (NPA) aimed to prevent and investigate violence that had taken hold in much of the country.

5.2 The Political Transition

The late 1980s and into the early 1990s saw the beginning of transformation and transition in South Africa. Major milestones in South Africa's transition to democracy punctuate the political narrative of the transition. President de Klerk's 1990 speech to parliament in which he announced the decision to remove the ban on the ANC and South African Communist Party (SACP), release Nelson Mandela from prison, and begin to repeal other elements of Apartheid legislation, was the turning point in the transformation of the South African political system.⁶¹ After 27 years, Nelson Mandela was released from prison and negotiations continued towards an inclusive, and non-racial democracy. Over four years, major political parties and groups in South Africa negotiated an Interim Constitution in 1993 and held the first democratic election in April 1994. Despite the violence that had pervaded the country during the negotiations, the election itself was largely uninterrupted by violence. The 1994 democratic elections were cemented through a series of negotiated agreements that, at different stages, engaged government leaders, delegates of previously banned political organizations, and representatives of the independent homelands.

The negotiations toward a democratic transition were precipitated by a number of core issues that suggest a "stalemate" brought the leadership to the negotiating table.⁶² The ANC was the Government's most prominent negotiating partner. The survival of South

⁶¹ Guelke, *Rethinking the Rise and Fall of Apartheid: South Africa and World Politics*, 156.

⁶² Timothy D. Sisk, "The Violence-Negotiation Nexus: South Africa in Transition and the Politics of Uncertainty," *Negotiation Journal* 9, no. 1 (1993): 78.

Africa and the continued inclusion of the white minority induced the Government to the negotiating table. On the other side of the table, the ANC's fight against the Apartheid regime had reached a point in the late 1980s where "winning" the struggle was increasingly unlikely.⁶³ The ANC's struggle against the regime using tactics of guerilla war and insurrection to overthrow the regime was proving untenable and unsuccessful.⁶⁴ In addition, the costs of coercive response to opposition to Apartheid were becoming increasingly problematic for the regime.⁶⁵ As Friedman outlines, "as long as order could be maintained by force alone, and sanctions remained, the country faced an inevitable economic decline."⁶⁶ The dynamics precipitating the negotiations and the process of negotiation itself illustrate that the transition in South Africa was neither imposed by the government nor a result of the overthrow of the government.⁶⁷ Negotiations were recognized by both sides as the best chance at what Friedman calls "a post-apartheid order."⁶⁸ As such, the process of concession and agreement through which the transition was crafted is important for the development of the Commission of Inquiry for the Prevention of Public Violence and Intimidation.

⁶³ Steven Friedman, ed., *The Long Journey: South Africa's Quest for a Negotiated Settlement* (Johannesburg: Raven Press, 1993), 10. See also Hermann Giliomee, "Democratization in South Africa," *Political Science Quarterly* 110, no. 1 (1995): 91-92.

⁶⁴ Friedman, *The Long Journey*, 10-11.

⁶⁵ Friedman, *The Long Journey*, 12.

⁶⁶ *Ibid.*, 12.

⁶⁷ Johannes Rantete and Hermann Giliomee, "Transition to Democracy through Transaction?: Bilateral Negotiations between the ANC and NP in South Africa," *African Affairs* 91, no. 365 (1992): 541-542.

⁶⁸ Friedman, *The Long Journey*, 12.

According to Rantente and Giliomee, initially the government “assumed it could initiate a process of democratization on terms determined by the government.”⁶⁹ These scholars suggest that the external pressures facing the Government were acted upon in such a manner as to try to ensure the government maintained control over the transition process, through a power-sharing arrangement with the ANC. Crucially, however, the negotiations did not unfold like this and the Government “needed the consent of the ANC for all kinds of transactions ranging from an interim government, constituent assembly and the rules of the first election.”⁷⁰ This negotiation environment in which the information-gathering mechanisms were established and the forces affecting institutional entrenchment and change are significant for the considerations of gradual institutional change that are analyzed in the coming chapters.

Between the February 1990 release of Mandela and the start of the Convention for a Democratic South Africa (CODESA) in late 1991, several other pacts were helped to facilitate the constitutional negotiations. Three agreements between the Government and the ANC preceded the National Peace Accord. These agreements were: the Groote Schuur Minute (1990), the Pretoria Minute (1990), and the D.F. Malan Accord (1991).⁷¹

⁶⁹ Rantete and Giliomee, "Transition to Democracy through Transaction?," 518.

⁷⁰ Ibid., 517-518.

⁷¹ Electronic copies of these accords can be found online through the Nelson Mandela Centre of Memory on the O'Malley archive compiled by Pdraig O'Malley. The O'Malley Archive, "Transition 1990-1994, Documents and Reports, 1990." <https://omalley.nelsonmandela.org/omalley/index.php/site/q/031v02039/041v02103.htm>, accessed December 30, 2018.

In each of these agreements, there were provisions to manage violence. The Government of South Africa and the African National Congress negotiated the Groote Schuur Minute in Cape Town in April 1990. The Groote Schuur Minute established a working group to investigate the release of political prisoners and identify legislation that could be used to determine what constituted political crimes. The same two parties then negotiated Pretoria Minute, which sketched the timeline for the release of political prisoners and set parameters for release. The early agreements at Groote Schuur and Pretoria included efforts to disarm MK.⁷² In addition, in the Pretoria Minute the ANC agreed to suspend activities of its armed wing in order to negotiate with the Government. Through the D.F. Malan Accord “it was agreed that the ANC would no longer infiltrate men and material into South Africa and that violence and intimidation accompanying mass action had to be eliminated.”⁷³ These agreements were, in a sense, incremental steps towards the larger agreement.

Friedman identifies that the National Peace Accord “was the first formal multi-party accord, and it built sufficient confidence among the parties to persuade them to proceed to constitutional talks.”⁷⁴ Even with these incremental steps, agreement on the National Peace Accord was not easily secured. Government proclamations and attempts at initiating dialogue were often received with a reasonable amount of scepticism.⁷⁵ More than 40

⁷² "The Groote Schuur Minute, 4 May 1990," accessed February 4, 2020, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/031v02039/041v02103/051v02104/061v02106.htm>; "The Pretoria Minute, 6 August 1990," accessed February 4, 2020, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/031v02039/041v02103/051v02104/061v02107.htm>

⁷³ Rantete and Giliomee, "Transition to Democracy through Transaction?," 521.

⁷⁴ Friedman, *The Long Journey*, 16.

⁷⁵ Gastrow, *Bargaining for Peace*, 19-25.

groups signed the NPA on 14 September 1991 at the National Peace Conference in Johannesburg, South Africa.⁷⁶ The ten chapters of the NPA included a range of provisions for political actors and members of various security forces, structured peace committees at a local, regional, and national level, the Commission of Inquiry for the Prevention of Public Violence and Intimidation, and provisions for specific courts to deal with the peace agreement.⁷⁷ It was a comprehensive agreement.⁷⁸ The structures incorporated into the National Peace Accord laid out standards of behaviour and measures for monitoring that supported the next phases of negotiations, culminating in the multi-party negotiation process to design and implement multi-racial democracy in South Africa. Once the peace agreement was signed, it was anticipated that constitutional negotiations could proceed. Prior to the formal negotiations that began in December 1991, the parties had to agree on how the new democratic dispensation would be decided upon and designed.

Over the years of negotiations, the necessary persistence of engagement is evident. Key issues in the negotiations included the issues of majority rule and the establishment of an interim government. On these points the Government's aim was to protect the white minority interests and the ANC's goal was securing full democratic rights for the majority who had been disenfranchised.⁷⁹ From early on the ANC was persistent on the matter of majority rule. In addition, the ANC was against the negotiation of a new constitution by

⁷⁶ National Peace Accord, 1991. See also, Gastrow, *Bargaining for Peace*, 32; Sisk, "South Africa's National Peace Accord," 53.

⁷⁷ National Peace Accord, 1991.

⁷⁸ Gastrow, *Bargaining for Peace*, 57; Sisk, "South Africa's National Peace Accord," 50.

⁷⁹ Friedman, *The Long Journey*, 14-15.

unelected negotiating personnel.⁸⁰ With regards to the possibility of an interim government, Rantete and Giliomee suggest that, “in the second half of 1991 the government began to explore new options, signalling its acceptance that it was impossible to dictate the process from above...”⁸¹ On both sides, concessions are evident in the eventual agreement.

The Government’s choice mechanism for establishing a democratic South Africa was through “a multi-party conference.”⁸² On the Government’s side, the critical issue underpinning the initiation of negotiations was that it would maintain protections for the white minority through a power-sharing arrangement, and did not want to agree to a majority rule system.⁸³ As Rantete and Giliomee observed, “uppermost in De Klerk’s mind was the need to balance the transition process in such a way that he gave enough assurances to white without unduly alarming the ANC as main negotiating partner...”⁸⁴ The ANC’s stance was that the new constitutional order could only be established by a constituent assembly that had been elected by a majority.⁸⁵ These issues persisted through the eventual multi-party negotiation process established as the Convention for Democratic

⁸⁰ Ibid., 14-15.

⁸¹ Rantete and Giliomee, "Transition to Democracy through Transaction?," 523.

⁸² Friedman, *The Long Journey*, 14.

⁸³ Ibid., 14.

⁸⁴ Rantete and Giliomee, "Transition to Democracy through Transaction?," 523.

⁸⁵ Friedman, *The Long Journey*, 14.

South Africa (CODESA) in December 1991, which brought together 19 negotiation parties.⁸⁶

Two iterations of the Convention for a Democratic South Africa (CODESA I and CODESA II) were established. These were multi-party talks for the establishment of a democratic constitution.⁸⁷ The breakdown of the CODESA II talks resulted in the development of another new round of negotiations.⁸⁸ The renewed negotiations, the Multi-Party Negotiating Process, composed of the Negotiating Council and the Transitional Executive Council (as well as a Plenary body and Planning Committee).⁸⁹ The transitional process and a draft constitution were developed within these structures.⁹⁰ The Transitional Executive Council (TEC) administered the country in preparation for the democratic election held in April 1994.⁹¹ One representative from each party to the MPNP could serve on the TEC, and the TEC selected membership of the TEC sub-councils working in areas like defence and finance.⁹²

In the end, in December 1993, an agreement to an Interim constitution was secured. The Government and the ANC agreed to a limited power-sharing arrangement during

⁸⁶ James Hamill, "The Crossing of the Rubicon: South Africa's Post-Apartheid Political Process 1990-1992," *International Relations* 12, no. 3 (1994): 24. See also Friedman, *The Long Journey*, 21.

⁸⁷ See for example, Giliomee, "Democratization in South Africa," 96; Sparks, *Tomorrow is Another Country*, 130-141.

⁸⁸ Sparks, *Tomorrow is Another Country*, 187.

⁸⁹ John Hatchard and Peter Slinn, "The Path Towards a New Order in South Africa," *International Relations* 12, no. 4 (1995): 8.

⁹⁰ *Ibid.*, 8.

⁹¹ John Hatchard, "Towards Majority Rule in South Africa: The Transitional Executive Council Act 1993," *Journal of African Law* 37, no. 2 (1993): 208.

⁹² *Ibid.*, 208-209.

which time a permanent constitution would be developed.⁹³ Lingering issues in the negotiations were resolved late in the process of negotiating the 1993 Interim-Constitution, including the amnesty clause.⁹⁴

While it is beyond the scope of this project to outline all elements of the negotiation process, outlining some of the key preferences and demands of the negotiating parties illustrates the context in which the Commission was established. In addition, the theories of institutional change employed in this project highlight the significance of actors and coalitional dynamics.⁹⁵ Particularly important is an accounting of the ability or inability of key actors and institutions to prevent change.⁹⁶ Here then, it is helpful to identify the key actors in the negotiation process to illuminate the dynamic of the negotiation environment in which the institutions under investigation were operating.

Both parties' recognition that the only way to end the crisis was through negotiation established a sort of balance, limiting each party's ability to move forward unilaterally and block changes without consensus.⁹⁷ As Sisk recognized, "the preliminary negotiations phase shows that in the South African case it is political leaders who best understand the

⁹³ Tom Lodge, "Resistance and Reform, 1973-1994," in *The Cambridge History of South Africa*, ed. Robert Ross, Anne Kelk Mager, and Bill Nasson (Cambridge: Cambridge University Press, 2011), 485; Fanie du Toit, "A Broken Promise? Evaluating South Africa's Reconciliation Process Twenty Years On," *International Political Science Review* 38, no. 2 (2017): 174.

⁹⁴ Emily H. McCarthy, "South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation?," *Michigan Journal of Race and Law* 3 (1997): 184.

⁹⁵ James Mahoney and Kathleen Thelen, "A Theory of Gradual Institutional Change," in *Explaining Institutional Change: Ambiguity, Agency, and Power*, ed. James Mahoney and Kathleen Thelen (Cambridge: Cambridge University Press, 2010), 22-31.

⁹⁶ *Ibid.*, 19.

⁹⁷ Sisk, "The Violence-Negotiation Nexus," 78.

maxim that ‘the alternative in any event is too ghastly to contemplate.’”⁹⁸ This helps to illuminate the potential for parties to initiate, refuse, or block proposed changes.

Despite this recognition, destabilizing violence threatened to move the negotiations off track throughout the process.⁹⁹ Violence was an existential threat to negotiations with the Government insisting that the ANC abandon its armed struggle and the ANC insisting that it would not continue negotiations with ongoing violence continuing and with the suspicion that the government was funding or instigating violence through the IFP.¹⁰⁰ As Rantete and Giliomee identify:

Under severe pressure, De Klerk removed the ministers for defence and police from their positions and appointed a standing commission to investigate instances of violence. This cleared the air sufficiently for the government and the ANC to participate, along with other parties and bodies, in the launching of a peace initiative which culminated in a Peace Accord.¹⁰¹

Sisk argues that the peace accord itself was a vehicle to manage violence, the structures which “reflect[ed] a recognition that the control of violence during the course of the transition [was] a long term prospect.”¹⁰² This proved accurate: even after the signing of the NPA, at several points during the constitutional negotiations that followed acts of violence—such as the Boipatong Massacre of 1992—threatened to derail negotiations. Indeed, the ANC suspended CODESA II after the massacre at Boipatong.¹⁰³

⁹⁸ Ibid., 87.

⁹⁹ See Sisk, "Violence-Negotiation Nexus," 77-94.

¹⁰⁰ See for example. Rantete and Giliomee, "Transition to Democracy through Transaction?," 521. For a more detailed overview, see Sparks, *Tomorrow is Another Country*, 133-152.

¹⁰¹ Rantete and Giliomee, "Transition to Democracy through Transaction?," 521.

¹⁰² Sisk, "Violence-Negotiation Nexus," 89.

¹⁰³ Rantete and Giliomee, "Transition to Democracy through Transaction?," 539.

The major negotiating parties had different ideas about how the negotiations should unfold and how a new constitution would be established. Van Zyl Slabbert argued that de Klerk's efforts to initiate the transition and maintain control over it was not sustainable and dependent on the other side. Van Zyl Slabbert recognized "the agenda is open-ended and determined by the quality of interaction between the regime and the challengers to its authority who have entered the bargaining space created by the regime."¹⁰⁴ The process of designing the new constitution required engagement on issues of institutional design and processes of transitional decision-making and these issues were not easily settled.

Prior to the end of the negotiating period Sisk identified that the insecurity of the security forces in South Africa was an important consideration.¹⁰⁵ This builds on O'Donnell and Schmitter's recognition that "no political actor in a transition from authoritarian rule is more insecure than the old regime's security forces."¹⁰⁶ Several sources have identified that the security forces' pressure for amnesty was significant such that threats were made towards the end of the negotiations that threatened to prevent the election should amnesty not be provided.¹⁰⁷ Ellis argues that "the evidence suggests that few senior officers actually wanted to sabotage negotiations for good simply because they knew this would not help them win the war. If they had wanted to do so it would have been

¹⁰⁴ Frederik Van Zyl Slabbert, *The Quest for Democracy: South Africa in transition* (London: Penguin Books, 1992), 40.

¹⁰⁵ Sisk, "Violence-Negotiation Nexus," 85.

¹⁰⁶ Sisk, "Violence-Negotiation Nexus," 85. Sisk points to O'Donnell and Schmitter, "Tentative Conclusions about Uncertain Democracies," 39.

¹⁰⁷ Alex Boraine, "Truth and Reconciliation in South Africa: The Third Way," in *Truth V. Justice*, ed. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 143; Hamill, "The Crossing of the Rubicon: South Africa's Post-Apartheid Political Process 1990-1992," 20; Charles Villa-Vicencio and Eric Doxtader, eds., *The Provocations of Amnesty: Memory, Justice and Impunity* (South Africa: David Philip Publishers, 2003), 1.

easy enough to sabotage the elections of April 1994.”¹⁰⁸ This is significant because the negotiations and transition depended on the participation of the security forces and made the security forces the strongest veto player in the process. However, as Lodge recognizes, the majority of the state’s security forces remained loyal to the Government.¹⁰⁹

The Commission of Inquiry for the Prevention of Public Violence and Intimidation operating during the constitutional negotiations. This Commission was established to investigate violence as part of the formal National Peace Accord in 1991. The Goldstone Commission is introduced here, followed by the 1995 Truth and Reconciliation Commission implemented after the democratic election.

5.3 The Commission of Inquiry for the Prevention of Public Violence and Intimidation

The Commission of Inquiry for the Prevention of Public Violence and Intimidation played a crucial role in monitoring and reporting on transitional violence while South Africa dismantled Apartheid and prepared for democracy. The National Peace Accord provisions specified the establishment of this standing commission on violence. Chapter Six of the National Peace Accord stipulated the creation of a “Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation (“the Commission”).¹¹⁰ The text introducing the provision for the standing commission rationalizes the inquiry based on an

¹⁰⁸ Ellis, "The Historical Significance of South Africa’s Third Force," 294.

¹⁰⁹ Lodge, "Resistance and Reform, 1973-1994," 485-486. Also, by this point Ellis suggests that the third force activities had dissipated, see Ellis, "The Historical Significance of South Africa’s Third Force," 293-294.

¹¹⁰ National Peace Accord, 1991, Chapter 6.

acknowledgement that investigations decrease violence by exposing it.¹¹¹ The agreement states:

It is clear that violence and intimidation declines when it is investigated and when the background and reasons for it is exposed and given media attention. There is therefore need for an effective instrument to do just that. It is agreed that the Commission established by the Prevention of Public Violence and Intimidation Act, 1991, be used as an instrument to investigate and expose the background and reasons for violence, thereby reducing the incidence of violence and intimidation.¹¹²

The Commission, chaired by Judge Richard Goldstone, conducted investigations into prominent episodes of public violence plaguing South Africa. The Commission produced over 40 reports (interim and final).¹¹³ These provided information on investigations into particular violent episodes, identification on causes where possible, and included recommendations. The legislation stipulated that reports would be provided to the State President, who would release them if “he deems necessary in the public interest.”¹¹⁴ From the outset, the task ahead of the Commission was significant. When the Commission’s initial investigation launched, one media report quotes Judge Goldstone stating that the Commission “cannot possibly itself inquire into every incidence of political

¹¹¹ National Peace Accord, 1991 § 6.3

¹¹² National Peace Accord, 1991, §6.3

¹¹³ A full list of reports can be found in the TRC Report, see *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 13, 508.

¹¹⁴ Republic of South Africa, *Prevention of Public Violence and Intimidation Bill* (1991), §10.

This process was not always smooth, early in the Commission’s operation there was an incident in which the President delayed releasing one report such that its release coincided with another report causing consternation among the parties. See Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 29-30. Media coverage illustrates some of the confusion see for example, John Perlman, “Goldstone Row one big mix-up,” *Star* 30 May 1992. Independent Board of Inquiry Collection AG2543, D54 Goldstone Commission 1991-1992, Wits Historical Papers, William Cullen Library, Johannesburg South Africa.

violence.”¹¹⁵ Furthermore, the Commission recognized that it was “not the Commission’s function to investigate incidents of public violence where the cause thereof is known.”¹¹⁶ Despite these limitations, the Goldstone Commission conducted investigations into significant and potentially destabilizing violent episodes and attacks.¹¹⁷ This included such incidents as the Boipatong massacre and the Bisho incidents, both of which impacted on the negotiations because of the violence.¹¹⁸ In addition, the Commission conducted hearings and released reports pertaining to thematic issues of violence facing South Africa, such as persistent violence on commuter taxis and trains.¹¹⁹

The Commission’s investigations into violent episodes ascertained tangible evidential information. In some instances, the Commission confirmed information publicly for the first time. This was the case, most famously or perhaps most anticipated in the allegations of a ‘third force’ operating and instigating violence.¹²⁰ Careful in its approach

¹¹⁵ Helen Grange, “Inquiry starts on violence in Tokoza,” *Star*, 15 November 1991. Independent Board of Inquiry Collection AG2543, D54 Goldstone Commission 1991-1992, Wits Historical Papers, William Cullen Library, Johannesburg South Africa.

¹¹⁶ Commission of Inquiry for the Prevention of Public Violence and Intimidation, Third Interim Report, §5.5.

¹¹⁷ For the list of reports released by the Goldstone Commission, see *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 13, 508.

¹¹⁸ The shooting at Bisho in September 1992 occurred when members of the ANC, SACP, and the Congress of South African Trade Unions, marched in the self-governing Ciskei to protest the prohibition on ANC organizing in the homeland. Despite a magistrate’s restrictions on the contested march, the leadership of the estimated 80,000 person march, Ronnie Kasrils, attempted to breach the restrictions by leading the crowd through a small gap in the fence. See Allister Sparks, *Tomorrow is Another Country*, 148-150. When the marchers attempted to advance through the fence, the Ciskei Defence Force (CDF) stationed around the area opened fire, killing 29 people. The Report’s findings indicate shortcomings in the March’s leadership and the response of the CDF. The “Commission of Inquiry regarding the Prevention of Public Violence and Intimidation, Report on the Bisho incident,” 29 September 1992.

¹¹⁹ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 13, 508.

¹²⁰ Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 40-46. Sparks, *Tomorrow is Another Country*, 172.

to the issue of evidence, the Commission “consistently refused to make findings without adequate evidence.”¹²¹ However, when it was able to make findings, it did so.¹²² Goldstone later reflected that “the commission didn’t tell people things they did not really know.”¹²³ However, Goldstone also acknowledged that the commission played a role in creating the conditions for the establishment of the TRC.¹²⁴

In addition to the recommendations in the reports, the commission recommended guidelines to prevent future violence and intimidation. As per the Prevention of Public Violence and Intimidation Act, the Commission was to:

make recommendations to the State President regarding–

- (i) the general policy which ought to be followed in respect of the prevention of public violence and intimidation;
- (ii) steps to prevent public violence or intimidation;
- (iii) any other steps it may deem necessary or expedient, including proposals for the passing of legislation, to prevent a repetition or continuation of any act or omission relating to public violence or intimidation...¹²⁵

The Commission made a number of such recommendations relating to marches and gatherings and the impending election. These are explored in further detail in Chapter 7.

The Commission’s investigation parameters are outlined here. Anyone could make a request of the Commission to address an element of public violence by following specified

¹²¹ Commission of Inquiry regarding the Prevention of Public Violence and Intimidation, “Fourth Interim Report,” 6 December 1993, 2.2.

¹²² *Ibid.*, 2.4

¹²³ Address by the Honourable Mr. Justice RJ Goldstone, at the Graduation Ceremony at the University of Natal, Durban, 13 April 1994, NMAP 2015/52, 2.1-2.2, folder 122, Nelson Mandela Centre of Memory, Johannesburg, South Africa.

¹²⁴ Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 57-58.

¹²⁵ Republic of South Africa, *Prevention of Public Violence and Intimidation Bill* (1991), Section 7, §1.

procedures.¹²⁶ Given its independence from the government, the Commission decided which incidences of violence to investigate.¹²⁷ When the Commission decided that an issue or incident warranted investigation, it established a committee of the commission. These smaller committees enabled a wider reach for the commission, rather than requiring all members investigate all instances of violence.

The Commission was not a court and was only able to make recommendations to the Attorney General when it was “of the opinion that the facts disclose the commission of an offence by any person.”¹²⁸ Established to investigate emergent violence, the Commission was precluded from investigating “any particular occurrence which took place and ended before the Commencement of this Act” or “occurrences in respect of which a prosecution, inquest or an inquiry by an official commission of inquiry was instated or completed before the commencement of this Act.”¹²⁹

Not all earlier investigative inquiries laid a positive foundation for truth-seeking and in South Africa, commissions of inquiry were frequently used to support the regime rather than produce change. The conditions that structured and influenced the Goldstone Commission were themselves distinctive, as will be demonstrated in Chapter 7. Having already initiated a path of reform, the Government established the Goldstone Commission as part of a negotiated agreement to address the increase in violence. That this Commission

¹²⁶ The legislation stipulated “by way of an affidavit or sworn statement” *Prevention of Public Violence and Intimidation Bill* (1991), Section 7, § 2a).

The National Peace Accord (1991) says any individual, § 6.13.

¹²⁷ In NPA text “The Commission does not only act upon receiving a request from an individual, but may of its own accord investigate matters.” § 6.13, page 23.

¹²⁸ *Prevention of Public Violence and Intimidation Act*, Section 8.

¹²⁹ *Ibid.*, Section 7, § 5.

was part of a peace agreement, and that it operated as constitutional negotiations were moving forward, resulted in a necessary consensus about its core operating components. Through its operation, the Goldstone Commission distinguished itself from earlier commissions of inquiry in important ways, thereby increasing its credibility. Furthermore, some of the elements included in the design of the Commission's legislation enabled shortcomings that had been inherent in earlier commissions to be addressed. These components of gradual institutional change that are taken up in Chapters 7, 8, and 9. Adjustments in the institutional modalities of the Goldstone Commission help to explain some of the institutional innovations in the South African TRC.

5.4 The Truth and Reconciliation Commission of South Africa

The South African Truth and Reconciliation Commission (TRC) continues to be heralded as one of the most successful truth commissions to date. Its operation has been lauded as a cornerstone of South Africa's transition. Its notoriety as a response to the harms committed during Apartheid popularized the truth commission as an institution of redress. Though there were critics of the process at the time, the dominant perception, especially from international observers, was a positive one.¹³⁰

The Promotion of National Unity and Reconciliation Act, 1995 founded and structured the TRC in South Africa. With the stated goals of "promoting national unity and reconciliation," the commission's tasks were:

¹³⁰ For a helpful discussion on some of the criticisms towards the TRC, see Adrian Guelke, "Truth for Amnesty? The Truth and Reconciliation Commission and Human Rights Abuses in South Africa," *Irish Studies in International Affairs* 10 (1999): 21-30.

- a analysing and describing the ‘causes, nature and extent’ of gross violations of human rights that occurred between 1 March 1960 and 10 May 1994, including the identification of the individuals and organisations responsible for such violations;
- b making recommendations to the President on measures to prevent future violations of human rights;
- c the restoration of the human and civil dignity of victims of gross human rights violations through testimony and recommendations to the President concerning reparations for victims;
- d granting amnesty to persons who made full disclosure of relevant facts relating to acts associated with a political objective.¹³¹

The TRC was composed of three committees: the Human Rights Violations Committee (HRV), the Amnesty Committee, and the Reparations and Rehabilitation Committee.¹³²

The President appointed 17 commissioners to serve on the TRC, after public consultation.¹³³ It is noteworthy that not only were the Commissioners selected based on extensive public engagement, but the legislation passed by Parliament was also subjected to extensive public debate and input.¹³⁴

The HRV Committee received statements and compiled information on abuses perpetrated during the period covered by the mandate. This committee also facilitated the public hearings and invited victims to testify. According to the TRC report, “the corroborated allegations of gross violations of human rights contained in these 21 000

¹³¹ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 4, 57. For the full mandate see Promotion of National Unity and Reconciliation Act, Parliament of the Republic of South Africa, Act 95-34 (1995).

¹³² Boraine, "Truth and Reconciliation in South Africa: The Third Way," 145-146.

¹³³ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2002), 27.

¹³⁴ Andrew Rigby, *Justice and Reconciliation: After the Violence* (Colorado: Lynne Rienner Publishers, Inc., 2001), 126-128. See also, Hayner, *Unspeakable Truths*, 27.

statements form the basis for the Human Rights Violations Committee's conclusions about the nature of the conflict."¹³⁵ The public hearings that captured significant public and media attention were an innovation of the South African TRC. The HRV Committee and its staff determined which cases would be heard in the public hearings. Selected as "window cases," these cases represented the breadth of abuses that took place, in an attempt to provide a cross-sectional overview of the patterns of violations without an ability to provide every case with a public hearing.¹³⁶ The TRC also relied on statement takers that travelled to communities to record testimonies in written form.¹³⁷

The Amnesty Committee's mandate was to receive and adjudicate applications from individuals to determine whether amnesty would be granted. The Amnesty Committee process and hearings were also an innovation in the realm of truth commissions. The South African TRC was the first truth commission invested with the powers to grant amnesty. The Amnesty Committee received applications for amnesty for crimes "with a political objective" committed between March 1, 1960 and May 10, 1994.¹³⁸ Amnesty numbers are categorized based on whether individuals met the eligibility requirement to apply for amnesty and, whether those that met the criteria of political crimes were seeking amnesty for "gross human rights violations" or not.¹³⁹ Public hearings were only required for those who committed "gross human rights violations," with the others addressed

¹³⁵ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 6, 165.

¹³⁶ *Truth and Reconciliation Commission of South Africa Report: Volume One*, on personal truth Ch. 5, 113; on hearings, Ch. 116, 145-149; on trends, Ch. 111, 338-339.

¹³⁷ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 6, 141.

¹³⁸ *Ibid.*, Chapter 10, 267.

¹³⁹ *Truth and Reconciliation Commission of South Africa Report: Volume Six*, 11, see also section 11, Ch. 13 "Modus Operandi of the Committee," 36-39.

administratively.¹⁴⁰ In total, 7116 people applied for amnesty. Of these, 4500 applications were “rejected administratively for mostly having no political agenda.”¹⁴¹ Of the remainder, 1167 people were granted full amnesty, and 145 partial amnesty.¹⁴²

The Reparations and Rehabilitation Committee was responsible for “developing a policy for long-term reparations as well as urgent interim relief.”¹⁴³ The Reparations and Rehabilitation Committee was largely a recommending body, with Parliament responsible for the final decisions.¹⁴⁴ As such, this committee engaged in processes to gather information about reparations, including with non-governmental organizations and churches and conducting research on the impact of human rights violations on victims.¹⁴⁵ The Reparations and Rehabilitation Committee also developed witness support programs, which worked to support those who provided testimony at public hearings, and associated training for statement takers.¹⁴⁶

The public testimonies to the HRV committee and the amnesties that garnered the most attention, and behind the scenes, the TRC collected, compiled, and investigated thousands of testimonies. Investigative and research staff supported the hearings, as well as a significant administrative staffing component. Despite the “serious powers of search,

¹⁴⁰ Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Antwerp and Oxford: Intersentia Publishers, 2004), 108.

¹⁴¹ Sarkin, *Carrots and Sticks*, 110-111. See also: Antje du Bois-Pedain, *Transitional Amnesty in South Africa* (Cambridge: Cambridge University Press, 2007), 63.

¹⁴² Sarkin, *Carrots and Sticks*, 107-108.

¹⁴³ Boraine, "Truth and Reconciliation in South Africa: The Third Way," 146.

¹⁴⁴ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 5, 105, 128-129.

¹⁴⁵ *Ibid.*, Chapter 10, 286-287.

¹⁴⁶ *Truth and Reconciliation Commission of South Africa Report: Volume One*, 289-291.

seizure, and subpoena,” bestowed upon the Research Department, and the “sizeable and variegated structure established” in pursuit of the goals of the TRC,¹⁴⁷ the TRC faced difficulties in collecting and evaluating the information it received.¹⁴⁸

The TRC also contended with a number of challenges that illustrate a significant interaction with other accountability institutions, particularly the legal system. Individuals and organizations brought a number of court cases against the TRC with regards to its constitutionality,¹⁴⁹ review of amnesty decisions,¹⁵⁰ and parameters surrounding notification of the accused.¹⁵¹ In a high profile case, former president P.W. Botha was charged and prosecuted after he “failed to appear” after being subpoenaed to appear before the commission.¹⁵² This is important when considering the variety of state structures that supported the TRC to achieve its independence and reliability. In the South African case, this demonstrates the availability and deployment of state structures to support truth-seeking.

¹⁴⁷ Deborah Posel and Graeme Simpson, "The Power of Truth: South Africa's Truth and Reconciliation Commission in Context," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* ed. Deborah Posel and Graeme Simpson (Johannesburg: Witwatersrand University Press, 2002), 4, 3.

¹⁴⁸ Piers Pigou, "False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002), 51-53.

¹⁴⁹ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Ch. 7, 174-178.

¹⁵⁰ du Bois-Pedain, *Transitional Amnesty in South Africa*, 44-54.

¹⁵¹ Sarkin, *Carrots and Sticks*, 92-97.

¹⁵² *Truth and Reconciliation Commission of South Africa Report: Volume One*, Ch. 7, 197.

In October 1998, the TRC produced a five volume report detailing an overview of violence committed by the state and opposition forces.¹⁵³ The contentiousness of the process is illustrated in these final moments of the commission:

Former president F.W. de Klerk successfully sued to block the commission, at least temporarily, from naming him in the report. In addition, the ANC, unhappy with the commission's conclusion about its past actions, attempted to block publication of the entire report with a clumsy, last-minute court challenge; the court ruled in favor of the commission just hours before the report was due to be released.¹⁵⁴

The Amnesty Committee completed its operations in 2002 after the rest of the TRC had concluded operations, and produced additional volumes to add to the Commission's final report.¹⁵⁵

As discussed in Chapter 3, the South African TRC is considered one of the most successful truth commissions.¹⁵⁶ Despite the lack of agreement on what 'success' means,¹⁵⁷ the South African TRC is still presented as a model. Whereas most accounts of success look towards the impact of the TRC, this remains problematic because of a lack of empirical assessments of the relationship between truth and reconciliation and the difficulty assessing these claims.¹⁵⁸ However, accounts of the TRC often speak to innovations in its

¹⁵³ Charles Villa-Vicencio, "Constructing a Report: Writing up "Truth,"" in *Truth V. Justice*, edited by Robert I. Rotberg and Dennis Thompson (New Jersey: Princeton University Press, 2000), 283.

¹⁵⁴ Hayner, *Unspeakable Truths*, 31.

¹⁵⁵ *Ibid.*, 31.

¹⁵⁶ James L. Gibson, "On Legitimacy Theory and the Effectiveness of Truth Commissions," *Law and Contemporary Problems* 72, no. 2 (2009): 125. Michal Ben-Josef Hirsch, "Ideational change and the emergence of the international norm of truth and reconciliation commissions," *European Journal of International Relations* 20, no. 3 (2014): 818; Robert I. Rotberg, "Truth Commissions and the Provision of Truth, Justice, and Reconciliation," in *Truth V. Justice*, ed. Robert I. Rotberg and Dennis Thompson (New Jersey: Princeton University Press, 2000), 6.

¹⁵⁷ Tristan Anne Borer, "Reconciling South Africa or South Africans? Cautionary Notes from the TRC," *African Studies Quarterly* 8, no. 1 (2004): 20-23.

¹⁵⁸ Erin Daly, "Truth Skepticism: An Inquiry into The Value of Truth in Times of Transition," *The International Journal of Transitional Justice* 2 (2008): 23-41; David Mendeloff, "Truth-Seeking, Truth-

institutional components. The inclusion of powers of search and seizure, witness protection, and amnesty set the capacity of the truth commission apart from other truth commissions.¹⁵⁹ The TRC had significant breadth of powers and was bestowed with institutional features to carry out its truth-seeking endeavours including subpoena powers and search and seizure powers.¹⁶⁰ The procedural and institutional components of the TRC are indicators of success for its operation. The project does not extend the successful *operation* of the TRC to the potential outcomes of reconciliation or justice.

Gibson articulates the TRC as a success because of the impact on reconciliation and he focuses, in part, on the institutional characteristics that informed the process. Gibson argues that the degree to which society engaged the process, the ability of the commission to draw in the attention of citizens, the TRC's impartiality, even-handed blame attribution, the focus on restorative justice, and the leadership of the transition all contributed to its success. It was the credible manner in which the truth commission operated that contributed to reconciliation.¹⁶¹ For Gibson, institutional legitimacy is essential for effective truth commissions when explored in relation to reconciliation.¹⁶² Gibson argues that the success

Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?," *International Studies Review*, no. 6 (2004): 355-380. For an empirical assessment of this relationship that finds a positive relationship, see Gibson, "Contributions of Truth to Reconciliation," 409-432.

¹⁵⁹ Ben-Josef Hirsch, "Ideational change," 817-818; Boraine, "Truth and Reconciliation in South Africa: The Third Way," 144-153; Hayner, *Unspeakable Truths*, 27-28; Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," *Journal of International Affairs* 52, no. 2 (1999): 656.

¹⁶⁰ Boraine, "Truth and Reconciliation in South Africa: The Third Way," 146. See also, Audrey R. Chapman and Hugo van der Merwe, "Introduction: Assessing the South African Transitional Justice Model" in *Truth and Reconciliation in South Africa: Did the TRC Deliver*, ed. Audrey R. Chapman and Hugo van der Merwe (Philadelphia: University of Pennsylvania Press, 2008), 10, 12.

¹⁶¹ Gibson, "Contributions of Truth to Reconciliation," 416-418.

¹⁶² Gibson, "On Legitimacy Theory and the Effectiveness of Truth Commissions," 137, 141.

of the truth commission was potentially also related to the existing political culture in South Africa that comprised rule of law and political pluralism.¹⁶³ He also suggests that the proportion of victims and the leadership in the process contributed to its success.¹⁶⁴

According to Sarkin's definitional components that are more likely to produce a successful truth commission, South Africa's TRC performs well. Revisiting these institutional contributors to success, from Chapter 2, Sarkin includes characteristics such as independence, public support, wide accessibility, established after engagement with relevant actors, and designed in a way to meet the needs of the specific context.¹⁶⁵ The South African TRC measures well against these metrics. Established by the Government through Parliamentary legislation, the TRC was independent. That the TRC's operations and decisions were often contentious, is often used as an indicator that the TRC was not bound to specific parties. For example, there were criticisms that the TRC unevenly targeted the former regime, but on the whole the Commission operated independently.¹⁶⁶

The legislation that established the TRC was deliberated upon and the Government sought feedback from civil society.¹⁶⁷ Similarly, the process of Commissioner selection was transparent and engaged the public.¹⁶⁸ The Commission was also successful in its

¹⁶³ Gibson, "Contributions of Truth to Reconciliation," 420-427.

¹⁶⁴ Ibid., 420-427.

¹⁶⁵ Jeremy Sarkin, "Redesigning the Definition a Truth Commission, but Also Designing a Forward-Looking Non-Prescriptive Definition to Make Them Potentially More Successful," *Human Rights Review* (2018): 365-366.

¹⁶⁶ Gibson, "Contributions of Truth to Reconciliation," 416. See also, Lyn S. Graybill, "Pursuit of Truth and Reconciliation in South Africa," *Africa Today* 45, no. 1 (1998): 108-109; *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 1, page 8.

¹⁶⁷ Rigby, *Justice and Reconciliation: After the Violence*, 126-128. See also, Hayner, *Unspeakable Truths*, 27.

¹⁶⁸ Boraine, "Truth and Reconciliation in South Africa: The Third Way," 145.

accessibility, having established offices throughout the country and taking statements in communities.¹⁶⁹ Additionally, the public hearings had extensive reach on television, an innovation which has contributed to the TRC's public reputation.¹⁷⁰

Nichols identifies three characteristics that contribute to a truth commission's legitimacy. Nichols is interested in understanding how these features influence truth commission impacts. With the supposition that legitimacy is a "precondition" for success, Nichols outlines three characteristics or "components" of legitimacy related to truth commission success.¹⁷¹ These are authority, demonstrating a break with the past, and transparency; higher levels of each make a truth commission more likely to be legitimate.¹⁷² The ability for the South African TRC to garner legitimacy is an important indicator of its strength.

Nichols defines authority as being able to "carry out investigative functions, thus differentiating those bodies that merely whitewash crimes of the past from those that reveal difficult realities."¹⁷³ The South African TRC employed these capacities with extensive investigation and reporting as has been illustrated above. In Nichols' analysis on effects, this characteristic, authority, had the most significant impact on human rights and

It is important to note that the members of the Amnesty Committee were not appointed in the same way. These Commissioners were appointed by Nelson Mandela. The composition of the committee was also criticized because all of the members were lawyers. See Sarkin, *Carrots and Sticks*, 69-70.

¹⁶⁹ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 6, page 140-141.

¹⁷⁰ Posel and Simpson, "The Power of Truth: South Africa's Truth and Reconciliation Commission in Context," 7.

¹⁷¹ Angela D. Nichols, *Impact, Legitimacy, and Limitations of Truth Commissions* (Cham: Palgrave Macmillan, 2019), 31.

¹⁷² Nichols, *Impact, Legitimacy, and Limitations of Truth Commissions*, 31-39.

¹⁷³ *Ibid.*, 31.

violence.¹⁷⁴ The South African TRC was also established after a democratic transition, illustrating the “break with the past” that Nichols identifies. Finally, on the issue of transparency, which Nichols conceptualizes as a “holding public hearings and the release of a [truth commission’s] findings in a final report”, the South African TRC measures up well, having held extensive hearings and releasing a substantial report.¹⁷⁵

Against all of these metrics, the truth commission in South Africa can be considered successful. This is, of course, not to suggest that there were not shortcomings with the process. Some have questioned the degree to which the Commission actually used the powers that were granted to it, suggesting that the Commission did not make sufficient use of its powers to uncover information.¹⁷⁶ Pigou suggests that despite the Investigation Unit having the right to conduct searches and the opportunities to do so, these provisions were not well used.¹⁷⁷ The amnesty process, dealt with in-depth in Chapter 9 also raised concerns; the TRC faced criticisms for what seemed to be unequal applications of the criteria for amnesty.¹⁷⁸ One of the most prominent blunders was the decision to provide amnesty for 37 ANC members, despite problematic disclosures and the criteria of individual and conditional amnesty.¹⁷⁹ This decision was later reversed by the Courts.¹⁸⁰ Despite the prominence and significance of the public hearings, others point out that only

¹⁷⁴ Ibid., 88.

¹⁷⁵ Ibid., 36.

¹⁷⁶ Hayner, *Unspeakable Truths*, 28.

¹⁷⁷ Pigou, "False Promises," 57-58.

¹⁷⁸ Bhargava, "Defining Political Crimes," 1304-1339.

¹⁷⁹ Sarkin, *Carrots and Sticks*, 15-18.

¹⁸⁰ Gibson, "Contributions of Truth to Reconciliation," 423, note 426.

10% of people who provided statements to the TRC were able to share their stories in these hearings.¹⁸¹ Further, the process of statement taking has been criticized for stripping the narrative out of people's statements to ensure consistency with coding.¹⁸²

Despite these shortcomings, the TRC was able to investigate violence of the past, acknowledge some of the injustices, and produce a report that could serve as historical record. Although the TRC captivated the attention of many in the field of transitional justice, and efforts have been made to demonstrate its effectiveness, why it was as successful as it remains under-investigated. While the negotiations and political constraints on addressed the past help to explain why a truth commission was established, the particulars of the design decisions and operational dimensions warrant further attention. As the next four chapters demonstrate, the strength of the TRC, in terms of institutional innovations and capacities, can be explained in part with respect to its institutional predecessors.

Conclusion

This chapter has offered an overview of the Apartheid system and outlined the context of the negotiation process and the political transition. The chapter also examined measures to manage political violence during the negotiating period and identified some of the main actors associated with violence. In the final section, the Commission of Inquiry for the Prevention of Public Violence and Intimidation and the South African TRC were

¹⁸¹ Chapman and van der Merwe, "Introduction: Assessing the South African Transitional Justice Model," 10.

¹⁸² Buur, "Monumental Historical Memory: Managing Truth in the Everyday Work of the South African Truth and Reconciliation Commission," 78-79.

introduced. The chapter concluded by specifying the parameters for success of the TRC focused on the institutional credibility of the truth commission process.

Chapter 6

6 The Commission of Inquiry and Apartheid Violence

Throughout its history, South Africa has used commissions of inquiry to respond to incidences of public outcry or to pre-empt such outcry. The government frequently relied on the commission of inquiry to be seen to be doing something about particular issues, without actually addressing the underlying discrimination, repression, and sources of social and political problems.¹ There is thus a value in situating the moments of change and continuity in the commission of inquiry, specifying where it relied on its institutional roots, and where there are indicators of gradual change. While the institutional framework and guidelines for commissions of inquiry were well institutionalized, the analysis presented here argues that the operation of the Commission of Inquiry for the Prevention of Public Violence and Intimidation illustrates important changes away from the Apartheid commissions of inquiry.

Chapters 3 and 4 discussed the potential that the persistence of the commission of inquiry is important to the operation of truth commissions. The commission of inquiry and the truth commission share institutional features. As illustrated in Chapters 3 and 4, there are theoretical reasons to consider that the persistent or entrenched use of commissions of inquiry can lead to the reproduction of the status quo in later truth-seeking measures. The

¹ For example, on the Harms Commission, see: Allister Sparks, *Tomorrow is Another Country* (Sandton: Struik Book Distributors, 1994), 156; Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (Ann Arbor: The University of Michigan Press, 2013), 159; Matthew R. Keller, "Commissioning Legitimacy: The Global Logics of National Violence Commissions in the Twentieth Century," *Politics & Society* 37, no. 3 (2009): 382. On the Wessels Commission see, Philip Frankel, *An Ordinary Atrocity: Sharpeville and Its Massacre* (New Haven and London: Yale University Press, 2001), 199.

South African case demonstrates another variation, the deployment of existing information-gathering measures using the same institutional framework but that operates differently to strengthen information gathering. This chapter explores how a system of information-gathering in South Africa, the commission of inquiry, was entrenched and maintained reflecting path dependent characteristics. This sets up the analysis in the next chapter of the Goldstone Commission undergoing and facilitating gradual institutional change to strengthen information gathering.

The chapter first outlines the structural constraints that developed from operating commissions of inquiry under Apartheid. Then the chapter identifies the ways in which the credibility of investigations were affected by their use under Apartheid. The chapter briefly touches on the internal inquiries undertaken by the African National Congress. Despite the fact that these were not state-led, the decision to implement a commission of inquiry illustrates the entrenchment of the institution. These elements situate enduring elements in the Apartheid regime's recourse to the commission of inquiry to set up the discussion of the Commission of Inquiry for the Prevention of Public Violence and Intimidation in Chapter 7.

6.1 Entrenchment and Maintenance

To demonstrate how the Commission of Inquiry for the Prevention of Public Violence and Intimidation departed from its predecessors requires an investigation into how the patterns of investigation were entrenched under the Apartheid regime. Within the South African political system, commissions of inquiry were used fairly frequently. Between 1960 and 1994 alone, the Truth and Reconciliation Commission (TRC) report identifies 34

commissions of inquiry undertaken by the government.² The government used various commissions of inquiry to respond to public crises and general questions of governance. Some of these were high profile investigations, including the commission established after the Sharpeville Massacre—the Commission of Inquiry into Sharpville, Evaton and Vanderbijlpark Location Riots in 1960. Other high profile examples include the 1976 Commission of Inquiry into Matters relating to the Coloured Population Group, and the 1979 Commission of Inquiry into the Riots at Soweto and Elsewhere from 16 June 1976 to 28 February 1977.³ These types of commissions of inquiry played a prominent role in the entrenchment of Apartheid. As Sitze identifies:

It was also a Commission of Inquiry (or, to be precise, two such commissions) that produced the epistemic field within which Apartheid policies would emerge and then dominate white public opinion during the late 1940s and 1950s: in 1947 the Sauer Commission would recommend ‘total Apartheid between Whites and Natives,’ and in 1955, the Tomlinson Commission would plot out the industrialization of the ‘Black Areas’ created by the 1913 Native Land Act.⁴

The Sauer Commission is often portrayed as the source of “blueprints” for the implementation of Apartheid.⁵ For instance, it is suggested that the National Party’s Sauer Commission was used to “add flesh to the bare bones of the concept” of Apartheid that informed the party’s 1948 platform.⁶ There is some dispute about the degree to which the Sauer Commission clarified the meaning of Apartheid, or instead reflected divisions in

² *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 13, 498-506.

³ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 13, 498, 501, 502.

⁴ Sitze, *The Impossible Machine*, 132.

⁵ Saul Dubow, *Apartheid, 1948-1994*, First ed. (Oxford: Oxford University Press, 2014), 14.

⁶ Adrian Guelke, *Rethinking the Rise and Fall of Apartheid: South Africa and World Politics* (New York; Basingstoke, UK: Palgrave Macmillan, 2005), 85.

interpretations of how the idea of Apartheid might be implemented.⁷ The pertinent point here is that the Government relied on commissions of inquiry to determine how best to achieve and maintain white hegemony and economic success.

The recommendations emerging from these investigations were not evenly adopted by the Government. This helps to explain their value as “schemes of legitimation”, as Ashforth suggests.⁸ They produced findings through which the Government could justify its actions. These power relations served as positive-feedback for the use of this institution. As Pierson argues, “where certain actors are in a position to impose rules on others, the employment of power may be self-reinforcing. Actors may utilize political authority to change the rules of the game...to enhance their power.”⁹ These patterns help to explain the Apartheid regime’s use of commissions of inquiry, deployed by those in positions of power in order to strengthen and maintain that position.

The Tomlinson Commission, operating in the early 1950s, provides a useful example. The Tomlinson Commission was established to examine how Government policy toward the land-areas designated for the African population should be adjusted to manage growing urbanization, poverty, and overcrowding in the cities.¹⁰ The Tomlinson Commission recommended continued “separate development” for the races in South

⁷ Deborah Posel, "The Meaning of Apartheid before 1948: Conflicting Interests and Forces within the Afrikaner Nationalist Alliance," *Journal of Southern African Studies* 14, no. 1 (1987): 136-139. See also, Dubow, *Apartheid, 1948-1994*, 15.

⁸ Adam Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa* (Oxford: Oxford University Press, 1990), 3.

⁹ Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton and Oxford: Oxford University Press, 2004), 36.

¹⁰ Deborah Posel, "The Apartheid Project, 1948–1970," in *The Cambridge History of South Africa*, ed. Robert Ross, Anne Kelk Mager, and Bill Nasson (Cambridge: Cambridge University Press, 2011), 338.

Africa.¹¹ As Posel notes, however, the Commission also recommended “a far-reaching and expensive programme of economic rehabilitation and development in the reserves. But these were rejected...”¹² The introduction to the Tomlinson report illustrates the degree to which information was gathered and compiled in this endeavour. In just under five years, the Commission accepted oral evidence and memoranda, conducted tours to the African areas, and produced a 51 chapter report totalling almost 4,000 pages.¹³ This is important because it demonstrates state efforts to investigate, and illustrates that the machinery of the commission of inquiry was, accordingly, well-entrenched.

As a product of the oppressive system and a mechanism of enforcing state power, the commission of inquiry could be, and was, used over and over again to serve the aims of white interests. This purpose for the institution helps to explain why it endured. Successive uses of the commission of inquiry, as is demonstrated below, offered the government a means through which to enforce racially motivated policies.

¹¹ F.R. Tomlinson, Summary of the Report of the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa, U.G.61/1955, 1955, A1906, Reverend Douglas Chadwick Thompson Papers, 1871-1985, ZA HPRA 1906, An1.6 - Part V Recommendations: 194, Historical Papers Research Archive, University of the Witwatersrand, Johannesburg, South Africa, <http://historicalpapers-atom.wits.ac.za/uploads/r/historical-papers-research-archive-library-university-of-witwatersrand/f/1/a/f1a5413309b25df3af1b02c099de51095663b5a2cbda02fe18c193369fa74f73/A1906-An1-6-001-jpeg.pdf>.

¹² Posel, "The Apartheid Project, 1948–1970," 338.

¹³ F.R. Tomlinson, Summary of the Report of the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa, U.G.61/1955, 1955, A1906, Reverend Douglas Chadwick Thompson Papers, 1871-1985, ZA HPRA A1906, An1.1 - Title Pages and Table of Contents: xvii-xviii, Historical Papers Research Archive, University of Witwatersrand, Johannesburg South Africa, <http://historicalpapers-atom.wits.ac.za/uploads/r/historical-papers-research-archive-library-university-of-witwatersrand/8/a/3/8a3fae005c5ad755e73978c80680bb549403124ae3897ae8c7ac663363727541/A1906-An1-1-001-jpeg.pdf>.

The majority of South Africans had no legal avenue to protest against state laws and policy, and as such, the recourse to voice dissent was often physical protest and marches.¹⁴ Often, peaceful marches ended in violence. The accompanying violence demanded a state response but did not, from the perspective of those in power, require redress or significant adjustment to power relations. But, to demonstrate some response, commissions of inquiry were often deployed. Their use strengthened government positions and often resulted in more restrictions.

Adam Sitze provides a comprehensive assessment of commissions of inquiry as an arbiter to reinforce state power.¹⁵ In South Africa, Sitze suggests, “Commissions tasked with gathering information about acts of violence committed by state officials were not the exception but the rule.”¹⁶ Freund points to the Beaumont and Godley Commissions as having played important roles in the development of the 1923 Native Urban Areas Act, which he describes as “the charter for racial segregation in the cities and towns of South Africa.”¹⁷

Both Sitze and Frankel recognize an underlying dimension of “balance” in the reports of such inquiries. This type of pattern that persisted across numerous commissions in order to reach conclusions that designated a shared blame—police were to blame insofar as

¹⁴ Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor* (New Haven and London: Yale University Press, 2000), 36.

¹⁵ Sitze, *The Impossible Machine*, 157.

¹⁶ *Ibid.*, 132.

¹⁷ Bill Freund, "South Africa: The Union Years, 1910-1948 – Political and Economic Foundations," in *The Cambridge History of South Africa*, ed. Robert Ross, Anne Kelk Mager, and Bill Nasson (Cambridge: Cambridge University Press, 2011), 236.

civilians were to blame for their roles in violence.¹⁸ Frankel argues that the context of the inquiries shaped findings. According to Frankel, “while the police were technically under observation for an act of gross public violence, this took place within the context of a system with an inbuilt presumption that black protest was unacceptable if not demonic.”¹⁹ This, despite the repressive nature of Apartheid’s enforcement. The legacies of these commissions’ reports are the absence of responsibility assigned to the system itself, the mechanisms of enforcement, and unsubstantial investigation and reporting on the role of the police and military.

One of the effects of the events at Sharpeville in 1960 which saw unarmed protestors shot by police was the international outcry that Sharpeville provoked.²⁰ Frankel’s exploration of the Wessels commission, implemented to investigate the 1960 Sharpeville Massacre, illustrates how commissions, even in situations that caused international uproar, could be used by the Government to justify its use of force in maintaining the racist system.

According to Frankel:

The exact circumstances surrounding the actual shooting were never fully delved into, while the Commission, to its very end, avoided, circumvented, or lightly touched upon many of the important technical and brutal aspects of the killings - such as the type of ammunition used by the SAPS and the actions of the black police whom the SAP, in their official history of the events of the sixties, admit 'occasionally acted without self-restraint and in an undisciplined manner'.

Many of these omissions could be put down to considerations of time rather than to conscious calculation. Like the Diemont Commission which considered the

¹⁸ Sitze refers to this as ‘concomitant cause’ whereby all parties were to blame and restraint on the part of the state could not really be expected given the ‘threat’ they were facing. Sitze, *The Impossible Machine*, 164-165. Frankel refers to the Wessel’s Commission production of an “inherent duality” about the events of Sharpeville that have persisted, Frankel, *An Ordinary Atrocity*, 199.

¹⁹ Frankel, *An Ordinary Atrocity*, 193.

²⁰ Saul Dubow, "Were There Political Alternatives in the Wake of the Sharpeville-Langa Violence in South Africa, 1960?," *Journal of African History* 56, no. 1 (2015): 125.

simultaneous disturbances at Langa, the Wessels Commission was obliged to produce a publicly palatable set of conclusions in a very short time. Still, its overall findings, read four decades later, are so densely unintelligible, so ridden with double-talk, qualifications, and refutable logic as to defy both legal reasoning and ordinary comprehension.²¹

The undercurrent in Frankel's analysis is that the state's actions at Sharpeville at this time were not patently rebuked. The investigation found fault in the actions on both sides, but police were not blamed.²² Instead, the aftermath of the Sharpeville massacre saw increased repression through existing legislation.²³ It was in the aftermath of the protest and massacre that the African National Congress and Pan-African Congress were banned.²⁴ Frankel's passage is important in highlighting how the state's engagement with the commission of inquiry could be used to strengthen its position on power. Sitze suggests that in the context of the Wessels commission, the commission of inquiry became a tool through which the government could achieve another dimension of control, "decreas[ing] the perception of racial hatred abroad."²⁵ This benefits of the commission of inquiry for the government were extensive and this helps to explain their continued use.

In some cases, observers suggest that the commission of inquiry *did* result in some change in government practice. That the commission of inquiry could open a space for change or reform is a complex representation given the comprehensive structures of Apartheid. Waldmeir, for example, describes government commissions as "that unlikely

²¹ Frankel, *An Ordinary Atrocity*, 192.

²² Sitze, *The Impossible Machine*, 180.

²³ Frankel, *An Ordinary Atrocity*, 189.

²⁴ Anne Kelk Mager and Maanda Mulaudzi, "Popular Responses to Apartheid: 1948-c. 1975," in *The Cambridge History of South Africa*, ed. Robert Ross, Anne Kelk Mager, and Bill Nasson (Cambridge: Cambridge University Press, 2011), 396; Sparks, *Tomorrow is Another Country*, 23.

²⁵ Sitze, *The Impossible Machine*, 181.

but effective instrument of change.”²⁶ Waldmeir’s analysis of the Cillie Commission, the Commission of Inquiry into the Riots at Soweto and Elsewhere, appointed to investigate the protest and police shooting at Soweto in 1976, illustrates this perspective:

From a government-appointed commission headed by an Afrikaner judge, one might have expected a whitewash. But this, surprisingly, was never the National Party’s way; throughout the 1970s and 1980s, government was advised by commissions that told a fairly accurate version of the truth. The Cillie Commission presented Apartheid, for the first time, as part of the South African problem, and government accepted this diagnosis. Nearly a decade would pass before Pretoria would act on Cillie’s analysis; nonetheless, it sowed doubts.²⁷

This rather optimistic reading presents the commission as planting the seeds of necessary change. However, it also includes several assumptions that are somewhat difficult to connect, including a ten-year period between cause and effect.

The 1976 Soweto Uprising offers another example in which protest against Apartheid laws and repression was met with further suppression. Student-organized protest against the State’s enforcement of a law that stipulated that education had to be carried out in the Afrikaans language prompted waves of student protests. Initially, protests by students took the form of class boycotts.²⁸ On June 16, 15,000 students began a march towards the school in Soweto that had been a site of contestation against the education ruling.²⁹ According to the TRC Report, after firing teargas, the police opened fire in response to students throwing stones, and killed two students, which “fundamentally transformed the nature of the student protest from a peaceful march into a violent confrontation with government’s security

²⁶ Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* (New Brunswick, N.J.: Rutgers University Press, 1998), 31.

²⁷ *Ibid.*, 24.

²⁸ Tom Lodge, "Resistance and Reform, 1973-1994," in *The Cambridge History of South Africa*, ed. Robert Ross, Anne Kelk Mager, and Bill Nasson (Cambridge: Cambridge University Press, 2011), 419.

²⁹ Lodge, "Resistance and Reform, 1973-1994," 420.

forces.”³⁰ The aftermath saw what Lodge describes as a “state of insurrection” in Soweto but the protests continued into 1977.³¹ The protests died down at the end of 1977,³² with 575 fatalities and over 2000 injured during the period between 16 June 1976 and 28 February 1977.³³

Based on testimony it received and its review of the Cillie Commission testimony, the TRC Report found “the police and the former state responsible for creating the climate in which these deaths took place.”³⁴ Specifically relating to the police, the TRC identified that “the police adopted a shoot-to-kill policy.”³⁵ With respect to the Cillie Commission itself, the TRC made findings against the Commission for not taking student and community evidence into consideration in determining cause and creating a culture of impunity for the police.³⁶ This is a significantly different assessment to Waldmeir’s above.

The tensions in these assumptions are magnified by Sitze’s reading of the 1979 Cillie Commission into the police shootings at Soweto. The difference in the interpretations lies in the overarching rationale for the commission of inquiry as an institution.³⁷ Rather than interrogating the Apartheid system itself, as Waldmeir suggests, Sitze identifies that the issue was to be solved by focusing on the “agitators, intellectuals, and ‘radical student

³⁰ The aftermath saw the crowds murder two white men working in Soweto, see *Truth and Reconciliation Commission of South Africa Report: Volume Three*, Chapter 6, page 559.

³¹ Lodge, “Resistance and Reform, 1973-1994,” 420.

³² *Ibid.*, 421.

³³ *Truth and Reconciliation Commission of South Africa Report: Volume Three*, Chapter 6, page 569.

³⁴ *Ibid.*, 570.

³⁵ *Ibid.*, 570.

³⁶ *Ibid.*, 570.

³⁷ Sitze, *The Impossible Machine*, 182-183.

groups' who persist in calling racist laws into question."³⁸ In Sitze's evaluation, what Waldmeir identifies as *not* a "whitewash" was not grounded in an even-handed approach, nor did the commission of inquiry shed its repressive nature.³⁹ Rather, the performative value of the commission of inquiry was, similar to the Wessels Commission, to speak to the international realm, to demonstrate to foreign investors that there was sufficient political stability.⁴⁰

Commissions of inquiry set up to address labour relations are also identified as contributors to shifts in the economic dimension of race relations in Apartheid South Africa, despite their embeddedness in the racist structures. The government established the Wiehahn and Riekert Commissions in 1977, in the aftermath of massive worker strikes and the development of then-illegal black unions.⁴¹ Although the reforms proposed by these Commissions are identified as turning points, these seem to be the result of unintended consequences rather than concerted efforts at reform. Even these unexpected outcomes are mired in repressive goals.

Wood, for example, points to the unintended consequences of labour reforms as a factor that enabled mobilization towards democracy. She points to the labour inquiries as a factor recognizing that, "significant changes to labor regulations, influx controls, township governance, and other restrictions on African workers and residents were made

³⁸ Sitze, *The Impossible Machine*, 175.

³⁹ *Ibid.*, 179.

⁴⁰ *Ibid.*, 180.

⁴¹ Danelle van Zyl-Hermann, "White Workers in the Late Apartheid Period: A Report on the Wiehahn Commission and Mineworkers' Union Archival Collections," *History in Africa* 43 (2016): 237-238; W.J. Vose, "Wiehahn and Riekert revisited: A review of prevailing Black labour conditions in South Africa," *International Labour Review* 124, no. 4 (1985): 448. See also Lodge on worker strikes and uprisings, Lodge, "Resistance and Reform, 1973-1994," 411-415.

at the recommendations of the Wiehahn and Riekert Commissions beginning in 1979.”⁴² However, these examples also demonstrate the restrictive nature of commissions’ investigations and recommendations in light of the Apartheid system. Vose, for example, argues that the recommendations strengthened rather than loosened state control over labour.⁴³

A recommendation from the 1977 Wiehahn Commission, that black unions be legalized, had significant effects on the prospects for reform.⁴⁴ As van Zyl-Hermann argues, however, although the reforms were “hailed as ‘major’ at the time, these reforms sought to offer concessions to sections of the African population in order to contain resistance and safeguard continued white, Afrikaner-led control over the state and economy.”⁴⁵ The system of segregation itself was not addressed. For example, Vose’s 1985 review of the two commissions states that “Riekert thus failed to challenge the system of separate development with its far-reaching labour policy implications.”⁴⁶ The Wiehahn and Riekert Commissions are important because they help to illustrate how commissions of inquiry were established and conducted, efforts at reforms discussed, but with limited change to the system itself.⁴⁷ These examples of commissions of inquiry in South Africa

⁴² Wood, "An Insurgent Path to Democracy," 876.

⁴³ Vose, "Wiehahn and Riekert revisited: A review of prevailing Black labour conditions in South Africa," 462.

⁴⁴ Waldmeir, *Anatomy of a Miracle*, 27.

⁴⁵ van Zyl-Hermann, "White Workers in the Late Apartheid Period: A Report on the Wiehahn Commission and Mineworkers’ Union Archival Collections," 238-239.

⁴⁶ Vose, "Wiehahn and Riekert revisited: A review of prevailing Black labour conditions in South Africa," 461.

⁴⁷ The Wiehahn Commission is particularly interesting in this regard because of its size with 11 white commissioners, and one black commissioner, one coloured commissioner, and one Indian commissioner. See, van Zyl-Hermann, "White Workers in the Late Apartheid Period: A Report on the Wiehahn Commission and Mineworkers’ Union Archival Collections," 241.

demonstrate their frequent use, with benefits for the government in terms of control. Commissions of inquiry served to strengthen the origins of Apartheid rules, and addressed protest and associated violence in a manner that protected the state. Some changes were ceded—but with an end toward regime preservation, not in an effort to dismantle or restructure the system of Apartheid itself. The frequent return to this institutional structure in response to unrest suggests it was well-entrenched as a state response and usually worked in the state’s favour. In line with Pierson’s argument that “the allocation of political authority to particular actors is a key source of positive feedback,”⁴⁸ these outcomes demonstrate the value of the commission of inquiry and its entrenchment over time. The regime used commissions of inquiry to maintain its hold on power.

Given shortcomings in commission of inquiry use in response to violence, selecting this same tool as part of the democratic transition raises important questions relating to their value for credible information gathering in response to violence. Further, state security forces were not only the subject of enquiries, these forces were also involved in the conduct of inquiries. The next section outlines investigation issues associated with these institutional structures in order to better situate the challenges facing the Commission of Inquiry for the Prevention of Public Violence and Intimidation.

6.2 Credibility Problems

The Apartheid system depended on significant policing to uphold Apartheid laws. The South African Police (SAP) had been used to enforce the unjust laws and segregation of Apartheid since its implementation in 1948. Even before the formal institutionalizing of

⁴⁸ Pierson, *Politics in Time*, 36.

Apartheid, racially differentiated practices were forcefully imposed.⁴⁹ Policing and its associated violence was justified as necessary for maintaining the racist system.⁵⁰ The powers of the security forces increased as perceived threats to the state grew from opposition forces. What limits there were on power decreased in the 1960s with the development of legislation that allowed for detention without charge and vague rules about the policing of opposition.⁵¹ Posel captures the undergirding relationship in stating that “the police were [thus] regarded as an arm of government, mandated to enforce its authority, rather than as a relatively independent agency to protect the populace.”⁵² As the armed struggle and negotiations continued, the police-community nexus was evermore enmeshed with distrust: under-resourced, disproportional responses, arbitrary arrest and detention, and numerous deaths in police custody.⁵³ As a result, perceptions of police in the community, and among anti-Apartheid actors, were frequently negative.⁵⁴

As discussed in the previous chapter, a significant problem facing South Africa preceding and during the transition years were allegations—proven and unproven—of

⁴⁹ Mike Brogden and Clifford D. Shearing, *Policing for a New South Africa* (Florence: Routledge, 1997), 10-11.

⁵⁰ Brogden and Shearing, *Policing for a New South Africa*, 16.

⁵¹ Dubow, *Apartheid, 1948-1994*, 45. On vague ‘rules’ see Brogden and Shearing, *Policing for a New South Africa*, 17-18. For instance, police policies of shoot to kill and allowing firearms as a means of crowd control.

⁵² Posel, "The Apartheid Project, 1948–1970," 347.

⁵³ Posel, "The Apartheid Project, 1948–1970," 347. The TRC report and many of the TRC amnesty hearings of former security forces personnel illustrate the types of violence, and the entrenchment of clandestine security operations in the violence of the transition. See *Truth and Reconciliation Commission of South Africa Report: Volume Six*.

⁵⁴ Independent Board Of Inquiry Report, 16 August 1993, 5-7. IBI Collection. AG2543 3.7, file AG2543/3.3-3.7 IBI Memoranda, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

police involvement in violence leading up to the transition.⁵⁵ Allegations of police complicity in violence were pervasive as were allegations of police involvement in covering up the crimes that led to these allegations. The manner in which governance and policing were enmeshed under Apartheid raise considerable doubts for meaningful and impartial investigation capacities without a regime change.

A frequently cited example of security force involvement in violence is the case of the Trust Feed Killings.⁵⁶ In this 1988 incident, 11 people were killed after an attack on a house that has since been found to have been planned and executed by the police in conjunction with Inkatha operatives. As the TRC report indicates:

An attack on the Trust Feed area was planned for December 1988, involving members of Inkatha and special constables. After a police ‘clean-up’ operation to disarm and round up UDF suspects, the police would withdraw, leaving Inkatha members and the special constables to launch an attack on UDF members.⁵⁷

Sparks describes the aftermath as “an elaborate police cover-up”⁵⁸ with police stalling the investigation until a “police officer with integrity and courage” got wind of the case and had arrested the key police players within two weeks.⁵⁹ The Trust Feed case is significant in that it demonstrates both police involvement in violence along with the internal cover-ups, but also the possibility that not all members of the security forces were complicit in

⁵⁵ Timothy D. Sisk, "The Violence-Negotiation Nexus: South Africa in Transition and the Politics of Uncertainty," *Negotiation Journal* 9, no. 1 (1993): 84-86. See also, Chris Spies, "South Africa's National Peace Accord: its structures and functions," in *Accord: an international review of peace initiatives*, ed. Catherine Barnes (London: Conciliation Resources, 2002), 24.

⁵⁶ For summaries of the incident, see Sparks, *Tomorrow is Another Country*, 165-168. *Truth and Reconciliation Commission of South Africa Report: Volume Three*, Chapter 3, 198-202.

⁵⁷ *Truth and Reconciliation Commission of South Africa Report: Volume Three*, Chapter 3, 198.

⁵⁸ Sparks, *Tomorrow is Another Country*, 167.

⁵⁹ *Ibid.*, 167.

the crimes committed. This last point is important for the analysis of gradual change to the structural conditions in the next chapter.

The reliability of and public trust in the police are particularly important for the current discussion, given that investigations conducted by commissions of inquiry were supported, if not carried out, by investigators within the South African Police force. This meant that the police were directly involved in conducting investigations involving allegations against police and military personnel. Goldstone identifies that “the police had little if any credibility among the majority of South Africans.”⁶⁰ Ellis suggests that even after the transition, “a far more difficult task faces the Police, trained by the outrages which they perpetrated before 1994...”⁶¹ To rely on police to investigate violence thus presented challenges for credibility and legitimacy.⁶²

This tension is particularly evident in the Harms Commission, the very purpose of the which was the investigation of hit-squad activity allegedly tied to the state. As discussed in Chapter 5, allegations of the so-called “third force” were difficult to prove though the phenomenon seemed pervasively to be known.⁶³ Issues with investigations conducted by commissions and the involvement of the police speaks to the crux of the issue this project

⁶⁰ Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor* (New Haven and London: Yale University Press, 2000), 33.

⁶¹ Stephen Ellis, "The Historical Significance of South Africa's Third Force," *Journal of Southern African Studies* 24, no. 2 (1998): 295.

⁶² See also discussion by Daniel Terris, *The Trials of Richard Goldstone* (New Brunswick: Rutgers University Press, 2019), 84.

⁶³ The Third Force is the dominant term used during the negotiations referring to instigators of violence, assumed to be state-led, that were responsible for often seemingly random attacks. See, Ellis, "The Historical Significance of South Africa's Third Force," 261-264.

is investigating. The establishment of the Harms Commission by de Klerk in 1990 illustrates the pervasiveness of the issue.

The government established the Harms Commission of Inquiry, the Commission of Inquiry into Certain Alleged Murders, to investigate the allegations of death squads in the security forces. In the introduction of the Harms Commission report, the issue is taken up directly:

At the opening of the commission I pointed out that it was valid question whether it was proper to use police in the investigation, especially in respect of the part of the investigation which deals with the allegations involving police. I said that I had no other solution available and that in the absence of a factual basis one could not condemn the SAP as a whole. I then stated that should any facts be brought to my attention which reflect upon the ability of any officer to assist the Commission, immediate action would be taken. Not once was the ability of any officer questioned. No-one presented an alternative. I can say without fear of contradiction that the Commission would not have been able to function properly without its officers. Their dedication and behaviour was exemplary.⁶⁴

The Harms Commission reported that it was unable to find evidence of the hit squad activity under investigation, based on the determination that witnesses were unreliable.⁶⁵

Evidence has since emerged that witnesses did not tell the truth to the Harms Commission.⁶⁶ Media coverage of the report identifies that Harms “admitted it was likely that the police had committed crimes of violence, but said he found no evidence that ‘a

⁶⁴ L.T.C. Harms, Chairman and Sole Member, Commission of Inquiry into Certain Alleged Murders Report (Pretoria: September 1990), 31. NMAP, 4.2, folder 156, Nelson Mandela Centre of Memory, Johannesburg, South Africa.

⁶⁵ David B. Ottaway, "Hit-Squad Report Sparks Outcry in South Africa," *The Washington Post*, November 17, 1990, accessed online, <https://www.washingtonpost.com/archive/politics/1990/11/17/hit-squad-report-sparks-outcry-in-south-africa/c83d2505-df49-45bd-93b6-14b39bf29f17/>.

⁶⁶ James Gump, "Unveiling the Third Force: Toward Transitional Justice in the USA and South Africa, 1973-1994," *Safundi: The Journal of South African and American Studies* 15, no. 1 (2014): 91. See also: "O'Malley's Political Interviews, 25 Nov. 1996, Meyer, Roelf," The O'Malley Archive, O'Malley: The Heart of Hope, accessed April 16, 2020, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/031v00017/041v00344/051v00965/061v01078.htm>.

particular policeman committed a particular crime of violence for a particular purpose.”⁶⁷

That the report claims that hit-squads did not exist was not surprising to civil society organizations that had been reporting on violence with relative frequency. While the Harms Commission reported inconclusively, civil society organizations like the Independent Board of Inquiry continued to investigate and report on information related to such allegations.⁶⁸

Media reports reported that “human rights and anti-Apartheid groups, the media and political commentators have lambasted the commission for failing to issue any indictments or shed much light on how so many activists over the past decade died under mysterious circumstance.”⁶⁹ More pointedly, du Toit argues that with the Harms Commission the “legalistic facade” of commissions of inquiry “finally began to come apart in public.”⁷⁰ Thus, the Harms Commission could not lay the issue of hit squads to rest. Moreover, the Harms Commission perpetuated the perception that the commission of inquiry was a means to maintain the status quo and not a change oriented instrument. This is important because it highlights the significance of the degree of change that the commission of inquiry underwent through the Goldstone Commission. Allegations of hit-squads persisted and were later investigated by the Goldstone Commission when sufficient

⁶⁷ Christopher S. Wren, "Inquiry in South Africa Inconclusive," *The New York Times*, November 14, 1990, accessed online, <https://www.nytimes.com/1990/11/14/world/inquiry-in-south-africa-inconclusive.html>

⁶⁸ The reports of the IBI illustrate these allegations. Housed at Wits Historical Papers, some of the collection has been digitized and is available at: <http://www.historicalpapers.wits.ac.za/?inventory/U/collections&c=AG2543/R/8125>

⁶⁹ David B. Ottaway, “Hit-Squad Report Sparks Outcry in South Africa,” *The Washington Post*, November 17, 1990.

⁷⁰ André du Toit, "A Need for ‘Truth’: Amnesty and the Origins and Consequences of the TRC Process," *International Journal of Public Theology* 8 (2014): 398.

evidence came to light to confirm their operation shortly before the election.⁷¹ Procedurally, the Goldstone Commission also addressed the policing perception problem as is explored in the next chapter.

6.3 ANC Inquiries

Though the focus of this project is explicitly on state-initiated investigations, the issue of credibility necessitates a brief consideration of the ANC's own internal inquiries. This also illustrates the entrenchment of the system of the commission of inquiry. When considering why a commission of inquiry would be the vehicle of choice in the transition despite South Africa's history of oppression, it is worth noting that investigatory commissions could also be carried out, and were, without presidential authorization.⁷² They could be used by non-governmental actors. Such commissions also played an important role in information gathering and considerations into violence. Commissions created by non-government bodies, had "no greater power or protection than that enjoyed by a private individual in the conduct of his affairs and must rely on the voluntary cooperation of witnesses."⁷³ This is particularly relevant in situating the ANC commissions of inquiry that preceded the democratic transition. The ANC established the Skweyiya and Motsuenyane commissions of inquiry in 1991 and 1993, respectively, to investigate complaints internal to the ANC

⁷¹ There were other investigation efforts beyond the Goldstone Commission, another investigation into security force involvement in hit squads was appointed through the Attorney-General's office. See: Piers Pigou, "False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002), 54-56. See also Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 57.

⁷² A.J. Middleton, "Notes on the Nature and Conduct of Commission of Inquiry: South Africa," no. 19 (1986): 253.

⁷³ *Ibid.*, 253.

structures, particularly in military camps operated by the ANC.⁷⁴ The ANC's initiative in undertaking internal investigations has been praised, despite the criticisms levied by external observers to the process.⁷⁵ While these commissions identified instances of significant rights violations and made recommendations, the processes, outcomes, and implementation of recommendations were entirely dependent on the ANC organization itself.

It is notable that the opposition forces viewed the inquiries or investigations as a mechanism that could shed light on the issues that were under investigation. While it has been noted that the ANC demonstrated a certain initiative in investigating human rights in this way, the chosen approach for the process has received less attention. Without the constraints of state-led investigations or challenges of governance, the ANC could, theoretically, have chosen any sort of investigation. In some senses, the ANC's reliance on this type of investigation re-articulated the continuing utility or legitimacy of this type of institution. In the South African context, one indicator of the degree to which the institutionalization of commissions of inquiry had become entrenched as an appropriate means of investigation is its use even by non-state actors. This is significant because it illustrates a sense of legitimacy in the process of the commission of inquiry, which helps to demonstrate the degree to which it was entrenched.

Though the circumstances of their implementation and operation are remarkably different from a state-led and state-financed inquiry, the value of this kind of unofficial

⁷⁴ *Truth and Reconciliation Commission of South Africa Report: Volume Two*, Chapter 4, 350-351.

⁷⁵ Priscilla B. Hayner, "Fifteen Truth Commissions — 1974 to 1994: A Comparative Study," *Human Rights Quarterly* 16, no. 4 (1994): 625-626, 632-634.

investigation and reporting is still an important consideration. Key illustrations of both continuity and change suggest the ANC-led inquiries follow similar patterns in implementing successive inquiries. For example, as Ellis notes, the ANC established the Motsuenyane Commission after the Skweyiya Commission based on continuing pressures, “partly because of the limits to its terms of reference.”⁷⁶ The Skweyiya Commission report identifies in its introduction that Mandela wanted the commission to investigate complaints and to “establish whether or not they are correct, and if they are, what action it should take in consequence thereof.”⁷⁷ The investigation’s proceedings were not made public, though a public report was to be released with names removed at the discretion of the commission.⁷⁸ According to an ANC circular, *Mayibuye*, the purpose of this was to ensure that the organization adequately addressed people’s complaints.⁷⁹

The implementation of successive internal investigations, with panels of lawyers investigating allegations of abuse, has an important implication for this study. The use this type of investigative body suggests it had some legitimacy among members of the organization and sufficient credibility to satisfy external pressures to do something about the issue of potential human rights abuses against people in detention at the ANC camps. Though compelling, the influence of these commissions is beyond the scope of this project. They are mentioned here only to acknowledge the degree to which the commission of

⁷⁶ Stephen Ellis, "Mbokodo: Security in ANC Camps, 1961-1990," *African Affairs* 93, no. 371 (1994): 281.

⁷⁷ Report of the Commission of Enquiry into Complaints by Former African National Congress Prisoners and Detainees, August 1992, 6. Community Agency for Social Enquiry Records 1990-1996, AG2838, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

⁷⁸ *Ibid.*, 7,8.

⁷⁹ “Commission of inquiry into detentions,” *Mayibuye*, October 1991, 22. South African Institute of Race Relations, Press Cuttings, Part A, 1928-1998, AD1912, Folder GC 22, M.170.1 Multi-Party Conference 1991, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

inquiry was entrenched in the political landscape in South Africa. The inescapable discussions about the moral non-equivalence of forces struggling to end Apartheid and those operating to enforce Apartheid suggest that disentangling this influence will be difficult, though it is necessary.⁸⁰

Neither the ANC's internal commissions, nor the Commission of Inquiry for the Prevention of Public Violence and Intimidation, nor the Truth and Reconciliation Commission, appear to be tools of acquiescence to the status quo despite similar institutional frameworks. However, government-initiated commissions had to be augmented for the transitional purposes for which they were intended, in order to avoid the legacies of government partiality. The next chapter demonstrates how the Commission achieved this credibility. Including the operating structure and mandate of the Commission of Inquiry for the Prevention of Public Violence and Intimidation in the National Peace Accord, 1991, suggests that there was consensus on the utility of such an institution to investigate violence during the transition. Furthermore, the Goldstone Commission became operational within weeks of agreement to the National Peace Accord. This suggests that the Government furnished the Commission with the necessary resources to support the peace initiatives.⁸¹ The relative readiness of the Commission's mandate and operational

⁸⁰ See TRC report for consideration of the moral dimension, *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 1, 12-13.

⁸¹ The National Peace Accord was signed on 21 September 1991. The first hearings of the Goldstone Commission started on November 15, 1991 according to Section 3 of the Commission of Inquiry for the Prevention of Public Violence and Intimidation, "Report on the Violence at Tokoza." Pretoria, 17 November 1992.

capacity can be understood as a result of the familiarity with the process and available legislation.⁸²

Conclusion

South Africa's previous experience with commissions of inquiry was problematic. Used by the state to entrench the Apartheid system and maintain order, the use of another commission of inquiry to facilitate negotiations could have suffered the same institutional problems, supporting the status-quo for the regime rather than acting as an agent of change. This chapter has demonstrated that the commission of inquiry persisted during the Apartheid regime because it served the interests of those in power. The institution had some consensus as a means to investigate, as is illustrated by their use by non-governmental actors. The next chapter investigates how this institutional foundation underwent a process of gradual change, as illustrated in the operation of the Commission of Inquiry for the Prevention of Public Violence and Intimidation.

⁸² Acknowledging that the legislation itself had been passed months earlier, discussed in more detail in the next chapter.

Chapter 7

7 Gradual Institutional Change and the Goldstone Commission

As the previous chapter illustrated, commissions of inquiry usually failed to find fault with the system and state agents, police, and security forces were not held accountable for violence. This chapter examines how the Commission of Inquiry for the Prevention of Public Violence and Intimidation was able to address the legacies of the commission of inquiry in South Africa in order to restore credibility to the investigation process, in turn strengthening the operating conditions for the Truth and Reconciliation Commission. The argument is presented in two steps.

First, the chapter argues that the context of the Commission's establishment provided space for adjustments to be made to the familiar institutional structures of the commission of inquiry. The chapter argues that, as a product of the negotiated peace efforts that followed the transitional opening in South Africa, the Commission of Inquiry for the Prevention of Public Violence and Intimidation was able to be molded to the needs of the transition in a way that enabled the leadership of the Commission to strengthen the credibility of the Commission as an investigative process, despite the inherited legacy. The design of the founding legislation for the Goldstone Commission laid a necessary foundation for the Commission to be deployed towards credible information gathering. Second, the chapter articulates how the Commission of Inquiry for the Prevention of Public Violence and Intimidation was able to mediate the entrenched problems associated with similar such investigations into violence that preceded it and cultivate credibility in investigations. These adjustments can be understood using Mahoney and Thelen's model

of conversion in their theorizing of gradual institutional change.¹ To conclude, the chapter analyzes the two-fold impact of the Commission's operation on the Truth and Reconciliation Commission (TRC). The Commission did not only lay the foundation for the TRC by identifying the degree to which information was withheld. It also helped to prepare the environment for truth-seeking, as a result of gradual institutional change, demonstrating that investigations could be carried out in a credible and legitimate manner.

7.1 The Context for Change: Transition and Negotiation

The Commission of Inquiry for the Prevention of Public Violence and Intimidation had important effects, both on the ongoing negotiations and on the credibility of investigatory practices. Entrenched as an instrument to support the state's power relations, a commission of inquiry into violence could have maintained its stature as a partial government institution. Rather, as this section illustrates, this commission of inquiry was redeployed in a manner that enabled credible investigations into violence and served the ends of negotiation and transition, rather than the state. Gradual change in the institution is evident in the operation and institutional adjustments of the Goldstone Commission. The conversion of these familiar institutional structures was facilitated, in part, by the transitional setting in which it was established.

Mahoney and Thelen identify several dimensions that lead to gradual institutional change through conversion. One component is lower veto potentials, or few actors with

¹ James Mahoney and Kathleen Thelen, "A Theory of Gradual Institutional Change," in *Explaining Institutional Change: Ambiguity, Agency, and Power*, ed. James Mahoney and Kathleen Thelen (Cambridge: Cambridge University Press, 2010), 1-19.

means to block change, and the another is higher levels of ambiguity in the enforcement or implementation of rules.² In addition, Thelen suggests that the incorporation of new actors or coalitions helps to account for change through conversion.³ The negotiating environment that produced the National Peace Accord and the Commission of Inquiry for the Prevention of Public Violence and Intimidation was important in creating conditions that facilitated gradual institutional change. As is demonstrated below, the negotiating environment lowered the veto points and veto players. The legislation for the Goldstone Commission was negotiated as part of the process *and* had built in ambiguity. In addition, the negotiating process brought new coalitions of actors into the fold.

Most accounts of the South African transition recognize that de Klerk's ascension to the party leadership in 1989 was significant in facilitating the transitional period because he was more liberal than his predecessors and recognized the need to incorporate the black majority into governing structures in order for South Africa to survive.⁴ In this way an ideological shift was discernable, although the 1990 speech still took most by surprise.⁵ As a soft-liner, who recognized that change was necessary, de Klerk thus endeavoured to engage in a transition process that he and the National Party could control.⁶ The initiation

² Mahoney and Thelen, "A Theory of Gradual Institutional Change," 19.

³ Mahoney and Thelen, "A Theory of Gradual Institutional Change," 29-31. See also, Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (Cambridge: Cambridge University Press, 2004), 32-33, 294-295.

⁴ Steven Friedman, ed., *The Long Journey: South Africa's Quest for a Negotiated Settlement* (Johannesburg: Raven Press, 1993), 10-12; Frederik Van Zyl Slabbert, *The Quest for Democracy: South Africa in transition* (London: Penguin Books, 1992), 31.

⁵ Allister Sparks, *Tomorrow is Another Country* (Sandton: Struik Book Distributors, 1994), 107; Van Zyl Slabbert, *The Quest for Democracy: South Africa in transition*, 34.

⁶ Johannes Rantete and Hermann Giliomee, "Transition to Democracy through Transaction?: Bilateral Negotiations between the ANC and NP in South Africa," *African Affairs* 91, no. 365 (1992): 524; Van Zyl Slabbert, *The Quest for Democracy: South Africa in transition*, 39.

of the transition in 1990 was a critical point, but the governance structures in South Africa remained much the same. It was another two years before much of the Apartheid legislation was actually repealed.⁷ Further, the negotiations continued with the recognition of the sovereignty of the governance structures.⁸

The political violence and unrest that had increased in 1990 played an ongoing role in the direction, continuity and impasses of the negotiation processes. According to figures from the South African Institute of Race Relations, the year 1990 had more than double the fatalities as a result of political violence than the previous year.⁹ Distinct from the Convention for a Democratic South Africa (CODESA) negotiations, the earlier peace negotiations were impelled by efforts to find solutions for the violence. Complicating matters was the proliferation and multiple sites of violence. Recalling the dynamics of violence discussed in Chapter 5, some pointed to issues of political rivalry between the African National Congress and the Inkatha Freedom Party. Yet, there were persistent allegations that the state was also responsible for fomenting violence. To address the increasing violence the National Peace Accord was signed in 1991, by over 40 groups.¹⁰

The negotiating parties signed the 1991 National Peace Accord at a time when political violence was rampant. Including the provisions for a commission to investigate ongoing violence within the peace agreement itself conferred legitimacy on the process.

⁷ John Hatchard and Peter Slinn, "The Path Towards a New Order in South Africa," *International Relations* 12, no. 4 (1995): 6; James Hamill, "The Crossing of the Rubicon: South Africa's Post-Apartheid Political Process 1990-1992," *International Relations* 12, no. 3 (1994): 9.

⁸ Friedman, *The Long Journey*, 26.

⁹ Adrian Guelke, "Interpretations of Political Violence During South Africa's Transition," *Politikon* 27, no. 2 (2000): 241. The year 1989 had 1403 deaths, 1990 had 3699 deaths, and 1991 had 2706 deaths.

¹⁰ National Peace Accord, 1991.

This is important because the legislation for the establishment of a standing commission to investigate violence had *already* been passed by the South African parliament months prior to the signing of the NPA, but it had not been established. As such, the structures were in place for the relatively quick deployment of the Commission.¹¹ In this way, the Government could be seen to be doing something about the violence, but unlike the commissions of inquiry of the past, established for similar such reasons, the Goldstone Commission was structured differently to increase its efficacy.

The de Klerk government introduced legislation for a standing commission on violence to Parliament and discussed the proposed commission at a peace conference held by the government in early 1991.¹² However, the ANC did not participate in the government-initiated conference, citing illegitimacy of the proceedings.¹³ It is notable, then, that the NPA provisions for a commission to investigate violence used the Prevention of Public Violence and Intimidation Act passed in April 1991 to structure the institution. Rather than simply being appointed by the Government at the time, the implementation of the legislation as part of a negotiated settlement demonstrated, at the outset, mutual agreement to this institution to address violence. According to media coverage, earlier drafts of the peace agreement included provisions for the Commission suggesting:

It would link up with the proposed standing judicial commission on violence and intimidation proposed by President FW de Klerk in mid-June... The exact nature of

¹¹ The NPA identifies that a statute of some sort would be necessary for the powers proposed for the type of commission and thus it is suggested that the Prevention of Public Violence and Intimidation Act, 1991 be used because it was ready to go, National Peace Accord, 1991, §6.29.

¹² Memorandum on the Objects of the Prevention and of Public violence and Intimidation Bill, 1991, at the end of the Bill.

¹³ David Breier and Brendan Seery, "Mass action as ANC quits talks," Sunday Star 19 May 1991. South African Institute of Race Relations (SAIRR), Press Cuttings, Part A, 1928-1998, AD1912, 184, Negotiations 1991 and 1992, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

the link is still being discussed but it is expected that it would be the chief enforcement mechanism of the peace code.¹⁴

This demonstrates the significance of the inclusion and the continued discussion of this type of commission throughout the peace negotiations.

In the memorandum that accompanied the publication of the bill in the Government Gazette, the commission is presented as an instrument to identify the causes of violence in order to address and reduce said violence. The Gazette reads:

Provision is being made for the establishment of a Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation. The object of the Commission will be to strive for a community free of public violence and intimidation. The main function of the Commission will be to inquire into the phenomenon of public violence and intimidation in the Republic and the nature of causes thereof.¹⁵

It should also be noted that various organizations were calling for something like the Commission that was ultimately established. The ANC's open letter to de Klerk of early 1991 stipulated a standing investigatory commission into police and security force roles in violence.¹⁶ This is significant because not only did the NPA apply the already developed institutional framework, but this type of response had previously been identified as suitable by extra-parliamentary powers. Employing the commission out of a procedurally inclusive and negotiated dialogue lent credibility to the information-gathering process.

From the outset, its inclusion in the Agreement gave the Commission legitimacy. A

¹⁴ Patrick Bulger, "Peace plan put to three key players," *Business Day*, 14 August 1991, South African Institute of Race Relations (SAIRR), Press Cuttings, Part A, 1928-1998, AD1912, 184.1a., Negotiations 1991, file Neg. August 1991, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

¹⁵ Republic of South Africa. B0148-91 (GA). Memorandum on the Objects of the Prevention of Public Violence and Intimidation Bill, 1991, page 16.

¹⁶ "Open letter to State President de Klerk and his Cabinet from the National Executive Committee of the ANC." *Star*, 9 April 1991. Centre for Applied Legal Studies (CALS), Records, N2-N2a "Negotiations 1993", Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

media report from 1992 quotes Brian Currin, executive director of Lawyers for Human Rights, stating that “unlike the others it was born out of a process of negotiation which included the most relevant political actors. It’s a highly credible commission and has the support of the majority of people.”¹⁷ Beyond the structures being included in the NPA provisions, the appointment of commissioners and other important decisions stemmed from the negotiated arrangement. The NPA identifies:

Fully aware of the fact that the composition of the proposed body will determine its relevancy and legitimacy, the Minister of Justice indicated during the Second Reading Debate of the Act that no appointments would be made without consultation and negotiation with the relevant role players. Consensus will be the key word. The group agrees that for this system to be effective, it needs to be credible.¹⁸

Both the ANC and NP agreed upon the leadership of the Commission, thus cultivating an integral joint perception of credibility.¹⁹

7.2 New Legislation, Similar Institutional Framework

In South Africa, the implementation of the Commission of Inquiry for the Prevention of Public Violence and Intimidation during the negotiations for a democratic South Africa was unique in the timing of its application and the capacity of the commission. As demonstrated in Chapter 6, it was not exceptional in its institutional application to address elements of South African violence particularly. In 1990 alone, the Government the Commission of Inquiry into Certain Alleged Murders, the Commission of Enquiry into the

¹⁷ Philipa Carson. “No Trust Without Enough Funds” WM, 10/1/92. Independent Board of Inquiry Collection AG2543, D54 Goldstone Commission 1991-1992, Wits Historical Papers, William Cullen Library, Johannesburg South Africa.

¹⁸ National Peace Accord, 1991, §6.26.

¹⁹ Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor* (New Haven and London: Yale University Press, 2000), 25.

Incidents at Sebokeng, Boipatong, Lekoa, Sharpeville and Evaton on 26 March 1990, and the Commission of Inquiry into the Death of Clayton Sizwe Sithole.²⁰ As is demonstrated below, the Commission of Inquiry for the Prevention of Public Violence and Intimidation was distinctive because of the breadth of its powers and the extension of its guiding provisions beyond the Commissions Act that had structured previous inquiries.

The Commissions Act (1947) and the Inquests Act (1959, amended 1977 and 1990) stipulated the processes, structures, and resources through which the government conducted inquiries into events and unexplained deaths. The investigations conducted under the Inquests Act were also particularly renowned for their cover-ups through the processes of investigations.²¹ The long term consequences of the partial and often absurd conclusions drawn to explain deaths are still playing out today as family members are still searching for information and acknowledgement.²² It is beyond the scope of this project to interrogate the influence of the Inquests Act, although it is necessary to recognize the pervasiveness of state involvement in manipulating the official record on repression.

The Commissions Act 1947 still informs the structure of commissions of inquiry in South Africa. The disruption of the transitional period did not lead to an overhaul in the legislative framework of these inquiries. Though there were innumerable issues to address in the transition to a multi-racial democracy, the adjustments made to the Commissions Act included the removal of reference to “South-West Africa” and left the rest of the

²⁰ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 13, 505.

²¹ George Bizos, *No One to Blame? In Pursuit of Justice in South Africa* (Cape Town: David Philip Publishers, 1998).

²² Newspaper reports, for example, Geoffrey York, "Apartheid victims' long wait for justice nears an end as the crimes of South Africa's past make their way to trial," *The Globe and Mail*, April 17, 2019, A10-A11.

legislation generally intact.²³ Interestingly, the legacy of commissions outlined in the previous chapter did not upend their structuring framework. For example, Freeman argues that in South Africa “the influence of the Commonwealth commission of inquiry tradition...is apparent,” pointing to the Commissions Act of 1947 and the 1995 Promotion of National Unity and Reconciliation Act.²⁴ This suggests that it was the usage and operation of commissions of inquiry, not just the legislation, that was responsible for the less than impartial outputs of investigations.

What needed to be undone in response to the legacies of earlier commissions of inquiry was societal distrust in the investigatory bodies and institutions. The potential for similar types of investigations and institutional components that had been used to consolidate repression to be used to monitor and redress that repression required a modification in delivery. The Commission of Inquiry for the Prevention of Public Violence and Intimidation, established in 1991, demonstrated gradual change than enabled a commission of inquiry to stimulate change, through adjustments to processes of investigation and reporting, and through engagement with the negotiating parties. One manner in which this can be assessed is the passage of new legislation for the standing commission into violence.

Though operating as a commission of inquiry, Government established the Goldstone Commission under the Prevention of Public Violence and Intimidation Act (1991) and not the Commissions Act (1947). This new legislation suggests that the Commission needed

²³ Republic of South Africa Government Gazette Vol. 376, No. 17477, General Law Amendment Act, 1996.

²⁴ Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006), 23-24, 24 note 85.

to be differently structured to investigate ongoing violence in the country. An introduction of the Bill, by the State President in a Joint Sitting of Parliament, locates the commission within a discussion of other negotiation efforts. The President's statement included the following:

Discussions following on the recent summit on violence and intimidation are continuing and will hopefully bear fruit soon. At the same time the hon members of this Parliament will be asked to dispose of legislation this week in order to establish a standing commission on violence and intimidation. The aim is the creation of an objective instrument to combat violence and intimidation which will have sufficient powers to be able to evaluate State action and evaluate unbiased security action.²⁵

Hansard debates days later illustrate discussion surrounding the necessity of the proposed commission and its legislation. Government rhetoric surrounding the proposed legislation indicated an acknowledgement of the toll of violence and government responsibility in addressing violence.²⁶ It also acknowledged the lingering perception of past investigations with the Minister of Justice, suggesting that:

This commission must not merely be seen as another State-instituted body. The commission will not only look into the conduct and involvement of those bodies, organisations or persons who have no ties with the State, but also at State institutions. In other words, if a State organisation is allegedly involved in violence, the commission will be able to and will indeed take cognisance of that.²⁷

The minister continued, demonstrating the fragility in the context of negotiations:

However, I do want to emphasise again that the commission should not be seen as an instrument to bring the security forces into discredit. If mistakes have been made on that side, the commission will be failing in its duty if it does not bring its finding to the attention of the hon the State President.²⁸

²⁵ Government of South Africa, Hansard, Joint Sitting, Monday 17 June 1991, 13064, Republic of South Africa, "Debates of Parliament (Hansard), 1991," Volume 28, 5 June – 21 June.

²⁶ Government of South Africa, Hansard Thursday, Extended Public Committee Assembly, 20 June 1991, 13658.

²⁷ Government of South Africa, Hansard Thursday, Extended Public Committee Assembly, Thursday 20 June 1991, 13660.

²⁸ *Ibid.*, 13660.

In response to queries about the creation of new structures, the Minister of Justice responded, “then the hon member must not come and tell me that I am building up a number of institutions, while he knows that a commission—according to the Commissions Act in its present form—is an imperfect legal concept.”²⁹

The Government assented to the Bill on 27 June 1991.³⁰ The provisions for a standing commission to investigate violence were already legislated when the National Peace Accord was negotiated and signed. Thus, the Commission of Inquiry for the Prevention of Public Violence and Intimidation, was both the product of existing government structures and the product of negotiation. The text of the National Peace Accord specifically recognizes the value of having the commission ready to go, and, the Commission launched its first investigation within about a month of the NPA being signed.³¹ The violence that had persisted in South Africa—and which was the impetus for the peace accord—increased the urgency of a response. It is difficult to dismiss the value of the familiarity with the inquiry method, more so given that the Prevention of Public Violence and Intimidation Act, 1991 granted the commission expanded powers compared to the previous commissions of inquiry in South Africa, in addition to the fact that it was envisioned as a permanent commission.³²

The negotiating process led not only to the agreement to the Commission of Inquiry on the Prevention of Public Violence and Intimidation, but also to agreement on the

²⁹ Ibid., 13721.

³⁰ National Peace Accord, 1991, text, addendum.

³¹ The hearings started on November 15, 1991 according Section 3 of the “Report on the Inquiry Conducted by the Committee of Inquiry into the Violence at Tokoza,” of the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, 19 November 1992.

³² National Peace Accord, 1991, Chapter 6, section 6.5.

appointed leadership. This had been recognized as an important dimension of credibility early in the process.³³ There was an agreement between the Government and the ANC to choose someone perceived to be credible at the outset, given that “no appointments would be made without consultation and negotiation with the relevant role players.”³⁴ This was not without contention. Prior to the signing of the peace agreement, opposition parties expressed dissatisfaction with the ANC involvement in an appointment. One critic in the discussion asked, “Why is the ANC at the fore when it comes to being consulted?... The ANC is not supposed to be governing the country, and I cannot understand this government behind the scenes.”³⁵ However, the decision to ensure agreement on his appointment helped to shore up support for the Commission. According to Goldstone:

de Klerk suggested to the negotiating bodies that he should set up that commission. Well the ANC and Mandela in particular didn’t want another government commission. And they agreed to it I think fairly reluctantly but on condition only that the chairman and four members would be appointed unanimously by all of the...parties of the negotiating process.³⁶

This was a significant distinguishing feature from earlier commissions of inquiry.

The agreement to use the commission as a tool towards peace and negotiations as well as the consensus underlying the appointment of commission personnel are some of the components that did the most to address the legacies of ineffective, and often uninformative, inquiries of the past. Timothy Sisk’s early assessment of the National Peace Accord identifies the value in the approach:

³³ The parliamentary debates at the time indicate a concern from opposition parties that there be widespread consultation on appointment. Hansard Thursday 20 June 1991 Extended Public Committee, 13667, 13670, 13679, 13685.

³⁴ National Peace Accord, 1991, Chapter 6, section 6.26.

³⁵ Government of South Africa, Hansard, Extended Public Committee - Assembly, Thursday, 20 June 1991, 13670.

³⁶ Richard Goldstone, interview with author, April 2017.

A standing commission is constituted for three years to fully investigate the underlying causes of violence, specific incidents, and steps required to prevent further violence. The “independent and nonpartisan” commission is chaired by widely respected Appeals Court Judge Richard Goldstone. The commission includes members implicitly nominated by the major political parties, including the ANC and IFP, and is thus seen as much more representative than previous judicial commissions.³⁷

This is significant because the formal process of the state, and the institution it produced in the Goldstone Commission, were supported by important forces that had no representation in government. This agreement created the space for an independent investigatory body to operate.

Procedurally, the Commission of Inquiry for the Prevention of Public Violence and Intimidation was bestowed with significant powers that other earlier commissions were not. Significantly, the Commission had the power of search and seizure.³⁸ As will be explored further in the next chapter, the non-cooperation of state-aligned witnesses at the Harms commission resulted in significant limitations in that commissions investigations and findings. In briefly justifying the inclusion of more robust subpoena powers, The Minister of Justice continues to explain the adjustments made to the Bill, so that it would not be subject to the same criticisms leveled at the Harms Commission:

We were criticised because the Harms Commission had no teeth, because it did not aim at more concrete results, because it revealed shortcomings, according to the hon members. I must say that I felt the same way. The protection of a commissioner, for example, is not adequate. I am not quite certain whether this commissioner is going to have adequate protection. This is something which I have to look at. It is one of the points that are worrying me, but the fact remains that here we are dealing in a bona fide way with the shortcomings in the Commissions Act and

³⁷ Timothy D. Sisk, "South Africa's National Peace Accord," *Peace & Change* 19, no. 1 (January 1994): 54.

³⁸ Government of South Africa, *Prevention of Public Violence and Intimidation Act*, 1991.

supplementing them in a way which still protects the right of a person to remain silent.³⁹

This account highlights the recognition from the government that the Harms Commission did not satisfy the calls for investigation that had been made. While the media reports of the Harms Commission and the report focused on the ‘toothlessness’ of the process, the government recognized existing limitations.

The Goldstone Commission’s legislative framework allowed for the search and seizure of documents, and thus it could move beyond voluntary witness testimony in gathering evidence for its investigations.⁴⁰ This power proved invaluable in uncovering the links between the South African Police and violence. The Goldstone Commission’s report on the issue directly referenced the powers of search and seizure in the ability to link the elements of violence under investigation.⁴¹

Perhaps one of the most valuable features of the Prevention of Public Violence and Intimidation Act was the built-in capacity for the Commission to request adjustments and additions to its mandate as shortcomings became evident. Through these provisions, the Goldstone Commission adjusted its operating capacity by establishing additional units to gather information and report on ongoing violence. This illustrates a degree of “discretion” in the implementation of the process, which is significant in explaining the manner in which

³⁹ Government of South Africa Hansard, Extended Public Committee – Assembly, Thursday, 20 June 1991, 13723. This also speaks to the complexity of compelling participation, with a recognition of the tension between testimony, implications of subpoena as related to the potential for self-incrimination. These tensions are important for consideration but beyond the scope of this project.

⁴⁰ Government of South Africa, *Prevention of Public Violence and Intimidation Act*, 1991.

⁴¹ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, “Criminal Political Violence by Elements Within the South African Police, KwaZulu Police and the Inkatha Freedom Party,” (18 March 1994), 3.3. See also the earlier case of Joao Cuna, in Goldstone, *For Humanity Reflections of a War Crimes Prosecutor*, and Sparks, *Tomorrow is Another Country*, 172-173.

the commission could enhance investigation credibility.⁴² The rationale for this component of the legislation is difficult to determine given the lack of access to documents surrounding this decision-making process.⁴³ The impacts, however, are significant. Through an amendment to the legislation, the Commission was able to establish more committees to investigate violence.⁴⁴ Other adjustments included the incorporation of investigation units,⁴⁵ and the establishment of witness protection measures.⁴⁶

The passage of legislation for the standing commission illustrates that the previous forms of the commission of inquiry were not likely to be sufficient for the task at hand. Decades of experience with commissions created by the racist and repressive system resulted in the inclusion of different provisions in a Commission which was to eventually form a pillar of the negotiated agreement. The structure of the legislation meant that when the Commission faced operational limitations, there were provisions in place for requests and adjustments. In addition, at the outset, the Commission had more powers than previous commissions of inquiry. These features enabled the Goldstone Commission to operate within the parameters of the system but to achieve a greater degree of credibility than had been seen in previous commissions of inquiry. Iterative adjustments could be made to existing powers of investigation rather than attempting an entirely new investigative

⁴² Mahoney and Thelen, "A Theory of Gradual Institutional Change," 19.

⁴³ These documents were not able to be located at the Parliamentary Library.

⁴⁴ See Republic of South Africa, Hansard, Joint Meeting, Friday 3 April 1992, 3543-3551, Republic of South Africa, Debates of Parliament (Hansard), 1992, Volume 32, 24 March - 24 April.

⁴⁵ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Report on the Investigation Units of the Goldstone Commission: 1 October 1992 – 30 September 1993," 26 November 1993.

⁴⁶ Regulations Made Under the Prevention of Public Violence and Intimidation Act (Act no. 139) of 1991, as amended by Prevention of Public Violence and Intimidation Amendment Act No. 50 of 1992, Government Gazette, No. 14197, Volume 325, 31 July 1992.

institution during a period of upheaval. Although the relationship between the Commission and the negotiating parties' leadership was not always smooth and straightforward,⁴⁷ the Commission was able to develop trust and credibility through its operation.⁴⁸

7.3 Innovations in the Prevention of Public Violence and Intimidation Act, 1991

The innovations in the structure of the Commission were the result of the design of the legislation itself, alongside the implementation and operational decisions undertaken by the leadership of the Commission. These institutional design elements set the Commission apart from its predecessors and enabled the Goldstone Commission to demonstrate a different modus operandi for violence investigation. Three distinguishing features of the Commission will be taken up in turn. First, the legislation itself was designed in a way that increased the powers of the commission at the outset *and* that enabled modifications illustrating a degree of discretion in implementation. Second, and closely related, this amendment potential enabled operational innovations to be implemented. Finally, the element of timing and duration is important. The Commission's mandate did not limit its operation to a specific time frame and thus the Commission had the time to determine its own limitations and suggest improvements. Each of these elements demonstrates a higher degree of interpretation which allowed the Commission's leadership to interpret the rules towards stronger investigations, facilitating a process of conversion.⁴⁹

The Commission of Inquiry for the Prevention of Public Violence and Intimidation

⁴⁷ Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 29-30.

⁴⁸ Sisk, "South Africa's National Peace Accord," 56-57.

⁴⁹ Mahoney and Thelen, "A Theory of Gradual Institutional Change," 18-33.

was not established under the usual Commissions Act, but through newly promulgated and specific legislation. It is difficult to trace the emergence and development of the Prevention of Violence and Intimidation Act of 1991 through Parliamentary channels. It is evident that the Government presented a draft of the bill at the Government's April peace summit in order to solicit feedback.⁵⁰ However, exactly how the decisions were made on what was included in the final version of the Bill is not clear. Despite this limitation in understanding of the processes' development, parliamentary records indicate that, although there was support for the purpose of the Bill, political representatives expressed unease over the manner in which the Bill was developed and presented.⁵¹

In terms of procedure, parliamentary debates do indicate some concern by members of parliament over the applicability of the commission itself, the potential for self-incrimination, and a lack of witness protection.⁵² The government justified the bill based on the need to do something to curb the violence, and identified that existing statutes may not have given the proposed Commission sufficient capacity to carry out the necessary functions in the face of ongoing violence.⁵³ Thus, the development of the Act recognized the limitations of the existing legislation and that the ongoing violence needed to be addressed differently than it had been historically. This suggests that intentions behind the investigation and information-gathering process for the Goldstone Commission were

⁵⁰ §3 Memorandum on the Objects of the Prevention of Public Violence and Intimidation Bill, 1991.

⁵¹ See for example, the perception of rushed timing, Hansard, 1991 Extended Public Committee – Assembly, 20 June 1991, 13664, 13682-13684, Joint Meeting, 21 June 1991, 13744.

⁵² See for example, Republic of South Africa, Hansard, Joint Committee – Assembly, 20 June 1991, 13687.

⁵³ See Republic of South Africa, Hansard, 20 June 1991, Extended Public Committee – Assembly, 13680; Joint Sitting, Monday, 17 June 1991, 13064; Extended Public Committee, 20 June 1991, 13718, 13726.

different than those that had informed previous commissions. Although this intentionality is difficult to determine, the remainder of this section illustrates the different structure of the Commission for the Prevention of Public Violence and Intimidation and the impact these institutional design elements had on its operation and later truth-seeking processes. The degree of power granted to the Commission in the establishing legislation is important.

While there are similarities between the Prevention of Public Violence and Intimidation Act and the Commissions Act 1947, there are key differences. Both legislative frameworks allow for the summoning of witnesses and the production of relevant documents or items.⁵⁴ But, beyond this, the legislation diverges in substantial ways. The 1991 Act conferred significant powers on the standing commission it crafted. The memorandum attached to the bill states:

With a view to assisting the proposed Commission in the exercise and performance of its powers, duties and functions, provision is being made for –

- (i) the establishment of *ad hoc* committees and institutes; and
- (ii) powers of investigation.⁵⁵

The first element listed under the powers of the Commission is the ability for the Commission itself to determine the “nature and extent” of its mandated inquiries.⁵⁶ This is significant because it illustrates the breadth of independence conferred.

Additionally, the Commission was bestowed with strong ‘powers of investigation.’ The provisions for search and seizure were, an “unusual authority.”⁵⁷ The Act stipulates

⁵⁴ Government of South Africa, “Commissions Act.” Act no. 8, 1947, Union Gazette Extraordinary, 18th April 1947. See also, Prevention of Public Violence and Intimidation Act 1991, Section 8, “Powers of Commission for purposes of Inquiry.”

⁵⁵ Memorandum on the Objects of the Prevention of Public Violence and Intimidation Bill, 1991.

⁵⁶ Prevention of Public Violence and Intimidation Act 1991, Section 8, “Powers of Commission for purposes of Inquiry,” §1.

⁵⁷ Daniel Terris, *The Trials of Richard Goldstone* (New Brunswick: Rutgers University Press, 2019), 85.

that, “The Chairman or any member of the staff of the Commission may, for the purpose of an inquiry, at all reasonable times enter upon and inspect any premises and demand and seize any document on or kept on such premises.”⁵⁸ Such powers were unique for a commission of inquiry. These provisions were invaluable in eventually helping the Commission discover evidence on security force involvement in violence.⁵⁹ Evidence of a third force significantly impacted the recognition that further information gathering was necessary, as is discussed later in the chapter.⁶⁰

The potential for modifications to the Bill under the purview of the Minister of Justice also had meaningful implications for the operation of the Commission. Entrenched in the Bill itself were stipulations enabling the Minister to make additional provisions:

15. (1) The Minister may make regulations as to—
- (a) any matter required or permitted to be prescribed in terms of this Act and
 - (b) generally, all matters which in his opinion are necessary or expedient to be prescribed to achieve the objects of this Act.⁶¹

With this inclusion, an element of ambiguity was built into the Commission that enabled adjustments to strengthen information-gathering capacities—enabling the addition of institutional components or adjustments to those incorporated into the Bill at its

⁵⁸ Prevention of Public Violence and Intimidation Act 1991, Section 8, “Powers of Commission for purposes of Inquiry,” §6.

⁵⁹ Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 41-42. See also Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, “Fourth Interim Report,” 6 December 1993.

⁶⁰ Despite the value of this institutional feature, Terris identifies that “Goldstone was fighting a tyrannical system with a search and seizure power outside of the normal framework of checks and balances.” He cites Richard Goldstone who states, “I was doing many things on the Commission that in a democracy would have been unthinkable and unconstitutional. The fact that we could conduct a raid on government offices without a court order. . . . We were taking advantage of the undemocratic nature of the nature of the regime.” See Terris, *The Trials of Richard Goldstone*, 85.

⁶¹ Prevention of Public Violence and Intimidation Act 1991, Section 15, “Powers of Commission for purposes of Inquiry.”

establishment.

The witness protection program was established under these provisions. As will be explored in detail in Chapter 8, the Commission's recognition of the limitations of witness protection for its investigations was thus addressed through the structures governing the legislation. Another institutional feature that aided the investigative capacities of the Commission was the establishment of the investigation units as part of the Commission. It is not clear whether the investigation units were established under the Section 15 provision, only that they were established in consultation with "relevant parties."⁶²

Also important was the Commission's ability to create committees that would help the Commission complete its work.⁶³ While the Committee structure was originally included in the bill, in April 1992, the Government amended legislation to adjust the Commission's committee composition and structure. Where the initial legislation stipulated that each committee required a member of the Commission to sit on it, the amendment enabled committees to be established without a Commission member. The purpose of this expansion was to "make it possible to appoint committees more quickly to investigate violence where it may arise."⁶⁴ The composition of the committees was under the purview of the Commission itself.⁶⁵

The permanent nature of its operation is the third element that set the Commission

⁶² Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Report on the Investigation Units of the Goldstone Commission: 1 October 1992 – 30 September 1993," 26 November 1993.

⁶³ Prevention of Public Violence and Intimidation Act 1991, Section 4. See also, Bill Memorandum 4.2.

⁶⁴ Prevention of Public Violence and Intimidation Amendment Bill, Second Reading Debate, 3 April 1992, Republic of South Africa, Hansard, Joint Meeting, 3 April 1992, 3544.

⁶⁵ Prevention of Public Violence and Intimidation Act, no. 139 of 1991 as amended by Prevention of Public Violence and Intimidation Act no. 50 of 1992.

apart from earlier commissions of inquiry. This permanence is specified in the Prevention of Public Violence and Intimidation Act, and in the National Peace Accord text. Thus, the adjustments to the Commission's operation can be situated in the ability to learn from investigations. For example, multiple investigations into violence at Mooi River illustrated limitations in the earlier engagement of the Commission.⁶⁶ The killing of witnesses who had testified during an early investigation and the difficulty in ascertaining evidence of the 'third force' illustrated a need for witness protection measures.⁶⁷ The creation of an independent investigation unit and bringing in international experts moderated limitations in investigations, which is discussed in further detail below. In addition, the longer timeline meant that public hearings could be held on multiple issues, strengthening the outputs of the Commission.

Its permanent nature also enabled the Commission to report more frequently since the reports did not have to wait until the end of the mandate. The Commission was thus able to demonstrate its work throughout its operation. Crucially, that incremental changes were made in light of these emergent limitations points to (1) the opening provided to make the desired changes, and (2) the leadership acting on these needs. The interaction of these elements is explored below.

⁶⁶ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Final Report on the Violence at Mooi River," 21 December 1992.

⁶⁷ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Second Interim Report," (Pretoria: 2 April 1992), §1.4

7.4 Building Credibility and Demonstrating Effectiveness

The incremental changes associated with negotiations and concessions enabled the space for the Goldstone Commission investigations to change the status quo. That an investigation could be more than a government-centric initiative changed the purpose of investigation, but relied on the associated structures through which investigations had been conducted previously. In his personal reflections, Goldstone acknowledged that:

It was essential to demonstrate to the people of South Africa that this commission was different from preceding ones, all of which had been presided over by white male judges. It was essential that we conduct the affairs of this commission, to the extent possible, in a nonracist, nonsexist and impartial fashion.⁶⁸

Arguably, the Goldstone Commission succeeded in overcoming the state-centric legacy of the commission of inquiry, in part, because its investigations benefitted from the structures of the state but did not answer to them. From Judge Goldstone's perspective, "I think the important thing was that I was sensitive to the importance of gaining the confidence of all South Africans in the independence of the Commission and its investigation units."⁶⁹ Not only was the Commission designed with sufficient ambiguity to facilitate the process of gradual institutional change, the leadership of the Commission capitalized on these measures to strengthen truth-seeking through the Commission's operations.

7.4.1 Consensus Building

Throughout its period of operation, the Commission cultivated credibility, thus positioning itself to contribute to further investigations and other measures to address potential

⁶⁸ Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 27.

⁶⁹ Richard Goldstone, Interview with author, April 2017.

violence. Writing close to the time of the Commission's operation, Sisk suggests that the Goldstone Commission was one of the only elements of the National Peace Accord that could be described as an "unqualified" success."⁷⁰ Sisk recognized that:

The Goldstone Commission's investigations and reports are widely viewed as serious attempts to determine the nature and causes of political violence, including specific incidents. They appear unbiased, and the Commission has earned enormous legitimacy (judicial commissions have historically been perceived as biased toward the government). The investigations have been speedy and thorough, recommendations practical, and blame is perceived to be apportioned in a generally even-handed manner.⁷¹

The Commission also received praise from Secretary-General of the United Nations. A 1992 Report indicates that:

It is neither necessary nor possible here to recount the far-reaching work being undertaken by Justice Richard Goldstone, Chairman of the Commission of Enquiry into Public Violence and Intimidation. Suffice it to say that it commands widespread respect in South Africa and abroad.⁷²

Goldstone recognized the significance of the participation of the various political groups.

With respect to how the Goldstone Commission distinguished itself from its predecessors,

Goldstone states:

I suppose it's a combination of things—certainly my independence, my concern for democracy in the future in South Africa, and crucially the cooperation of all the major political parties. Without all of them on board it would have failed. It wouldn't have had credibility if I didn't have the support of both the government and the ANC and Inkatha for that matter and that's much to the credit of Mandela who immediately embraced the Commission on its appointment.⁷³

⁷⁰ Sisk, "South Africa's National Peace Accord," 56-57.

⁷¹ *Ibid.*, 56-57.

⁷² United Nations Security Council, Report of the Secretary-General on the Question of South Africa, S/24839, S/24839, (New York: United Nations, 7 August 1992), para. 67.

⁷³ Richard Goldstone, Chairman of the Commission of Inquiry for the Prevention of Public Violence and Intimidation, interview with author, April 2017.

The negotiated foundation on its own was not sufficient for its credible operation, as suggested in this passage. The independence in approach and operation further legitimized the process.

The readiness of the Commission to conduct investigations when needed and the relative trust in the institution to do so when needed illustrate its importance. A report of a Multi-National Panel investigating and making recommendations for the election, speaks to these qualities in considering the role for the Commission through the election period:

It is difficult to imagine that it would be possible, in the short time remaining before the election, to create another entity imbued with the credibility enjoyed by the Commission. Over the past two years, the very fact of the Commission's existence and its availability to accept referrals of the most difficult and sensitive matters has provided an outlet for political tension. The investigation and hearing process itself has given the public some assurance that serious misconduct, even by the State, would be pursued.⁷⁴

Its contribution was also partially a result of both its ability to quickly deploy to troublesome situations and the powers granted to the Commission. One illustrative example of this was the Commission's deployment in response to the "Events at the World Trade Centre on 25 June 1993."⁷⁵ During this incident, 3000 right-wing Afrikaner protestors forced their way into the World Trade Centre where the CODESA negotiations were taking place.⁷⁶ The protest had been approved by the local authorities, with caveats to the location and a prohibition on firearms.⁷⁷ The State President requested that the

⁷⁴ Final Report of the Multi-National Panel Regarding the Curbing of Public Violence and Intimidation During the Forthcoming Election, Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation (11 August 1993), Section IV.

⁷⁵ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Report on the Inquiry into the Events at the World Trade Centre on 25 June 1993," Pretoria, 13 July 1993.

⁷⁶ Sparks, *Tomorrow is Another Country*, 190-191.

⁷⁷ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Report on the Inquiry into the Events at the World Trade Centre on 25 June 1993," Pretoria, 13 July 1993, §5.3-5.4.

Goldstone Commission investigate the matter. Significantly, though, the Negotiating Forum had debated implementing its own investigation/inquiry into the matter but decided to delegate the investigation to the Goldstone Commission because of its statutory powers.⁷⁸ This is significant because it demonstrates the Commission's response potential. It is notable that the Commission presented its report on this incident to the State President on 13 July 1993,⁷⁹ only a few weeks after the incident itself had occurred.

One of the strengths of the commission was its ability to cultivate support among key parties to the peace agreement, beyond the initial appointment on leadership. In this way, during its operation, it also acted as a legitimate source of 'new rules' that helped to structure behaviour conducive to peacebuilding and negotiation. Perhaps the clearest example of this is the role that the Commission played in the development of the guidelines and draft legislation for the Regulation of Marches and Gatherings. The Commission established a Committee to investigate "procedure to regulate the organisation, conduct and policing of mass demonstrations," given that "in South Africa unpredictable or undisciplined behaviour by mass demonstrators or other members of the public and the police present at mass demonstration create a very real potential for violence."⁸⁰

The Commission recognized the necessity of the investigation into these regulations in its first interim report, reporting the establishment of the Committee and the

⁷⁸ Minutes of the Meeting of the Planning Committee Held at 12h00 on Monday 28 June Through Thursday 1 July 1993 at the World Trade Centre, unpublished, Addendum 1, E2.4. South African History Archive The Multi Party Negotiation Papers AL3078, file E2.1-E2.8 (APNP 58).

⁷⁹ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Report on the Inquiry into the Events at the World Trade Centre on 25 June 1993," Pretoria, 13 July 1993.

⁸⁰ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Report on the Regulation of Gatherings," (15 January 1993), Section 1.

value of international experts acknowledged.⁸¹ Soliciting feedback and operating hearings for parties to participate, the Committee first established guidelines to which the ANC and the SAP agreed to adhere.⁸² In the Final Report, the Commission recognizes the “almost universal adherence to the Interim Agreement.”⁸³ From these guidelines, the Commission drafted and circulated draft legislation.⁸⁴ This is an example of the Commission’s utility in establishing parameters for what it deemed to be a democratic right.⁸⁵ It demonstrates the Commission’s ability to engage with the public and secure incremental agreements until consensus could be reached. The Commission first secured an agreement between the ANC and SAP and then worked to develop more comprehensive legislation. This example also illustrates gradual institutional change within the Goldstone Commission.

The characteristics conducive to conversion within the commission of inquiry are also illustrated in this example. The element of interpretation is present on several levels. The mandate’s ability to propose legislation sets out the parameters for engagement with such regulations to prevent violence. However, the manner in which the Regulations on Gatherings guidelines were proposed itself demonstrates the flexibility in interpreting the process. The Commission engaged in a process of negotiation, soliciting feedback and buy-

⁸¹ Commission of Inquiry for the Prevention of Public Violence and Intimidation, “First Interim Report,” (Cape Town, 24 January 1992), 7.3.

⁸² Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, “Report on the Regulation of Gatherings,” (15 January 1993).

⁸³ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, “Final Report on the Regulation of Gatherings,” 28 April 1993.

⁸⁴ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, “Final Report on the Regulation of Gatherings,” 28 April 1993. On circulation for instance, the TEC discusses them and their feedback “Report Number Four of the Technical Committee on Violence: 2 June 1993.” A1.3.5.1.6, South Africa History Archive, AL2916, Mayet, Khalik.

⁸⁵ Commission of Inquiry for the Prevention of Public Violence and Intimidation, “First Interim Report,” (Cape Town, 24 January 1992): Section 7.1.

in from those with vested interests. Not only were the police consulted, but the engagement also incorporated the preferences of the former liberation movements, bringing different coalitional actors into the fold. The use of the commission to develop legislation to prevent further violence is a significant change from their use under the Apartheid state to reinforce unjust laws.

The recognition that including all parties in the process would benefit investigations into violence illustrates how the leadership of the Commission navigated the ambiguity of the transitional environment to strengthen its credibility. Goldstone recounts that, “I decided that it was important politically for me to promptly report what the commission was doing. We were legally obliged to report to de Klerk so he would know what was happening and I decided to do the same with Mandela.”⁸⁶ Accounts of Goldstone’s conversation with de Klerk, with respect to briefing Mandela on the Commission’s operations, suggest that despite de Klerk’s hesitancy, Goldstone advised on the need to keep Mandela informed given his likelihood of being in the government in the future.⁸⁷ This illustrates not only the choices made by Goldstone to deploy information-gathering measures in a more credible fashion to the historical use of commissions of inquiry. It also reiterates the degree to which the established rules were in-flux during the transitional period.

The Commission was positioned such that when necessary, decisions could be made to investigate incidences with little delay. While the findings and recommendations were not binding, having an institution ready to investigate provided some immediate

⁸⁶ Richard Goldstone, interview with author, April 2017.

⁸⁷ Terris, *The Trials of Richard Goldstone*, 91-92.

acknowledgment of the incident. Additionally, simply having *something* done, some independent action taken, indicated a change in approach, given the circulating allegations of state involvement in violence. With respect to the political leadership of de Klerk and Mandela, Goldstone states, “in no way did either of them in any way try to influence what we were doing or which way we should go. But it was useful to get their input and obviously I needed more and more goodies from the government.”⁸⁸

The government demonstrated important commitment to the process, providing funding and provisions for adjustments to the mandate, as will be discussed further below.

One Interim Report ends with a recognition that:

The Commission’s needs with regard to staff, material and facilities are met by the Government. No important request in that regard from the Commission has been refused. For that the Commission would like to express publicly its appreciation to the Minister of Justice, Mr H J Coetsee, and to the appropriate members of his Department.⁸⁹

Here it is important to recognize that its actual *capacity* to operate influenced the credibility of the Commission. The capacity of the Commission, however, needs to be distinguished from the adoption of recommendations by the Government, which is beyond the scope of this discussion.

This section has provided an overview of the elements of the Goldstone Commission that made it a credible violence-investigating institution during the negotiation period. This focus does not suggest that the process was without challenges or

⁸⁸ Richard Goldstone, interview with author, April 2017.

⁸⁹ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, “Third Interim Report,” 21 December 1992.

shortcomings. It, like many other such investigative commissions lacked “teeth”.⁹⁰ Sisk identifies deficiencies in witness protection and investigations, as well as the lack of implementation powers for its own recommendations.⁹¹ Wilson equates the Goldstone Commission with the Harms Commission when suggesting that neither really demonstrated the Government’s willingness to do anything about violence. Wilson argues that both commissions were “under-resourced, overly legalistic, misled by police evasions and political party cover-ups, and disappointing in their conclusions.”⁹² Given other government decisions pertaining to the negotiations and information gathering, such as the destruction of records or the police’s reticence and partiality in investigations, it is difficult to determine why, specifically, the Goldstone Commission received the Government support it did.⁹³ Though these tensions cannot be resolved here, they are noted because they will benefit from further consideration in the future. Despite these shortcomings, the Goldstone Commission still had an impact on the institutionalization of truth-seeking in South Africa.

⁹⁰ Independent Board of Inquiry Memoranda, 16 August 1993, 10. Wits Historical Papers, AG2543, IBI Memoranda, File 3.3-3.7, Item 3.7, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

⁹¹ Sisk, "South Africa’s National Peace Accord," 56-57.

⁹² Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), 65.

⁹³ Sriram identifies that the Commission was under-resourced, though does not expand on this. On this point, Mallinder suggests that perhaps Justice Goldstone did not request sufficient resources given that de Klerk contends the Commission got what it asked for, and much of the evidence suggests that it did. This contention is thus noted here. See: Louise Mallinder, "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa," in *Working Paper No. 2 from Beyond Legalism: Amnesties, Transition and Conflict Transformation* (Queens University Belfast: Institute of Criminology and Criminal Justice, 2009), 31-32; Chandra Lehka Sriram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (London and New York: Frank Cass, 2004), 157.

In order to investigate the mechanics of this impact in more detail, it is necessary to illustrate how the Goldstone Commission differentiated itself from earlier commissions of inquiry through gradual institutional change. Given the facilitating conditions for institutional change, one can trace evidence of conversion further in the investigative process. In the South African case, the Goldstone Commission played an important role in the institutionalization of truth-seeking, by mediating and adjusting to the constraints imposed on investigations by the earlier use of commissions of inquiry. The constraints of the previous commissions of inquiry are reflected in the TRC Report's accounting of political violence and the covert involvement of the state. The Report states that for many in the security forces the Harms and Goldstone Commissions, among other state investigations, "were seen by many as public relations exercises rather than determined initiatives to root out 'dirty practices'. The long history of cover-ups and condonation of lying to such commissions merely reinforced this perception."⁹⁴ The next section argues that this mediating effect is illustrated in the change made to the investigation process.

7.4.2 Investigative Credibility

Demonstrating a recognition of the constraints on investigations, the Goldstone Commission instituted numerous provisions so that investigations could be conducted in a credible manner, even though it was difficult to move away from relying on the state security forces. The issue of police relations is addressed directly in the second interim report when presenting findings on information on the causes of violence that had been presented to the Commission to that point. The report identifies:

⁹⁴ *Truth and Reconciliation Commission of South Africa Report: Volume Two*, Chapter 7, page 693.

A police force and army which, for many decades, have been the instruments of oppression by successive White governments in maintaining a society predicated upon racial discrimination. This involves a police force and an army that for the majority of South Africans have not been community based or orientated. For many South Africans, the police and the army are not perceived as fair, objective or friendly institutions.⁹⁵

The report continues to address the issue of state involvement in violence, particularly:

A history over some years of State complicity in undercover activities, which include criminal conduct. Those activities have enabled critics of the Government and others, fairly or unfairly, to place the blame for much of the current violence at the door of the security forces. That and the well-documented criminal conduct by individual members of the South African Police and the KwaZulu Police exacerbate the perception of so many South Africans that the Government or its agencies are active parties responsible for the violence.⁹⁶

The Goldstone Commission did not have an operational investigation unit at the outset of its operations. The development of the investigation units demonstrates additional efforts by the Commission to interpret the mandate in a way that developed stronger information-gathering capacities. The Commission established investigation units in Johannesburg, Durban, East London, Port Elizabeth and Cape Town in October of 1992.⁹⁷ Each unit was composed of officers from the South African Police Service and at least one attorney. Most also had an international observer.⁹⁸ Between October 1, 1992 and September 30, 1992, the investigation units conducted 245 investigations.⁹⁹

⁹⁵ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Second Interim Report," (Cape Town, 29 April 1992), 2.3.2.

⁹⁶ *Ibid.*, 2.3.7.

⁹⁷ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Report on the Investigation Units of the Goldstone Commission: 1 October 1992 – 30 September 1993," 26 November 1993.

⁹⁸ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Report on the Investigation Units of the Goldstone Commission: 1 October 1992 – 30 September 1993," 26 November 1993.

⁹⁹ *Ibid.*

An *ex post facto* accounting of the investigation process of the Commission suggests that clear evidence of the benefits of the investigation units is the number of investigations and reports completed before and after the establishment of the investigation units.

According to Newham:

Whereas in the first year of operation the Goldstone Commission had only completed four inquiries and released 11 reports, by the time the commission had come to an end three years later, four hundred and sixty seven investigations had been conducted and forty seven reports had been completed.¹⁰⁰

Reflecting on the constraints of police involvement in earlier investigations, the means by which the Goldstone Commission seconded police investigators in order to increase credibility and trust reflects adjustments in recognition of these earlier issues.

The Goldstone Commission used a public vetting process to identify investigators when the investigation unit was established. The Commission announced publically the names of potential appointees from the police force and solicited feedback on whether anyone objected to any of the individuals so named. Through this process, the public had a chance to object to the credibility of particular officers.¹⁰¹ Rather than simply relying on existing state institutions, the Goldstone Commission publicized the names of police officers offered to it by the Commissioner of Police in order for any concerns to be raised by the public of the participating officers. Engaging the public in this way prevented one officer from joining the Commission and ensured the public were aware of who would be

¹⁰⁰ Gareth Newham, "Investigation Units: The teeth of the Truth and Reconciliation Commission," *The Centre for the Study of Violence and Reconciliation* (1995): 3.

¹⁰¹ Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 33.

conducting the investigations.¹⁰² A 1994 press release suggests that the Commission followed a similar process to expand the team in the lead-up to the elections.¹⁰³

The addition of investigators was not the only factor that facilitated an increase in the number of investigations. Once the Government amended the legislation to enable single-member committees to undertake investigations, the overall number of ongoing investigations increased. Thus, the demand for, and adjustment to allow for, more investigators can be understood with respect to the ability to amend the legislation.

The Commission also distinguished itself from its predecessors by using international investigators in partnership with local investigators. International investigators increased the credibility of investigation teams.¹⁰⁴ Goldstone notes the significance of the government agreeing to this request given the reticence of any international involvement in the domestic affairs of South Africa under Apartheid.¹⁰⁵ In particularly difficult cases, like the Boipatong Massacre, the Commission sought assistance from external sources as well. In this case, where multiple sources alleged police complicity—but insufficient evidence was available due to erased recordings—an external

¹⁰² Richard J. Goldstone, "Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes," in *Quality Control in Fact-Finding*, ed. Morten Bergsmo (Florence: Torkel Opsahl Academic EPublisher, 2013), 41.

¹⁰³ Press Release by the Honourable Mr Justice RJ Goldstone, Chairman of the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, 8 March 1994. NMAP 1.1-1.2, folder 1, Goldstone Commission Collection, NMAP 2015/52, Nelson Mandela Centre of Memory, Johannesburg, South Africa .

¹⁰⁴ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Report on the Investigation Units of the Goldstone Commission: 1 October 1992 – 30 September 1993," 26 November 1993.

¹⁰⁵ Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 33. See also, for example, parliamentary discussion on the bill when opposition forces were reported to have called for an international commission, Republic of South Africa, Hansard, Extended public committee – Assembly, 20 June 1991, 13724.

policing expert was appointed by the Commission to try to recover the recordings and to write an independent report.¹⁰⁶ The decision to turn to external experts is innovative compared to earlier investigations into violence that were constrained by the regime. The Government's agreement to international investigators reflects the opening in the regime that created the conditions for gradual institutional change undertaken by the Goldstone Commission.

The Goldstone Commission was not set up as a precursor to the TRC at the time it was established. Despite this, the Goldstone Commission did influence the TRC in important ways. Framed in this way, the operation of the Goldstone Commission provided important lessons for the TRC. The innovations of the Goldstone Commission served as an example for later institutional modalities because of how the Commission changed to achieve its goals.

7.5 Value as a Precursor to the TRC

The transitional context and the pressure to do something about violence saw the implementation of a recognizable form of investigation, the commission of inquiry. However, it was implemented in such a way that demonstrated a departure from the status-quo. In this way, it pre-empted some of the work that needed to be done by the TRC. The preceding discussion has illustrated one way that the Goldstone Commission laid a positive foundation for the TRC, by identifying and rectifying shortcomings in information-

¹⁰⁶ Commission of Inquiry for the Prevention of Public Violence and Intimidation, "Report of the Inquiry into the police response to, and investigation of, events in Boipatong on 17 June 1992," Dr. P.A.J. Waddington, 20 July 1992.

For another interpretation, see James G.R Simpson, "Boipatong: The Politics of a Massacre and the South African Transition," *Journal of Southern African Studies* 38, no. 3 (2012): 623-647.

gathering institutions. The Goldstone Commission made adjustments to the commission of inquiry and associated investigation practices. In so doing, the Commission of Inquiry for the Prevention of Public Violence and Intimidation adjusted its approach to investigation and rebuilt crucial credibility in investigations.

The Goldstone Commission also demonstrated the need for further investigation. In this way, the information the Goldstone Commission investigated and made public played a valuable role in demonstrating the need for further truth-seeking. Richard Goldstone identifies that “it really laid the foundation and [in a] way it took the rug from under the feet of de Klerk in opposing it. You know de Klerk could credibly have argued to his people that there were no serious human rights violations for a TRC to investigate.”¹⁰⁷ As Judge Goldstone identified after the election, there was a perception that violence was ethnically or politically motivated but in certain cases this violence was fomented by the security forces.¹⁰⁸ Thus, he states, “the Commission uncovered third force activities from within the military and national police. Yet, it did nothing more than scratch the surface.”¹⁰⁹ These initial investigations were themselves important. According to Judge Goldstone, “But I think the evidence we brought out, particularly the third force, made it impossible for de Klerk to say there’s nothing to investigate.”¹¹⁰ This demonstrates the value in the initial investigations.

¹⁰⁷ Richard Goldstone, interview with author, April 2017.

¹⁰⁸ Richard Goldstone, "Exposing Human Rights Abuses -- A Help or Hindrance to Reconciliation," *Hastings Constitutional Law Quarterly* 22 (1995): 614.

¹⁰⁹ *Ibid.*, 614.

¹¹⁰ Richard Goldstone, interview with author, September 2017.

Even prior to the TRC, efforts to further investigate information uncovered by the Goldstone Commission emerged, indicating in part, the degree to which further investigations were necessary. For example, there was an investigation unit headed by the Attorney-General of the Transvaal, Jan D'Oliviera, to inquire into hit-squad activities.¹¹¹ The value of information and truth in the transitional period had been evident in discussions by civil society and activists.¹¹² Entwined with the advocacy for truth for reasons of morality and acknowledgement then, was a recognition of the depths of the efforts to prevent this information from coming to light. Government destruction of records and security force efforts to disrupt Goldstone's investigations highlight the interests in preventing information from being made public, let alone acknowledged.¹¹³

Finally, the adjustments made by the Goldstone Commission demonstrated a change in institutional modalities used for information-gathering. Institutional components that worked well re-appeared in the TRC, for example, the inclusion of investigation units resembling those used by the Goldstone Commission. The institution of witness protection will be taken up directly in the next chapter to illustrate this continuity, but the example of

¹¹¹ Ole Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process* (Leiden: Martinus Nijhoff Publishers, 2009), 18-19; Piers Pigou, "False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission," in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002), 55.

¹¹² Overview discussion tracing the value of truth, see André du Toit, "A Need for 'Truth': Amnesty and the Origins and Consequences of the TRC Process," *International Journal of Public Theology* 8 (2014): 393-419. See also remarks by individuals in Alex Boraine and Janet Levy, eds., *The Healing of a Nation?* (Cape Town: Justice in Transition, 1995), see Albie Sachs, 103-109; see also Dullah Omar, "Justice Minister's Reply," 130-136.

¹¹³ Verne Harris, "'They should have destroyed more': The Destruction of Public Records by the South African State in the Final Years of Apartheid, 1990-1994," in *Archives and Justice: A South African Perspective* (Chicago: The Society of American Archivists, 2007), 305-333. On Goldstone's investigations see *Truth and Reconciliation Commission of South Africa Report: Volume Two*, Chapter 7, page 698.

the investigation unit components in the two institutions is illustrative here. A comparison of the legislation for the creation of the Goldstone Commission and the Truth and Reconciliation Commission does not specifically highlight a legislative overlap in the inclusion of investigation units, because the Goldstone Commission added its investigations after it had been established. However, the Promotion of National Unity Act contained the provisions for an investigation unit, along with the codification of the power of search and seizure, which were unique to the Goldstone Commission. The Promotion of National Unity Act stipulates that the commission “may establish an investigating unit.”¹¹⁴ Section 28 outlines the provisions for such a unit though most functional components of the investigation units are left to be determined by the Commission itself.¹¹⁵

The structure of the TRC’s investigation units was different from the Goldstone Commission’s. Both civilian and police personnel made up the TRC Investigation Unit. The civilian category included lawyers, researchers, NGO personnel, and journalists. Seconded members of the South African Police Services (SAPS) and the National Intelligence Agency comprised the police category.¹¹⁶ Whereas the Goldstone Commission developed its investigative arm through which investigation powers could be more frequently exercised, this feature was built into the TRC’s design at the outset.

What stands out starkly in considering the South African TRC in light of its institutional framework is the resemblance to the earlier commission of inquiry in South Africa. The experience with commissions—unsatisfactory investigations and findings, and

¹¹⁴ Promotion of National Unity and Reconciliation Act, Parliament of the Republic of South Africa, Act 95-34 (1995), s. 28.

¹¹⁵ *Promotion of National Unity and Reconciliation Act*.

¹¹⁶ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 11, 326-327.

difficulty separating state involvement in violence and investigations—suggests that the choice of tool could have been ill-suited to produce or engender change. The nature of the commission of inquiry in South Africa was well entrenched, sufficiently so to have a narrow set of expectations for what a commission of inquiry could be expected to produce.

Significantly, efforts to address this particular type of investigatory commission established by the state at a critical turning point during the transition demonstrate that the limitations in the structure could be addressed and adjusted in a way that addressed past omissions and practices in the use of earlier inquiries. While the commission of inquiry in Apartheid South Africa was in many ways knowingly unjust, the means and mechanisms through which its operations could be adjusted to undo these structural injustices were not clear cut.¹¹⁷ The provisions made for the operational capacities of the Goldstone Commission, and the cultivated legitimacy by the leadership of the commission helped to build credibility in light of the earlier investigations.¹¹⁸

Conclusion

Efforts taken by the Commission leadership, in combination with the space provided in the mandate for adjustment, created conditions conducive to gradual change, specifically conversion, within the commission of inquiry. The Goldstone Commission is an important nodal point in the institutionalization of truth-seeking in South Africa. This chapter has argued that the operation of the Goldstone Commission facilitated a process of gradual

¹¹⁷ On the surface, some adjustments are relatively clear— but given the embeddedness in a system of oppression, continued operation within the system means that perception problems were likely to be ubiquitous.

¹¹⁸ For Justice Goldstone’s perspective on the achievements of the commission see, Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 57-58. Here Goldstone suggests that the Goldstone Commission “assisted in creating the political climate in which the Truth and Reconciliation Commission could be established with the agreement of the major parties.”

institutional change in the commission of inquiry. At the outset, in its creation in the Prevention of Public Violence and Intimidation Act, and then negotiation into the National Peace Accord, the Goldstone Commission was bestowed with wider powers than previous commissions of inquiry, including search and seizure. These institutional innovations provided the Commission with stronger information gathering capabilities. The legislation had built-in provisions for amendments illustrating interpretation possibilities that were used by the Commission leadership. With these capacities, the Commission developed credible investigation practices that helped to uncover information about political violence during South Africa's transition. The Commission's investigations contributed to the recognition that there was further information that needed to be uncovered. Gradual institutional change in the Goldstone Commission laid a foundation for South Africa's TRC, demonstrating effectiveness in institutional design and innovative institutional modalities. In the next chapter, one of these modalities, witness protection is explored in depth.

Chapter 8

8 Gradual Institutional Change: Incorporating Witness Protection

The previous chapter argued that through the Goldstone Commission, the commission of inquiry underwent a process of gradual institutional change in order to serve the purposes of violence investigation during the transition. This chapter analyzes the institutional modality of witness protection to explore, in more depth, the way that institutions that had been utilized by the state for some time were redeployed for truth-seeking purposes. The chapter argues that the incorporation of witness protection measures illustrates the conversion process that took place within the Goldstone Commission. This saw the deployment of witness protection as a truth-seeking measure within the Goldstone Commission and eventually within the South African Truth and Reconciliation Commission (TRC). Although highlighted as an innovation of the South African TRC for its formal use as part of a truth commission process, the inclusion of witness protection can be better explained by taking into account the changes in the Goldstone Commission that laid the foundation for its deployment in the TRC.

In the historical institutionalist vein that directs attention to the significance of history, the institutionalization of witness protection in South Africa suggests its use less as an end towards information gathering than as a by-product of control measures in the context of Apartheid. The shortcomings of witness protection highlighted by the Goldstone Commission's operations resulted in the development of measures of witness protection more conducive to truth-seeking. Thus, the institution of the commission of inquiry was adjusted to better meet the needs of information gathering by incorporating witness

protection measures. These adjustments were made possible by the structure and operation of the Goldstone Commission.

The chapter begins by discussing the role of witnesses and witness protection in truth-seeking and truth commission processes. The next section identifies how the protective structures of the state created conditions that prevented the uncovering of information based on the design of witness protection measures. Then, it provides an analysis into the Commission of Inquiry for the Prevention of Public Violence and Intimidation, which recognized the need to have protective measures to facilitate uncovering information based on the shortcomings in the existing processes. The final section identifies that these adjustments were adopted by the TRC process in South Africa.

8.1 Truth-seeking and Witness Protection

Many states that pursue truth-seeking do so in conditions of crisis and instability. As de Greiff identifies, “truth commissions have become ‘normal’ responses in both post-authoritarian *and* post-conflict transitions. Indeed, some countries have implemented transitional justice measures not just in the absence of a political transition, but while conflict is still ongoing.”¹ Truth commissions and other truth-seeking endeavours depend on the willingness and ability of witnesses to participate in the proceedings. However, for people to participate in truth-telling processes, there needs to be a reasonable expectation of their safety.

¹ Pablo de Greiff, “‘Truth without Facts’: On the Erosion of the Fact-Finding Function of Truth Commissions,” in *The Transformation of Human Rights Fact-Finding*, ed. Philip Alston and Sarah Knuckey (Oxford: Oxford University Press, 2016), 283.

In this chapter, witness protection refers to both the policies and programs used to protect witnesses who provide evidence and testimony to fact-finding and truth-seeking institutions.² This includes formal witness protection programs operated by police within countries, or, organizations conducting investigations. It also includes other dimensions, such as adopting investigative practices that do not put witnesses at risk, structuring testimony collection in a way that can protect the identity of those who do not want to be identified, and reporting in a way that reduces the risk of intimidation or retribution for witnesses.³

International human rights organizations, fact-finding missions, and international commissions of inquiry rely on witness testimony to make determinations about ongoing human rights violations. Rothenberg identifies that “testimony infuses fact-finding reports with a sense of political and moral immediacy.”⁴ International commissions of inquiry depend on witness participation to collect evidence in order to make findings about human rights violations and abuses. Boutruche suggests that although witness testimony may suffer from concerns about objectivity, “first-hand accounts by direct eyewitnesses often constitute the easiest or most accessible way to clarify and establish the narrative and

² Chris Mahony uses both the formal and support measures analyzing witness protection in the judicial dimension in Africa. This breadth is useful and a similar approach has been adopted here in the truth-seeking dimension. See Chris Mahony, *The justice sector afterthought: Witness protection in Africa*, Institute for Security Studies (Tshwane (Pretoria), South Africa, 2010), 1-3.

³ For example, the *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* report identifies that one of the reasons that the Commission of Inquiry on Darfur did not publish the names of alleged perpetrators was to ensure the protection of witnesses, see United Nations Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* United Nations (New York and Geneva, 2015), 14.

⁴ Daniel Rothenberg, "The Complex Truth of Testimony: A Case Study of Human Rights Fact-Finding in Iraq," in *The Transformation of Human Rights Fact-Finding*, ed. Philip Alston and Sarah Knuckey (Oxford: Oxford University Press, 2016), 193.

circumstances of what happened.”⁵ In addition, these inquiries often depend on the availability of witness evidence given the lack of other types of evidence.⁶ Unlike truth commissions, in international and domestic commissions of inquiries, the focus on testimony shifts. The focus is less on victims being given an opportunity to tell their story than it is about investigation and fact-finding to draw conclusions about cause and attribution of responsibility in public crises.⁷

Testimony from witnesses as a component of evidence is most frequently associated with legal proceedings. In the transitional justice realm, understanding and considerations of the role of witness testimony largely developed with the operation of international prosecutions particularly in the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). The prosecutorial approach of international criminal tribunals and the International Criminal Court, for example, often rely on witness participation to make findings of guilt or innocence.⁸

The availability of witness testimony can have a significant influence, including on the selection of cases for prosecution and the outcomes of trials. Wald, for example,

⁵ Theo Boutruche, "Selectivity and Choices in Human Rights Fact-finding: Reconciling Subjectivity with Objectivity," in *Commissions of Inquiry: Problems and Prospects*, ed. Christian Henderson (Oxford: Hart Publishing, 2017), 301.

⁶ Rosette Muzigo-Morrison, "Victims and Witnesses in Fact-Finding Commissions," in *The Transformation of Human Rights Fact-Finding*, ed. Philip Alston and Sarah Knuckey (Oxford: Oxford University Press, 2016), 175.

⁷ Wayne A. Mackay and Monica G. McQueen, "Public Inquiries and the Legality of Blaming: Truth, Justice, and the Canadian Way," in *Commissions of Inquiry: Praise or Reappraise?*, ed. Allan Manson and David Mullan (Toronto: Irwin Law, 2003). Christian Henderson, ed., *Commissions of Inquiry: Problems and Prospects* (Oxford: Hart Publishing, 2017).

⁸ Robert Cryer, "Witness Tampering and International Criminal Tribunals," *Leiden Journal of International Law* 27, no. 1 (2014): 191-203. See also, Patricia M. Wald, "Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal," *Yale Human Rights and Development Law Journal* 5 (2002): 217-239.

recounts a case at the ICTY in which a massacre that had no survivors meant that “the episode could not be corroborated sufficiently to be included in the prosecutor’s case.”⁹

Bass’s account of the first trial in the ICTY includes the observation, somewhat in passing, that “the tribunal had hoped to make history with rape charges, but they were dropped on the morning the trial started because a witness was afraid to testify in The Hague.”¹⁰ These brief examples help to illustrate the necessary role that witnesses play in making findings in legal settings.

In transitional justice, much of the focus on witness testimony in prosecutions has been on its limitations: the rather narrow amount of information accessible through trial proceedings and the constraints on the courts as a venue for victims to be heard.¹¹ A distinction in the type of information being sought through these different venues helps to explain how the role of testimony can serve such different needs. As du Toit explains:

The procedures typical of law in the determination of justice have different objectives and assumptions, and require a distinctive sense of forensic evidence and truth, on the one hand, compared to, on the other hand, the methods developed by historical or scientific inquiry in the quest for narrative or nomological truth.¹²

Truth commissions are celebrated for their ability to include victims, to engage in a “narrative project” that identifies the structures and abuses of regimes.¹³ In trials, Minow

⁹ Wald, "Dealing with Witnesses in War Crime Trials," 220.

¹⁰ Gary Jonathan Bass, *Stay the Hand of Vengeance: the politics of war crimes tribunals* (Princeton, N.J.: Princeton University Press, 2000), 257.

¹¹ Martha Minow, *Between Vengeance and Forgiveness: facing history after genocide and mass violence* (Boston: Beacon Press, 1998), 58; Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2002), 107

¹² André du Toit, "Experiments with Truth and Justice in South Africa: Stockenström, Gandhi and the TRC," *Journal of Southern African Studies* 31, no. 2 (2005): 445.

¹³ Martha Minow, "The Hope for Healing: What Can Truth Commissions Do?," in *Truth V. Justice*, ed. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 239.

identifies that “victims and other witnesses undergo the ordeals of testifying and facing cross-examination. Usually they are given no simple opportunity to convey directly the narrative of their experience.”¹⁴ The truth commission, with its focus on collecting testimony, provides a different opportunity for participation from witnesses.

Crucially, though, the collection of testimony and the participation of witnesses is necessary for a truth commission to serve the purpose for which it is intended. There is also a significant information gathering and corroboration requirement, to try and record and report with as much accuracy as possible.¹⁵ Participating in a truth commission and providing testimony as a witness has ramifications, depending on whether participation is public and the identification of people believed to have been involved in the perpetration of violence.¹⁶

The variations of witnesses and witness testimony explored here demonstrate that transitional justice and truth-seeking measures rely on witnesses to achieve their intended goals. For those who have suffered and/or been witness to grave human rights violations, providing testimony and evidence to factfinders, in trials, and in truth commissions can put individuals and their families at risk. These risks may be psychological as the burden of recounting trauma has the potential to inflict continued hardship.¹⁷ There are also physical

¹⁴ Minow, "Hope for Healing," 238.

¹⁵ de Greiff, "'Truth without Facts'," 282-283.

¹⁶ Yazir Henry, "Where healing begins," in *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 166-183.

¹⁷ Laura Marschner, "Implications of Trauma on Testimonial Evidence in International Criminal Trials," in *The Transformation of Human Rights Fact-Finding*, ed. Philip Alston and Sarah Knuckey (Oxford: Oxford University Press, 2016). A helpful overview of the literature is provided by David Mendeloff, "Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice," *Human Rights Quarterly* 31, no. 3 (2009).

safety and security risks. Witnesses face threats and intimidation to their own lives, and the lives of family and friends.

Witness protection measures have taken different forms. Fear from participating as a witness was a theme that reappeared throughout the operation of the ICTY and ICTR.¹⁸ As such, guidelines and programs were established to protect witnesses who participate in prosecutions. Witness protection at the ICTY includes administrative support to get to proceedings, counselling, escorts to The Hague, and relocation programs where necessary.¹⁹ Protection is also attempted by holding proceedings *in camera*, changing voices and hiding the identities of people testifying.²⁰ The ICTY and the ICTR set important precedents in this regard. Both of these judicial tribunals demonstrated the value of witness testimony and the pressures of witness protection and witness identification in proceedings.²¹ These deliberations have continued at the ICC, where protection for witnesses is separated into two types: measures taken to protect witnesses where they live, and measures taken during court proceedings to protect witness identity.²² Investigations also ought to be structured in a way that protects those who are willing to give evidence or information.²³

¹⁸ Bass, *Stay the Hand of Vengeance*, 261.

¹⁹ Wald, "Dealing with Witnesses in War Crime Trials," 221.

²⁰ Wald, "Dealing with Witnesses in War Crime Trials," 221. For a comprehensive discussion on the tension between the right to a fair trial and the protection of witnesses see: Joanna Pozen, "Justice obscured: the non-disclosure of witnesses' identities in ICTR trials," *New York University Journal of International Law and Politics* 38, no. 1-2 (2005).

²¹ Goran Sluiter, "The ICTR and the Protection of Witnesses," *Journal of International Criminal Justice* 3 (2005): 281-322; Pozen, "Justice obscured," 281-322.

²² "Witnesses," (Webpage), International Criminal Court, accessed April 10, 2019, <https://www.icc-cpi.int/about/witnesses>.

²³ Muzigo-Morrison, "Victims and Witnesses," 183.

The same considerations are evident, though not yet entirely engrained, in international commissions of inquiry. Bisset points to a series of international documents, principles and guidelines which inform the structure of international commissions of inquiry and associated witness protection mechanisms. This includes instruments such as the *UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (1991), the updated *Minnesota Protocol* (2016) and the *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (1997, updated in 2005) which guide international commissions of inquiry.²⁴ For example, the Minnesota Protocol states: “An effective witness-protection programme is essential for some investigations and should be in place before the investigation begins... States should ensure that the authorities in charge of witness protection should in no way be involved in the alleged death.”²⁵ There has not yet been universal application of these types of guiding principles.²⁶

Choices made in the design of truth commission processes can be structured to provide protection to witnesses. In truth commissions and other investigative commissions, decisions made in the mandate, in terms of how testimony is collected and in the production of the report, are implicated in the treatment and protection of witnesses.²⁷ South Africa was the first truth commission to provide a formal witness protection program in its

²⁴ Alison Bisset, "Commissions of Inquiry and Procedural Fairness," in *Commissions of Inquiry: Problems and Prospects*, ed. Christian Henderson (Oxford and Portland: Hart Publishing, 2017), 320-321.

²⁵ United Nations Office of the High Commissioner for Human Rights, *The Minnesota Protocol on The Investigation of Potentially Unlawful Death (2016)* (New York and Geneva, 2017), 18.

²⁶ The pieces in this collection speak to the challenge of such applications: Henderson, *Commissions of Inquiry: Problems and Prospects*.

²⁷ Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006), 258-265.

founding legislation.²⁸ Other truth commissions have made provisions for safety in the process of data collection and dissemination that are less comprehensive. Hayner suggests that commissions that lack formal witness protection programs can provide security to people who testify by “providing strict confidentiality.”²⁹ Another element that many truth commissions include in their mandates is the ability for testimony to be heard *in camera* or in private. For example, the mandate for the Kenyan Truth, Justice and Reconciliation Commission outlines the protocol for the hearings as public, unless:

- (a) the security of perpetrators, victims, or witnesses is threatened;
- (b) it would be in the interests of justice; or
- (c) there is a likelihood that harm may ensue to any person as a result of proceedings being open to the public.³⁰

As with many institutional developments, particularly in states emerging from repression and conflict, there is a difference between the design of a truth commission in its mandate and its development in practice. Often, countries seek assistance from transitional justice experts and others with experience with truth commissions as they proceed to establish their own. Mandates, therefore, have a tendency to incorporate many ‘ideal type’ elements that have been identified as best practice in truth commissions.³¹

For truth commissions to encourage participation and support testimony from those who have direct involvement with the issues under investigation (either as witnesses or alleged perpetrators), processes and structures need to be in place to protect them from the

²⁸ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 4, 55.

²⁹ Hayner, *Unspeakable Truths*, 233.

³⁰ Parliament of Kenya, *The Truth, Justice and Reconciliation Commission Bill*, 2008.

³¹ See for example, International Center for Transitional Justice, "Truth Seeking: Elements of Creating an Effective Truth Commission."

dangers of participation. Without these structures the capacity to carry out credible investigations is seriously challenged. Fear about participating in truth commission processes has been identified as a harmful factor that can undermine their efforts.³²

Witnesses are targeted to prevent information from being made public. Hayner identifies that witnesses in Uganda often returned to retract testimony, and that some witnesses in El Salvador would only provide testimony outside of the country for fear of reprisal.³³

Witness protection measures are further dependent on the state's ability to deliver the necessary security and safety.³⁴ Institutional conditions play a role in whether witnesses are able to participate. In order to support witness participation, the creation or entrenchment of witness protection measures is an illustration of an entrenchment of truth-seeking or an institutionalization of the truth-seeking process.

8.2 Information Gathering and Witness Protection in South Africa

Given the reliance on witnesses and testimony, the operation of credible witness protection is a valuable indicator for the institutionalization of conditions conducive to truth-seeking. The South African TRC is notable in that it was the first truth commission to establish a witness protection program. The Promotion of National Unity and Reconciliation Act included provisions for the establishment of a "limited witness protection program."³⁵

³² Joanna R. Quinn and Mark Freeman, "Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa," *Human Rights Quarterly* 25, no. 4 (Nov. 2003): 1120.

³³ Hayner, *Unspeakable Truths*, 231, 233.

³⁴ Mahony identifies the challenges in African countries, Mahony, *Justice sector afterthought*, 4-5.

³⁵ See Promotion of National Unity and Reconciliation Act, Parliament of the Republic of South Africa, Act 95-34 (1995), section 35. See also: Gareth Newham, *Keeping the Wolves at Bay: Issues and Concerns*

However, the seeds of this inclusion are found in earlier institutional developments. Witness protection policies developed in South Africa through incremental changes in earlier investigative processes. The Commission of Inquiry for the Prevention of Public Violence and Intimidation identified the gaps in witness protection and, based on the characteristics discussion in Chapter 7, had a uniquely iterative capacity to adjust to fill these gaps.

Prior to the *ad hoc* measures adopted out of necessity by the Goldstone Commission, witness protection in South Africa operated at a very basic level. Newham identifies that “until 1992, statutory provision was made for the protection of witnesses under section 185 of the Criminal Procedure Act... witnesses who were deemed by the Attorney General to be in need of protective custody, were kept in the same conditions as prisoners awaiting trial.”³⁶ The National Peace Accord mentions measures for witnesses in Chapter 10, on Special Criminal Courts, referencing the provisions made in the Criminal Law Amendment Act of 1991.³⁷ The Criminal Law Amendment Act, 1991, still provided for the protection of witnesses in protective custody.³⁸ The final report of the Goldstone Commission captures the problems of the witness protection measures offered by the state. The report states:

Witness protection schemes presently in operation, eg under section 185 of the Criminal Procedure Act (No 51 of 1977), deal mainly with recalcitrant witnesses. Without delay provision should be made for witnesses who are willing to give evidence but are in fear of their lives; before, during and after testimony. The

in Establishing a Witness Protection Programme in South Africa, The Centre for the Study of Violence and Reconciliation (October 1995).

³⁶ Gareth Newham, “Keeping the Wolves at Bay: Issues and Concerns in Establishing a Witness Protection Programme in South Africa,” *The Centre for the Study of Violence and Reconciliation* (October 1995).

³⁷ National Peace Accord, 1991, §10.5.

³⁸ Republic of South Africa, *Criminal Law Amendment Act*, 1991, Act no. 135, 1991.

incarceration of such witnesses in cells or lock-ups is completely inappropriate; their fears cause stress calling for proper counselling. Programmes need to be devised for relocation after witnesses have testified, where necessary.³⁹

The subject of the Goldstone Commission investigations exacerbated the challenges of these conditions. Given the allegations of security force involvement in the violence in South Africa at that time, placing witnesses in this type of protection was not only undesirable, but potentially dangerous, given high numbers of death or injury of people in custody as discussed in Chapter 3 and 7.

The effect of minimal or questionable witness participation in such investigations is illustrated in the Harms Commission, which the Government appointed to look into allegations of state political murders, or hit squads, in South Africa in 1990. The limitations of this Commission are fairly well-established: the mandate was narrow, limiting the investigation to what had taken place within the country's borders and there was no follow-through on state organs under investigation to produce necessary documents.⁴⁰

Assessments of the commission and its associated report point to a weak mandate and almost satirical gathering of testimony. One media report described the situation as follows:

Some members of the [Civil Cooperation Bureau] and the police refused to testify unless their identities were protected - and the result was that the commission was at times turned into a comedy when some appeared in the commission room dressed in outlandish disguises, including false wigs and moustaches. Most used code names.⁴¹

³⁹ Commission of Inquiry regarding the Prevention of Public Violence and Intimidation, "Final Report of the Goldstone Commission," 27 October 1994, 4.2.

⁴⁰ Steve McQuillan, David Breier and Carolyn McGibbon, "The holes in Harms," *Sunday Star* 18/ 11/ 1990. Peter Harris, "The danger in letting the police off the hook," *Sunday Star* 18/11/1990. South Africa Institute of Race Relations (SAIRR), Press Cuttings, Part A, 1928-1998, AD 1912, H110, Harms Commission 1990-1991, file J3, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

⁴¹ Norman Chandler, "Findings of 'most difficult task' awaited," *Saturday Star*, 25/8/1990. South Africa Institute of Race Relations (SAIRR), Press Cuttings, Part A, 1928-1998, AD 1912, H110, Harms Commission 1990-1991, file J3, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

The findings of the report were relatively underwhelming, with Justice Harms finding no evidence of a hit squad at Vlakplaas, although the CCB “was linked to other crimes of violence.”⁴² The conclusion of the report partially implicated witnesses participation in the deficiency of evidence:

In the course of the Commission it also appeared that although allegations and accusations are rife as to who did what and why, there is a basic lack of evidential material that might put some flesh on the bones. In general, victims failed to furnish information. *Willing trustworthy witnesses did not come to the fore.*⁴³

The behaviour of witnesses in this case is not particularly surprising, given the alleged state involvement in the political murders under investigation. Indeed, the report acknowledges the potential issues with a reliance on the police more generally for the Commission’s operation.⁴⁴ At this time, the South African Police Service (SAPS) provided witness protection in South Africa. The Goldstone Commission was a significant turning point for witness protection in such investigations.⁴⁵ Through a process of gradual institutional change within the Goldstone Commission, witness protection was incorporated into Commission structures to strengthen violence investigation during the transition.

⁴² L.T.C. Harms, Chairman and Sole Member, Commission of Inquiry into Certain Alleged Murders Report (Pretoria: September 1990), 196. Goldstone Commission Collection, NMAP 2015/52, NMAP, 4.2, folder 156, Nelson Mandela Centre of Memory, Johannesburg, South Africa .

⁴³ *Ibid.*, 196-197, emphasis added.

⁴⁴ L.T.C. Harms, Chairman and Sole Member, Commission of Inquiry into Certain Alleged Murders Report (Pretoria: September 1990), 31.

⁴⁵ The *Report of the Commission of Enquiry into the Incidents at Sebokeng, Boipatong, Lekoa, Sharpeville and Evaton on 26 March 1990* did not identify the willingness of witnesses to participate as a challenge, though it did pass comment on the Commission’s perception of the calibre of participation. R.J. Goldstone, Chairman and Sole Member, *Report of the Commission of Enquiry into the Incidents at Sebokeng, Boipatong, Lekoa, Sharpeville and Evaton on 26 March 1990* (27 June 1990).

8.3 Witness Protection in the Goldstone Commission

The Goldstone Commission initiated and operated its own witness protection program from 1992 until the end of its operations in 1994.⁴⁶ The Commission's findings relied, in part, on witness testimony. In one of the first reports into violence, the Goldstone Commission acknowledged, "we would like to pay tribute to the courage of the many people who testified before us, to record that without them we could not have made any progress at all, and to stress the importance of giving all possible protection to them and their families."⁴⁷ As laid out above, without witness testimony, information and examination of instances of violence is difficult to substantiate and make public. The second interim report, of 29 April 1992, echoes the importance of witness testimony:

The Commission has at all times been convinced, and remains so, that factual findings cannot be made against individuals, groups or organizations on the basis of untested evidence. For this reason, the hearings of the Commission and of committees of the Commission have been held in public and witnesses have been subjected to cross-examination by lawyers representing interested parties.⁴⁸

However, by the time the Commission released this second interim report, and before the Goldstone Commission had established its witness protection program, one person slated to provide testimony was murdered, as was a family member of another potential witness.

The second interim report states:

Then there is the issue concerning the safety of witnesses who testify before the Commission. The murder of the leader of the "Black Cats" in Wesselton and the apparent revenge murder of the mother of a renegade "Black Cat" witness in the same

⁴⁶ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, "Fifth Interim Report" (Cape Town: 30 May 1994): § 5.

⁴⁷ Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, Report on the Violence at Tokoza, (Pretoria: 17 November 1992): §59.

⁴⁸ Commission of Inquiry for the Prevention of Public Violence and Intimidation, "Second Interim Report," (Cape Town, 29 April 1992), §1.2.

township highlight this problem. These murders took place during the course of the investigation into the “Black Cats” and are therefore likely to severely diminish the willingness of the members of the public to come forward and testify.⁴⁹

The nature of the investigations conducted by the Goldstone Commission and the environment in which particularly divisive facts were being uncovered necessitated the creation of structures to protect people testifying before the commission. More broadly, to be seen to be working with police or investigators could also impact relationships between community members. Those known or thought to be providing information or ‘colluding’ with the regime faced backlash and violence.⁵⁰ The volatile situation of the day necessitated a distinction between the police, writ large, and the Commission that was investigating instances of violence in which police were perceived to be involved. These concerns were not unique to the Goldstone Commission. However, the Goldstone Commission had both the statutory ability and leadership support to address these concerns, reflecting conditions conducive to the process of conversion. In the recommendations, the second interim report states:

The investigative functions of the Commission will continue to play an important role in relation to the curbing of ongoing violence. In this regard, the Commission should as soon as possible be granted adequate means and procedures for offering protection to witnesses who testify before it or its committees.⁵¹

⁴⁹ Ibid., §1.4.

⁵⁰ Many writers reference a fear of police, police complicity in violence, and the perception of collusion with police being part of violence. This is a complex issue. For example, see: Stephen Ellis, "The Historical Significance of South Africa's Third Force," *Journal of Southern African Studies* 24, no. 2 (1998): 267. Wilson refers to this in the discussion of Winnie Madikizela-Mandela's football club, See: Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), 165-167. Kynoch interrogates the early narratives, see Gary Kynoch, "Reassessing Transition Violence: Voices from South Africa's Township Wars, 1990-4," *African Affairs* 112, no. 447 (2013): 283-303. See also, Janet Cherry, "Historical Truth: Something to Fight For," in *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* ed. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 140.

⁵¹ Commission of Inquiry for the Prevention of Public Violence and Intimidation, "Second Interim Report," (Cape Town, 29 April 1992), 3.2.3.

Although witness protection was not incorporated into the original mandate/legislation of the Goldstone Commission, Chapter 6 of the National Peace Accord empowered the Commission to “order that the relevant authority provide appropriate protection to a person...if his life is endangered because of his assistance to the Commission.”⁵² This was bolstered in 1992 with an amendment to the Prevention of Public Violence and Intimidation Act, 1991. With this amendment, the Goldstone Commission used its powers to propose adjustments to its operations, as discussed in Chapter 7, to respond to the limitations in its ability to protect witness testimony, illustrating incremental adjustment towards stronger information-gathering measures.

Witness protection that functioned as part of the Goldstone Commission was thus operational within a year after the Commission began operations.⁵³ According to a statement made by Judge Goldstone at the preliminary hearing into the Boipatong Massacre, the Commission had recommended to the government that the Commission be:

empower[ed] to offer adequate witness protection to persons testifying before the Commission. The Minister of Justice has informed the Commission that this recommendation has been accepted and discussions are presently being conducted by the Commission with officials of the Department of Justice with regard to appropriate regulations. It is hoped that the regulations will be in force by 4 August 1992.⁵⁴

⁵² South Africa, National Peace Accord, 1991, 6.18.4.

⁵³ Lawyers for Human Rights advocated for a witness protection programme directly to the National Peace Secretariat. The request was initially declined. A letter from 10 November 1993 states that the proposed witness protection program to strengthen the National Peace Accord was “deemed inappropriate.” The Brian Currin Collection, AL3065, A51-A89, South African History Archive, Constitution Hill, Johannesburg, South Africa.

⁵⁴ Goldstone Commission, Boipatong Records 1990-1992. Records of Proceedings Volume 1, AK2672.A1.1, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

On 31 July 1992, the Government Gazette published an annexure to the Prevention of Public Violence and Intimidation Act that spelled out the provisions for the protection of witnesses and their families where necessary.⁵⁵ The provisions outlined the appointment of a security director, and stipulated that witnesses were to be protected at locations as determined by the security director and Chair of the commission. These regulations included “offences and penalties” for false representations, attempts to make protected persons known, or for contravening orders as a protected person.

The records of the opening proceedings identify that provisions had been made in time for the Boipatong investigation:

The committee is accessible to any member of the public at any time. In addition, I would like to make it clear that such a person may, if they have good reason to do so, approach the committee on the basis of confidentiality and secrecy. If they require protection because they fear reprisals or intimidation, suitable steps can be taken in terms of powers which have recently been given to this commission, for the protection of witnesses. In particular the commission is now enabled to arrange at no cost to a witness, housing at a secret venue for an appropriate period after the person has given evidence. I would appreciate if this aspect of the proceedings is brought to the attention of the people of Boipatong and to the residents of KwaMadala Hostel.⁵⁶

The incorporation of witness protection measures into the institutional structures of the Goldstone Commission illustrates how truth-seeking efforts were strengthened through the operation of the Commission. Rather than relying on inadequate state-provided protection, the Commission used its built in powers to modify the Commission in a manner conducive to information gathering.

⁵⁵ Regulations Made Under the Prevention of Public Violence and Intimidation Act (Act no. 139) of 1991, Government Gazette, No. 14197, Volume 325, 31 July 1992.

⁵⁶ Goldstone Commission, Boipatong Records 1990-1992. Records of Proceedings Volume 1, AK2672.A1.1, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

Part of the challenge with witness protection and the Goldstone Commission was that it had to rely on the existing state structures in order to be enacted. The initial reticence of the Commission to create a witness protection program was that the police would need to be heavily involved in the process. The discussion on investigation credibility in the previous chapter is beneficial here. At a time when there were serious allegations of police involvement in the perpetration of violence, police involvement was problematic. In a letter sent to the Goldstone Commission on 5 February 1992, a non-governmental monitoring organization, Peace Action Network, identified concerns with the Commission's operations as it related to investigations and witnesses, requesting "consideration be [sic] given for their protection." A handwritten note on the bottom of the document reads, "10/02/92 Goldstone phoned impossible to run a witness protect[sic] programme. The Commission wants to maintain some distance from the police, and the police are the people to use in the programmes."⁵⁷ However, when the need became increasingly urgent, the Commission established certain work-around arrangements to offer protection to witnesses. Here again the persistence, or path dependence, of the repressive institutional framework demonstrates how problematic institutions formed the foundation of the Goldstone Commission and against which the process of conversion is evident.

It is important to note that the Goldstone Commission's identification of a need for witness protection schemes was not the only influencing factor in the establishment of a witness protection process. Newham identifies that Lawyers for Human Rights had established an independent witness protection program that played an important role in the

⁵⁷ Peace Action Letter to Justice Goldstone, Feb 5, 1992. Peace Action Collection AG2515, file D5. Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

establishment of a witness protection program by the Goldstone Commission.⁵⁸ Archival evidence points to pressure from non-governmental organizations to establish a witness protection program. For example, the correspondence with Peace Action Network referenced above, a non-governmental monitoring organization, suggests that the potential for a witness protection program had been under discussion by civil society members prior to the Goldstone Commission adopting protection measures.⁵⁹

According to reports, the Commissions' program protected 37 witnesses and 40 family members.⁶⁰ The challenges and critiques of the witness protection program under the Goldstone Commission largely centre on the fact that the provisions had not been planned at the outset. Even though the witness protection has been criticized as "reactionary," its development within the commission of inquiry strengthened truth-seeking in South Africa.⁶¹

The Commission's mandate incorporated other measures to protect witnesses as part of the investigations into violence. The Prevention of Public Violence and Intimidation Act of 1991 stipulated that the hearings of the Commission would be held in public, except when there was a risk to a person or their family associated with being required to provide evidence to the Commission.⁶² The provisions in the National Peace Accord refined these

⁵⁸ Newham, *Keeping the Wolves at Bay*.

⁵⁹ Peace Action Letter to Justice Goldstone, Feb 5, 1992. Peace Action Collection AG2515, file D5. Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

⁶⁰ Jenny Irish et al., *Testifying Without Fear: A Report on Witness Management and the National Witness Protection Programme in South Africa*, Centre for the Study of Violence and Reconciliation (2000).

⁶¹ Newham uses the word "reactionary" to describe the witness protection program, Newham, *Keeping the Wolves at Bay*.

⁶² §9 of the *Prevention of Public Violence and Intimidation Bill*, B148-91 (GA).

parameters, outlining that the identity of a person providing evidence could not be identified, the contents of documents had to be kept confidential, and that hearings could be held in private when there was a threat or danger to participants.⁶³ The basis for the caveat pertaining to public proceedings explicitly refers to the “safety of witnesses.”⁶⁴

By incorporating witness protection, as a result of both heeding the demands from civil society and recognizing the impact that witness participation had on information gathering, the Goldstone Commission stoked a conversation that was eventually taken up by the TRC. The use of witnesses, and the dependence on witness protection to access information, laid a foundation for the role of witness protection elements in the TRC. In the final report of the Goldstone Commission, the Commission acknowledges the lingering inadequacies of state-run witness protection for further truth-seeking. The report states:

Even if the immediate needs of the international investigation team led by the Attorney-General of Transvaal or the proposed commission for truth and reconciliation are not taken into account, the Commission is convinced of the dire necessity of an adequate witness protection programme to be properly established and expanded to provide for needs throughout the country.⁶⁵

This suggests that there was a need for witness protection measures within the information-gathering institutions that followed the Goldstone Commission, and beyond. With the gradual changes that took place under the Goldstone Commission, the value of witness protection operating this way helps to explain its persistence in truth-seeking in the aftermath of the transition.

⁶³ National Peace Accord, 1991, 6.18.3-6.19.

⁶⁴ National Peace Accord, 1991, 6.19.

⁶⁵ Commission of Inquiry regarding the Prevention of Public Violence and Intimidation, “Final Report of the Goldstone Commission,” 27 October 1994, 4.1.

8.4 From the Goldstone Commission to the TRC

The South African TRC was the first truth commission to incorporate witness protection into its structures.⁶⁶ By looking further back in the institutional foundations for the truth commission, one can trace the development of witness protection, as part of an investigatory commission to the Goldstone Commission. Also evident are acknowledgments by civil society organizations of the potential for institutional continuity between the Goldstone Commission and the TRC.

As early as 1995 Gareth Newham identified that the lessons learned from the Goldstone Commission's work ought to inform the TRC's implementation of witness protection policies.⁶⁷ A submission from Lawyers for Human Rights on the Promotion of National Unity and Reconciliation Act details things that the Goldstone Commission had learned in terms of witness protection. The document suggests that, "it has been our experience during the Goldstone Commission that unless we were able to provide adequate protection for witnesses, we were unable to secure their attendance at the Commission for the purposes of procuring their testimony."⁶⁸ The Network of Independent Monitors' submission to the Minister of Justice on the establishment of the truth commission identifies that, "there has never been any effective witness protection programme in South Africa and this is an area that will need to be addressed seriously by the Truth

⁶⁶ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 4, 55.

⁶⁷ Newham, *Keeping the Wolves at Bay*.

⁶⁸ Lawyers for Human Rights, "Submissions on Promotion of National Unity and Reconciliation Bill, undated, 18-19. Peace Action Collection, AG2515, file H4, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

Commission.”⁶⁹ These examples demonstrate that civil society actors raised the issue and necessity of a witness protection program in the TRC. Further, the minutes of a technical workshop of civil society actors that took place in 1995, identify that the witness protection program must make clear that “witness protection” means “protective custody”.⁷⁰ This is a similar structure to that used by the Goldstone Commission, despite criticism of the process. Although the design of the witness protection program for the truth commission eventually developed into something more comprehensive,⁷¹ the links to previous witness protection schemes are evident.

Other elements of the TRC also influenced the development of witness protection measures. The decision to widely publicize the proceedings of the TRC and to name perpetrators in the process would, in part, have necessitated the development of processes and structures to protect those who provided testimony. The witness protection program was operational beginning May 1, 1996.⁷² According to the TRC Report, those who sought witness protection in the beginning were victims, witnesses who were concerned about safety based on details they could provide to the commission.⁷³ In October 1996, amnesty applicants increasingly sought protection, fearing “reprisals when testifying at public

⁶⁹ The Network of Independent Monitors Submissions to the Minister of Justice on the Establishment of a Truth Commission, 1992, § 6.2. Peace Action Collection, AG2515 H5.3, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

⁷⁰ Technical Workshop, Waalburg Conference Centre, Cape Town, Saturday 27 May 1995, 5. BC 1406, Alex Boraine Papers, E1.1 –E1.6, Fond 1406, Series E., University of Cape Town Libraries: Special Collections, University of Cape Town, Cape Town South Africa.

⁷¹ Government of South Africa, Regulations in Terms of Section 40 of the Promotion of National Unity and Reconciliation Act, 1995 (Act no. 34 of 1995): Limited Witness Protection Program, (1996).

⁷² *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 11, 387.

⁷³ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 11, 389.

hearings.”⁷⁴ The presence of protection provisions for people who testified at the commission strengthened the truth-seeking project by enabling people to come forward and provide evidence, and to have that evidence corroborated. 150 people used the witness protection program offered by the TRC.⁷⁵

The South African TRC also included other elements of protection for people to testify at the truth commission. Under certain circumstances, the Commission conducted hearings *in camera*. Its founding Act provided for enhanced information-seeking potential through Section 29:

Essentially, section 29 allowed the Commission to issue a *subpoena* calling on a person to appear before it and answer questions relating to a matter under investigation. Unless otherwise determined by the Commission, the enquiry would take place *in camera* and the witness would be compelled to answer questions, even though the answers might be self-incriminating.⁷⁶

Under Section 29, investigations and hearings could be held in private; the information and evidence provided to these investigations and hearings would only be made public at the discretion of the Commission according to the legislation.⁷⁷ The TRC used information gathered in these proceedings to corroborate evidence received through other information-gathering practices conducted by the truth commission. While there is some skepticism

⁷⁴ *Ibid.*, 390.

⁷⁵ Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," *Journal of International Affairs* 52, no. 2 (1999): 656.

⁷⁶ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 11, 334.

⁷⁷ See National Unity and Reconciliation Act, §29.

about what was accomplished in these hearings,⁷⁸ the TRC Report identifies that the Section 29 hearings played an important role in substantiating evidence.⁷⁹

The TRC also had other protection measures in place for people testifying or for those who would be identified publicly in its proceedings. If people were going to name people alleged to have been involved in incidents, the legislation dictated that the person implicated had to be notified that they would be named. This included for public hearings and in making findings.⁸⁰ Though the names of people who had been granted amnesty were to be published in the Government Gazette, the Human Rights Violations Committee had to grapple perpetrators named in hearings.⁸¹ The recourse for accused who did not want to be named was to apply to the courts for interdicts preventing the hearings from moving forward.⁸² Sarkin notes that the courts did require the TRC to provide adequate notice to those who would be named, the TRC “stat[ed] that it would not necessarily disclose the identity of witnesses that may name such perpetrators.”⁸³

In these design decisions, the interplay between the goals of truth-seeking, and the institutional components that facilitated truth-seeking are clearly illustrated. The Goldstone

⁷⁸ Piers Pigou, "The Apartheid State and Violence: What Has the Truth and Reconciliation Commission Found?," *Politikon* 28, no. 2 (2001): 208-209.

⁷⁹ Section 29 hearings are listed as a type of evidence which could be used to evaluate the probability of evidence, see *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 4, 91. See also, Chapter 10, 270.

⁸⁰ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 6, 143-144. See also the discussion of legal challenges faced by the TRC in in Volume 1, Chapter 7.

⁸¹ Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Antwerp and Oxford: Intersentia Publishers, 2004), 93.

⁸² Sarkin, *Carrots and Sticks*, 93-94. See also *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 7.

⁸³ Sarkin, *Carrots and Sticks*, 95.

Commission and the South African TRC provide a valuable example of how this space for interpretation in legislation and mandates can facilitate the truth-seeking processes with the incremental institutional change in the Goldstone Commission enabling the development of witness protection measures and the TRC refining it. The impact of the incremental institutional change is evident in two ways. First, earlier investigations highlighted some limitations of incorporating witnesses into the existing information-gathering processes. When the leadership of the Goldstone Commission had the capabilities adjust to identified limitations, and the resources to respond, the Commission developed modalities that were innovative in the South African context. Second, the adoption of similar witness protection measures at the TRC suggests a recognition of the value of the institutional conversion toward truth-seeking and information gathering within commission structures.

Conclusion

This chapter first highlighted the importance of witnesses in transitional justice and in the process of information gathering. Then, it demonstrated how the Goldstone Commission responded to limitations in its operating structure, recognizing the danger for witness participation and the limitations on information gathering during the transitional period. Framed as a process of incremental change, the witness protection component of the Goldstone Commission illustrates the manner in which the process of conversion better positioned the Goldstone Commission for information gathering. In the final section, this chapter demonstrated how the TRC was shaped and enabled by what came before it.

Chapter 9

9 Institutional Conversion: The Question of Amnesty

The previous chapters have demonstrated that the institutionalization of truth-seeking processes in South Africa can be explained using a path dependence framework coupled with theories of gradual institutional change. Thus far, two examples of institutional re-deployment in information-gathering institutions have been presented. Chapters 6 and 7 demonstrated that under certain conditions, the commission of inquiry, having been used historically to reinforce the Apartheid system was transformed, illustrating a process of ‘conversion’ in institutional adjustments. Chapter 7 illustrated that the commission of inquiry was re-deployed in a manner conducive to truth-seeking, despite the perceptions it had developed as part of the repressive system. Chapter 8 explored one example of institutional deployment that illustrated gradual institutional change in the commission of inquiry, through the institution of witness protection. This chapter explores how the institution of indemnity, and later amnesty was differently implemented and justified over the course of the South African transition, from the initiation of negotiations, through the constitutional negotiations, and eventually as a component of the Truth and Reconciliation Commission (TRC).

Scholars such as du Bois-Pedain and Sarkin articulate and demonstrate the persistence of amnesty from the early negotiations to the TRC’s power to grant amnesty.¹ Sitze recognizes, for example, that initial proposals about the amnesty process were similar

¹ Antje du Bois-Pedain, *Transitional Amnesty in South Africa* (Cambridge: Cambridge University Press, 2007), 40-43; Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Antwerp and Oxford: Intersentia Publishers, 2004), 194-198.

in every component to a piece of earlier indemnity legislation, the 1990 Indemnity Act, except for one element which referenced the newly established 1993 Interim Constitution.²

The question of amnesty within the transition was contentious until the end of the negotiations.³ South Africa's agreement to amnesty was included in the postamble to the 1993 Interim Constitution. The 1993 Interim Constitution included the following provision:

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.⁴

After the democratic election, the TRC was the chosen vehicle to address this clause of the Constitution.

This chapter traces the evolution of amnesty from the indemnity process under Apartheid, through the transitional negotiations, identifying the shift in instrumentality from the earlier negotiations to truth-seeking in the transitional period. It raises an important observation relating to institutional continuity and change. This chapter argues that the development and continued relevance of amnesty in this historical period can be explained as a product of persistence and change. We can trace a shift in amnesty's goals from its utility as a negotiation chip to the value placed on amnesty to access information

² Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (Ann Arbor: The University of Michigan Press, 2013), 30-31.

³ André du Toit, "A Need for 'Truth': Amnesty and the Origins and Consequences of the TRC Process," *International Journal of Public Theology* 8 (2014): 402.

⁴ Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. III: Laws, Rulings, and Reports (Washington, D.C.: United States Institute of Peace Press, 1995), 597.

at the TRC.⁵ This account offers a different perspective in analyzing the persistence of the institution of amnesty through the democratic election and into the TRC space, offering an explanation for the process as an illustration of incremental institutional change.

This chapter sets the context for the amnesty discussion, first, by situating how amnesty is theorized in truth-seeking and truth commissions. After a brief overview of indemnity under Apartheid, the chapter traces the development of the indemnity process in the early negotiating period, outlining elements of continuity in the decision-making and implementing arrangements. Mahoney and Thelen outline the significance of the coalitional dynamics, veto points or players in an environment, and the discretion in the interpretation of the rules as important features of gradual institutional change.⁶ The next three sections demonstrate how the interaction of these characteristics explains the gradual change in the purpose and application of amnesty in the South African transition focusing on the negotiating period, the Commission of Inquiry for the Prevention of Public Violence and Intimidation, and the TRC. The chapter argues that amnesty-in-exchange-for-information was not deployed with the Goldstone Commission because of the political conditions. However, these conditions were ripe for amnesty's conversation through the TRC. In the final sections, the chapter explores how amnesty was employed by the TRC in

⁵ Mallinder points to amnesty as a bargaining chip, but situates the discussion after the negotiations and then in discussions of bargaining for information. I suggest that the bargaining occurred with regards to early negotiations for political prisoners and that the exchange of information for amnesty represents a different goal to bargaining. See Louise Mallinder, "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa," in *Working Paper No. 2 from Beyond Legalism: Amnesties, Transition and Conflict Transformation* (Queens University Belfast: Institute of Criminology and Criminal Justice, 2009), 31-45.

⁶ James Mahoney and Kathleen Thelen, "A Theory of Gradual Institutional Change," in *Explaining Institutional Change: Ambiguity, Agency, and Power*, ed. James Mahoney and Kathleen Thelen (Cambridge: Cambridge University Press, 2010), 18-19.

light of its previous use and analyzes how these influences affected the amnesty process in the TRC.

A note on terminology is necessary. During the South African transition period under investigation, the terms indemnity and amnesty were sometimes used interchangeably.⁷ As discussed below, prior to the amnesty arrangement at the TRC, the Government of South Africa used indemnities to prevent charges being brought against individuals. In the early drafts of the legislation for the TRC, Minister of Justice Dullah Omar distinguishes between indemnity and amnesty based on whether or not an individual had been tried and convicted for acts of a political objective.⁸ According to this text, “indemnity is to be given to persons who have not yet been tried for any offence committed with a political object. Amnesty is granted to persons who have been convicted of an offence and who are serving or have served a period of imprisonment.”⁹ At the Healing of a Nation Conference in 1994, put on by civil society organizations to discuss the potential for a truth commission, the Minister of Justice, Dullah Omar, uses both terms in his remarks.¹⁰ Earlier legislation, both under Apartheid and during the negotiations, nominally refers to indemnity. However, with respect to information-gathering the concept of indemnity was replaced with amnesty—in exchange for truth.¹¹ Parker identifies that:

no important distinction was drawn between amnesties for those convicted of crimes and indemnities protecting violators from criminal and civil liability.

⁷ Sitze dedicates an entire chapter to the genealogy of these terms, see Sitze, *The Impossible Machine*, 23-49.

⁸ Sitze, *The Impossible Machine*, 33, 36.

⁹ *Ibid.*, 33.

¹⁰ Alex Boraine and Janet Levy, eds., *The Healing of a Nation?* (Cape Town: Justice in Transition, 1995), 2-8.

¹¹ Sitze, *The Impossible Machine*, 40.

Indeed, the 1995 Promotion of National Unity and Reconciliation Act uses the word amnesty for both.¹²

In the end, amnesty within the TRC included the components of indemnity. If granted amnesty, those already serving prison sentences for crimes that fell under the TRC's criteria would be released and those granted amnesty would be protected from criminal or civil liability for those acts.¹³

9.1 Amnesty and Truth-Seeking

In the field of transitional justice, the viability of amnesty in processes of redress is strongly debated. The debates on amnesty consider the legality of amnesties,¹⁴ questions of accountability and the prioritizing of retributive justice (and closely related arguments about deterrence),¹⁵ and the dimensions of morality that comprise deliberations over types of justice and amnesty.¹⁶ As Dugard points out, these discussions and debates are far from 'settled'.¹⁷ Furthermore, the moral complexity at the core of the discussions is not easily

¹² Peter Parker, "The Politics of Indemnities, Truth Telling and Reconciliation in South Africa: Ending Apartheid Without Forgetting," *Human Rights Law Journal* 17, no. 1-2 (1996): 1.

¹³ Promotion of National Unity and Reconciliation Act, Parliament of the Republic of South Africa, Act 95-34 (1995), 20 (27); *Truth and Reconciliation Commission of South Africa Report: Volume Six*, Chapter 1, page 14.

¹⁴ Diane F. Orentlicher, "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency," *The International Journal of Transitional Justice* 1 (2007): 18. See also, Mark Freeman and Max Pensky, "The Amnesty Controversy in International Law," in *Amnesty in the Age of Human Rights Accountability*, ed. Francesca Lessa and Leigh A. Payne (Cambridge: Cambridge University Press, 2012).

¹⁵ Chandra Lehka Sriram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (London and New York: Frank Cass, 2004), 6-12.

¹⁶ Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge: Cambridge University Press, 2017), 12-21 particularly. Stuart Wilson, "The Myth of Restorative Justice: Truth, reconciliation and the ethics of amnesty," *South African Journal on Human Rights* 17, no. 4 (2001): 531-562.

¹⁷ John Dugard, "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?," *Leiden Journal of International Law* 12 (1999): 1015.

mapped; theorizing the value of prosecution and accountability is necessarily different from implementing these ideals in practice.¹⁸ The issue is further complicated by ideas of non-retributive justice. Since the South African TRC particularly, the association of truth-seeking with amnesty has changed the parameters of the discussion, building on nuances of conditionality for disclosing information, and incentivizing participation in truth-seeking processes.

Leigh and Payne define amnesty as “legal measures adopted by states that have the effect of prospectively barring criminal prosecution against certain individuals accused of committing human rights violations.”¹⁹ An ongoing debate in the human rights community is whether amnesties can be justified in cases of human rights abuses or whether prosecution is always required. The entrenchment of an “accountability” norm has channeled much of the discussion into when amnesty might be justified, if ever, and what the limits of amnesty ought to be.²⁰ Pertinent to this framing is Dugard’s recognition that amnesties should not all be treated the same.²¹ Contextual differences may facilitate prosecution, and in some cases, prosecution may not be deemed the ‘right’ path of justice for human rights violations.

For those who contend that the impunity associated with amnesty is detrimental to the development of human rights and democratization, amnesties are considered

¹⁸ Sriram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition*, 7.

¹⁹ Francesca Lessa and Leigh A. Payne, "Introduction," in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh A. Payne (Cambridge: Cambridge University Press, 2012), 4.

²⁰ Kathryn Sikkink and Hun Joon Kim, "The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations," *Annual Review of Law and Social Science* 9 (2013): 269-285.

²¹ Dugard, "Dealing with Crimes of a Past Regime," 1009.

unjustifiable.²² Others, however, suggest that amnesties considered and granted under certain conditions have an instrumental role to play in addressing past human rights violations. This may be in the very possibility of a transition itself, or, in enabling other transitional justice mechanisms to operate.²³ Amnesty can facilitate transitions where parties may be otherwise unwilling to negotiate.²⁴ A demand for amnesty or an amnesty agreement is sometimes the contingency on which transitions or agreements are made. The intention here is not to situate my argument along the continuum of the morality or utility of amnesty. Rather, by presenting the broad strokes of amnesty's role in transitional justice, the link between amnesty and truth commissions itself can be more clearly articulated.

In the facilitator line of reasoning, amnesty can expedite the uncovering of information. Amnesty is identified as an incentive, in this regard, for disclosing information about past events.²⁵ South Africa's conditional amnesty, that is, the granting of amnesty only when individuals presented the complete details of crimes, influenced considerations of the application of amnesty mediated by truth commissions in transitional justice.²⁶

²² Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, "Conclusion: Amnesty in the Age of Accountability," in *Amnesty in Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa (Cambridge: Cambridge University Press, 2012), 337-339.

²³ Olsen, Payne, and Reiter, "Conclusion: Amnesty in the Age of Accountability," 340-341.

²⁴ Orentlicher, "'Settling Accounts' Revisited," 11.

²⁵ Louise Mallinder and Kieran McEvoy, "Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies," *Contemporary Social Science* 6, no. 1 (2011): 113. On the amnesty process as conditional see du Bois-Pedain, *Transitional Amnesty in South Africa*, 20-23. Antje du Bois-Pedain, "Accountability Through Conditional Amnesty: The Case of South Africa," in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh A. Payne (Cambridge: Cambridge University Press, 2012). See also, Ronald C. Slye, "Amnesty, Truth, and Reconciliation: Reflection on the South African Amnesty Process," in *Truth V. Justice*, ed. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 170-188.

²⁶ Slye, "Amnesty, Truth, and Reconciliation: Reflection on the South African Amnesty Process," 172.

Amnesty agreements do not necessitate the establishment of a truth commission, however the relationship between amnesties, truth commissions, and prosecutions is complex. When they first emerged, new governments often established truth commissions *because* prosecution was not possible. Thus, truth commissions may have been operating with amnesties already in place, as was the case in Chile, for example.²⁷ In Chile, an amnesty law passed in 1978 prevented the new regime from pursuing prosecutions for human rights violations committed under the regime of Augusto Pinochet.²⁸ The amnesty law was one of the factors that steered the new regime to adopt a truth commission in order to address the human rights violations under the previous regime.²⁹ The report of one of the truth commissions established in Chile, the Rettig Commission, recognizes that “the worst and most systematic human rights violations perpetrated by the military government occurred in the period covered by the amnesty.”³⁰ In this case, the truth commission was not structured to grant amnesty, but had been informed by the existing amnesty arrangement and the balance of power.

Hayner points out that the direct relationship between truth commissions and amnesty is frequently magnified based on the notoriety of the South African case.³¹ The

²⁷ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2002), 47.

²⁸ Mark Ensalaco, "Truth Commissions for Chile and El Salvador: A Report and Assessment," *Human Rights Quarterly* 16, no. 4 (1994): 657-659; Jose Zalaquett, *Introduction to the English Edition, Report of the Chilean National Commission on Truth and Reconciliation*, via United States Institute of Peace, 9.

²⁹ Ensalaco, "Truth Commissions for Chile and El Salvador," 657; Margaret Popkin and Naomi Roht-Arriaza, "Truth as Justice: Investigatory Commissions in Latin America," *Law & Social Inquiry* 20, no. 1 (Winter 1995): 84.

³⁰ Zalaquett, *Introduction to the English Edition, Report of the Chilean National Commission on Truth and Reconciliation*, 9.

³¹ Hayner, *Unspeakable Truths*, 104-105.

South African experience has also shaped perceptions about amnesty processes in other commissions, causing confusion at times.³² As Slye recognizes, however, the unique South African amnesty process has “not been adopted by any other country undergoing a similar transition, and it seems unlikely that it will.”³³ The characteristics of the South African transition enabled the production of a transitional process that was amenable to the negotiating parties, that could facilitate the disclosure of information, and that could facilitate the granting of amnesty. Less attention has been paid to how the gradual changes in the institution of amnesty explain, in part, its redeployment at the TRC. The institutional predecessors to the TRC in South Africa shaped its institutionalization and incremental change in important ways.³⁴

9.2 Indemnity/Amnesty: Apartheid and Transition

The institution of indemnity was relatively extensive for the security forces of the Apartheid state, reflecting a pattern of path-dependence. Similar to the commission of

³² Slye identifies that much of the text in the Kenyan TJRC mandate borrowed the language used in the South African TRC, despite the fact that that amnesty could only be recommended in the Kenyan case and the South African guidelines for determining amnesty were vastly different than those in Kenya. Ronald C. Slye, *The Kenyan TJRC: An Outsider's View from the Inside* (Cambridge: Cambridge University Press, 2018), 64-67.

³³ Slye, *The Kenyan TJRC: An Outsider's View from the Inside*, 50.

³⁴ Many discussions of amnesty in the South African transition focus on the debate between amnesty and impunity or the legacy of impunity. See, for example, Ole Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process* (Leiden: Martinus Nijhoff Publishers, 2009); Jonathan Klaaren and Howard Varney, "A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues Around Legislation for a Second Amnesty," in *The Provocations of Amnesty: Memory, Justice and Impunity*, ed. Charles Villa-Vicencio and Eric Doxtader (Trenton, NJ: Africa World Press, Inc., 2003), 265-293; Mahmood Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)," *Diacritics* 32, no. 3/4 (2002), 32-59; Wilson, "The Myth of Restorative Justice," 531-562.

The analysis here does not address the debates on the morality of amnesty nor on the potential for a legacy of impunity. The focus of this discussion is on the persistence of the institution of amnesty and the ways in which it was adjusted and redeployed over time.

inquiry, indemnity offered a means through which the state could enforce public order, and contain opposition. State security forces in South Africa were afforded several protections under law and one of these was indemnity from liability. Major pieces of legislation to facilitate indemnity were implemented after violent events that were condemned by international and domestic actors, like police involvement in the Sharpeville Massacre in 1960 and the police shooting of protestors during the Soweto Uprising in 1976.³⁵ Sitze traces the institution of indemnity using the historical jurisprudence of the concept suggesting that the TRC's use of amnesty was a continuation of the practice of indemnity that, under Apartheid, had become normalized.³⁶

Entrenched in law were provisions that police and defence forces could not be held liable for crimes committed in the pursuit of their duty. Bogden and Shearing characterize this as the “right to kill within rules,” pointing to the 1977 Criminal Procedure Act 51, which allowed shoot to kill responses to prevent suspects from getting away.³⁷ The 1982 Internal Security Act provided “officers in the SAP of the rank of lieutenant-colonel or above the power to order preventive detention, detention of witnesses, and for interrogation.”³⁸ A 1979 amendment to the Police Act provided for wider powers for the police, in terms of search powers.³⁹

In addition to the protection for state officers provided by the laws of policing and enforcement, the Government of South Africa passed Indemnity Bills in 1961 and 1977 to

³⁵ Sitze, *The Impossible Machine*, 47.

³⁶ *Ibid.*, 8.

³⁷ Mike Brogden and Clifford D. Shearing, *Policing for a New South Africa* (Florence: Routledge, 1997), 17.

³⁸ John D. Brewer, *Black and Blue: Policing in South Africa* (Oxford: Clarendon Press, 1994), 291.

³⁹ Brewer, *Black and Blue: Policing in South Africa*, 291.

protect members of the police, and other state officials, from being held accountable for the police-involved shootings at Sharpeville and Soweto.⁴⁰ The state justified these indemnity provisions in terms of necessary action to maintain public order, provided officials acted in good faith.⁴¹ Although passed in July 1961, the 1961 Indemnity Act was given effect from March 21, 1960 (the day of the Sharpeville Massacre). The legislation was:

To indemnify the Government, its officers and all other persons acting under its or their authority in respect of acts, announcements, statements or information advised, commanded, ordered, directed, done, made or published in good faith for the prevention or suppression of internal disorder or the maintenance or restoration of good order or public safety or essential services or the preservation of life or property in any part of South Africa included in the Republic or the termination of a state of emergency in certain areas included in the Republic, and to provide for matters incidental thereto.⁴²

Similarly, the provisions of the Indemnity Act of 1977 covered 16 June 1976 (the day of the start of the Soweto Uprising) onward:

To indemnify the State, members of the Executive Council of the Republic, persons in the service of the State and persons acting under their authority in respect of acts, announcements, statements or information advised, commanded, ordered, directed, done, made or published in good faith for the prevention, suppression or termination of internal disorder or the maintenance or restoration of good order or public safety or essential services of the preservation of life or property in any part of the Republic and to provide for matters connected there-with.⁴³

Both of these Acts highlight the prevention of disorder by state officials as justification for indemnity, despite the deadly outcomes of their actions. In both Sharpeville and the Soweto

⁴⁰ Sitze, *The Impossible Machine*, 72-80. See also, Brogden and Shearing, *Policing for a New South Africa*, 18.

⁴¹ Sitze, *The Impossible Machine*, 72-83.

⁴² Indemnity Act No. 61 of 1961, accessed April 13, 2020 at <https://www.justice.gov.za/legislation/acts/1961-061.pdf>. See also, *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 13, 459.

⁴³ Indemnity Act, No. 13 of 1977, Republic of South Africa Government Gazette, 141, no. 5445, 16 March 1977.

violence, the police were indemnified for shooting on crowds of civilians. These actions were justified by the state in terms of maintaining control, despite the discrepancy in threat versus response.⁴⁴ Sitze argues that,

initially theorized under imperial conditions as a technique for the suppression of anticolonial rebellion, indemnity functioned under apartheid as a *carte blanche* endorsement for the police to wage ‘low-intensity war’ against individuals and populations opposed to apartheid.⁴⁵

Using indemnity during Apartheid achieved the Government’s ambition of public order in the face of opposition.

Indemnity’s purpose at this time was not information gathering, nor conciliation. The goal was to protect state agents in the pursuit of ‘order’ at all costs, as the legislation passages above suggest. As Frankel notes in his assessment of the Wessels Commission after the Sharpeville Massacre, there was little expectation for information. Frankel suggests that “the police drew strength from the fact that they knew they were untouchable in the context of the times.”⁴⁶ Frankel recognizes that the prospective of amnesty in exchange for information emerged later, with the Truth and Reconciliation Commission.⁴⁷

Under Apartheid, indemnity was used by the state to facilitate enforcement and coercion without consequence; protecting the individuals that worked to maintain the regime. In the intervening period, indemnity and amnesty were deployed for another

⁴⁴ The TRC Report findings regarding the riots at Soweto point to the police’s shoot-to-kill policy and “excessive force” of the riot control in its findings. See *Truth and Reconciliation Commission of South Africa Report: Volume Three*, Chapter 8, page 570.

⁴⁵ Sitze, *The Impossible Machine*, 84.

⁴⁶ Philip Frankel, *An Ordinary Atrocity: Sharpeville and Its Massacre* (New Haven and London: Yale University Press, 2001), 199.

⁴⁷ See Frankel, *An Ordinary Atrocity*, 199.

purpose, facilitating progress in negotiations. Despite changes in its justification and goals, indemnity persisted through the negotiation period and to the TRC.

9.2.1 Negotiating Political Prisoners

The second discernable goal of indemnity/amnesty in South Africa is evident in its association with the initiation of the negotiation process. A contentious issue underscoring the transition was the issue of political prisoners. The Apartheid regime criminalized political opposition and civil protest.⁴⁸ Thus, people who operated in opposition to Apartheid were criminalized for their association with these organizations, meaning many ended up imprisoned or in exile.⁴⁹ The ANC's position was that for negotiations to be at least somewhat even-footed, members of political groups that were imprisoned ought to be released.⁵⁰

The context for indemnity's redeployment is important. Following on the pattern of both the commission of inquiry itself and witness protection, indemnity was used initially by the Apartheid state to maintain the status quo. But, during the opening of the transition, it was used as a tool for change. Given the ANC's demands to move forwards with negotiations, the Government could not ignore the calls for prisoner release, and this necessitated the implementation of indemnity measures. Furthermore, the negotiations about indemnity, and later amnesty, relied on the incorporation of the ANC's preferences,

⁴⁸ The TRC Report has an extensive list of Apartheid legislation see *Truth and Reconciliation Commission of South Africa Report: Volume One*, 458. See also: Saul Dubow, *Apartheid, 1948-1994*, First ed. (Oxford: Oxford University Press, 2014), 45.

⁴⁹ The number of such prisoners remains imprecise. See: Kate Savage, *Negotiating the Release of Political Prisoners in South Africa*, Centre for the Study of Violence and Reconciliation (2000), 2.

⁵⁰ Parker, "Politics of Indemnities," 2. As per footnote 36, Savage identifies that the number of political prisoners was not recorded.

given their influence on negotiation decision-making. The implementation of indemnity/amnesty at various stages throughout the negotiation and transition period demonstrates sufficient ambiguity in application that helps to explain the changing purposes of its deployment and re-deployment. This ambiguity is most prominent in the provisions and interpretations for who met the requirements for the successive indemnity agreements and associated legislation.

The government's decision to lift the ban on opposition organizations in 1990 required a way to approach those imprisoned for political crimes. In his 1990 speech, de Klerk identified that those who were imprisoned simply for being part of the organizations would be "identified and released."⁵¹ While there was existing legislation that could be used to commute sentences, it was necessary to establish a framework for people who had not yet been charged with offences or who were waiting for trial proceedings.⁵² In addition, agreements had to be forged to determine the criteria to denote crimes as political offences. It is important to reiterate that the number of political prisoners imprisoned in South Africa was imprecise—in part because of the government's treatment of political offences as criminal. People were imprisoned for a wide variety of offences "ranging from treason to terrorism, membership of a banned organisation to murder," complicating the release of

⁵¹ "F.W. de Klerk's Speech at the Opening of Parliament 2 February 1990," O'Malley Archives: The Heart of Hope, accessed April 13, 2020, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02104/06lv02105.htm>.

⁵² "Report – Working Group established under paragraph 1 of the Groote Schuur Minute," The Nelson Mandela Centre of Memory on the O'Malley Archive compiled by Pdraig O'Malley, accessed February 4, 2020, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02104/06lv02108.htm>. See also, Mallinder, "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa," 17; Parker, "Politics of Indemnities," 2.

political prisoners.⁵³ Given the prospects for negotiations, however, the Government's ability to unilaterally extend indemnities and make determinations of eligibility was diminished.

Two agreements signed in the early 1990s were incremental steps toward the constitutional negotiations that cemented South Africa's transition. These were also key points in which the indemnity and amnesty discussions are rooted. These first steps, the Groote Schuur Minute (4 May 1990) and Pretoria Minute (6 August 1990), outlined the process for identifying political prisoners and determining how prisoners would be released.⁵⁴ This process was legislated in the Indemnity Act, 1990.⁵⁵ The deliberations and decisions surrounding the release of political prisoners not only laid the foundation for amnesty but discerned institutional elements for identifying and indemnifying political prisoners.

These early agreements in the negotiating process opened the space for amnesty/indemnity to inform the transitional conversation. As political decisions, their composition and the means through which the agreements would be implemented, illustrate incremental elements of change. Although the purpose of indemnity at this time was related to accountability measures, the indemnities associated with the negotiations demonstrate changes in the application of the institution of indemnity. Their purpose at this stage was not about amnesty or indemnity-in-exchange-for-information. However, this stage still illustrates gradual institutional change.

⁵³ Savage, *Negotiating the Release of Political Prisoners in South Africa*, 40.

⁵⁴ "The Groote Schuur Minute, 4 May 1990."; "The Pretoria Minute, 6 August 1990."

⁵⁵ Kieran McEvoy, "Prisoner Release and Conflict Resolution: International Lessons for Northern Ireland," *International Criminal Justice Review* 8 (1998): 35.

The indemnity rules incorporated a new group of interests while maintaining the interests of the old. As Thelen notes, institutions respond to changing societal and political conditions, and “the political renegotiations that accompany such realignments are crucial to understanding changes over time.”⁵⁶ This is significant because in both the Apartheid period and in the negotiation period, indemnity was applied differently. At the height of Apartheid, indemnity enabled the state to enforce Apartheid rules and order without fear of repercussion. During the negotiations, its institutional application was extended to bring the opposition forces like the ANC and the PAC into the fold. As Parker states:

the question of indemnities for those who had not been charged was bound up with amnesties for political prisoners; both were seen less as a means of protecting agents of the state from subsequent prosecution for human rights abuses, and rather more as a necessary pre-condition for talks about talks.⁵⁷

The necessary extension of indemnity provisions to facilitate negotiations illustrates one part of the process of gradual institutional change. The transitional environment, the recognition on behalf of the state and opposition that negotiations were inevitable, recalibrated the indemnity process to include those who had previously been excluded and indeed victimized by indemnity provisions.

In order to extend the indemnity institution, these early negotiations and agreements directly address a critical element of the indemnity/amnesty conversation that shaped the later amnesty process: how a political crime would be defined.⁵⁸ This is significant for two reasons, which will be discussed in turn. First, it placed restrictions on the indemnities that

⁵⁶ Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (Cambridge: Cambridge University Press, 2004), 33.

⁵⁷ Parker, "Politics of Indemnities," 2.

⁵⁸ Mallinder, "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa," 15-16.

followed, which was an adjustment to the sweeping indemnities the State provided itself in 1961 and 1977. Second, the ‘political’ caveat on crimes provided a foundation on which later indemnities and amnesties would be evaluated. The institution of amnesty was reshaped by these agreements and this piece would itself become entrenched during the 1990s, later being used to determine eligibility for amnesty at the TRC and serving as an undergirding reference for the institution of amnesty.

The negotiating parties agreed upon to determine which crimes fell under the category of political crimes using the Norgaard principles as a framework.⁵⁹ Danish judge Carl Norgaard established these principles during negotiations between the Government of South Africa and SWAPO in Namibia.⁶⁰ With some adjustments, these principles informed the Indemnity Act (1990) and the Further Indemnity Act (1992) that emerged from the negotiations, agreements, and working groups of the incremental agreements between the Government of South Africa and the ANC in the 1990s.⁶¹ This language are also found in the Constitution in terms of “offences associated with political objectives,”⁶² and again in

⁵⁹ Sarkin, *Carrots and Sticks*, 63.-The Norgaard Principles can be found in: Boraine and Levy, *The Healing of a Nation?*, 156-160.

⁶⁰ Boraine and Levy, *The Healing of a Nation?*, 156.

⁶¹ Raylene Keightley, "Political Offences and Indemnity in South Africa," *South African Journal on Human Rights* 9 (1993): 346. See also, *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 4, 50. Another piece of indemnity legislation was passed in 1992, prior to the Further Indemnity Act. This amendment to the Indemnity Act 1990, the Indemnity Amendment Act No. 124, 1992 allowed for the “disposal of articles seized in connection with the investigation of events for which a particular person has been granted indemnity” *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 13, 475.

⁶² Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. III: Laws, Rulings, and Reports (Washington, D.C.: United States Institute of Peace Press, 1995), 597.

the TRC with respect to which types of crimes would be addressed by the amnesty provisions.⁶³

The 1992 legislation, the Further Indemnity Act, strayed the furthest from the earlier definitional arrangements. This legislation was criticized for it was perceived as a self-amnesty for state actors and provided leeway for interpretation.⁶⁴ Under this legislation the President could grant indemnity for “an act with a political object,” the definition of which, argues Parker, “covered anything that a person believed or was told was political. Whether such a belief was reasonable was an irrelevant consideration.”⁶⁵ Savage identifies that the Further Indemnity Act was a means to deal with the difficult cases of prisoner release with regards to “acts with a ‘political object’ in which criminal convictions resulted. It also allowed the government to grant indemnity in the most controversial cases.”⁶⁶ These criticisms are underscored by the manner in which the Government passed this legislation. When the bill did not pass in parliament, de Klerk sought approval from the President’s Council, controlled by the ruling party, to pass the bill.⁶⁷

Implementing the arrangements once agreements had been reached brought other challenges. This negotiation stage clearly highlights that the institution of indemnity was focused more on securing indemnity for individuals and not on access to information for the justifications of indemnity or amnesty. In accounts of the indemnity processes in the

⁶³ *Promotion of National Unity and Reconciliation Act*.

⁶⁴ Parker, "Politics of Indemnities," 2; see also André du Toit, "A Need for 'Truth': Amnesty and the Origins and Consequences of the TRC Process," *International Journal of Public Theology* 8 (2014): 413.

⁶⁵ Parker, "Politics of Indemnities," 6.

⁶⁶ Savage, *Negotiating the Release of Political Prisoners in South Africa*, 5.

⁶⁷ Keightley, "Political Offences and Indemnity in South Africa," 356. See also, Sarkin, *Carrots and Sticks*, 43.

1990s, the general consensus in the literature is that the roll-out of the process was uneven and not sufficiently transparent. Though the 1992 Further Indemnity Act raised the most concerns, given that power rested so tightly with the President, the earlier processes were also subject to criticisms. As Keightley identifies, much of the complexity arose from those who remained imprisoned whose crimes were seemingly politically motivated but which were also often violent.⁶⁸ The indemnity process for people imprisoned for contravening Apartheid laws that stifled the opposition were less contentious, though there were still implementation challenges.⁶⁹

The number of applications received, more than 9,000 by April 1992, caused bureaucratic challenges.⁷⁰ The volume of applications also created challenges with respect to cases that had to be reviewed based on higher degrees of violence and could not be addressed by blanket indemnities.⁷¹ In March 1991, the government reported that there were 42 “hard cases” to be assessed in this category, however, the number was higher according to Lawyers for Human Rights.⁷²

The lineage and continued use of the Norgaard principles is significant, as are the adjustments made in the indemnity-turned amnesty process. Despite challenges in their

⁶⁸ Keightley, "Political Offences and Indemnity in South Africa," 336.

⁶⁹ Keightley, "Political Offences and Indemnity in South Africa," 336, 348. However, Parker illustrates that even those who were indemnified for belonging to banned political organizations or who left the country ‘illegally’ based on political restrictions, still faced barriers such as requirements of employment for release. Parker, "Politics of Indemnities," 3.

⁷⁰ Keightley, "Political Offences and Indemnity in South Africa," 348.

⁷¹ For example, in cases where violence was perpetrated, there were 16 cases in Namibia versus thousands in South Africa. See Parker, "Politics of Indemnities," 3.

⁷² Ivor Powell, “Govt going back on prisoners deal, says ANC,” Sunday Star, March 31, 1991. South African Institute of Race Relations (SAIRR), Press Cuttings, Part A, 1928-1998, AD1912, 184, Negotiations 1991 and 1992, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

application, the Norgaard principles illustrate continuity in the process. The definition of political crime was relatively consistent between the negotiations of the Pretoria Minute, the Indemnity Act, promulgated 15 May 1990, and the government's August 1990 Guidelines for Defining Political Crimes.⁷³

The Norgaard framework also influenced the TRC. The Report of the TRC identifies that “the wording of the Act leaned very heavily on what had become known as the ‘Norgaard Principles’.”⁷⁴ This continuity demonstrates a recognition of the continued relevance of these criteria, relying on them to guide the transitional process. Using similar criteria throughout the negotiating process provided some mutually agreed consistency in their application. The negotiated arrangements shifted the indemnity decisions solely from the power of the state to reflect the demands and preferences of the former opposition movement. This illustrates a new framing for the institution of indemnity that served the purpose of negotiation.

9.2.2 Challenges with secrecy

The indemnity processes also proved divisive based on the secrecy that characterized the process. The level of secrecy highlights the degree to which information gathering was not achieved in the earlier negotiation stages of the institution's deployment. For example, there was agreement during negotiations that called for the establishment of a body to advise the government on indemnity and to demonstrate objectivity for involved parties. However, the manner in which this was actualized provided for “advisory” bodies that were

⁷³ Mallinder, "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa," 22.

⁷⁴ *Truth and Reconciliation Commission of South Africa Report: Volume Six*, Section 1, Chapter 1, page 8. Parker describes this as an “uncertain return to the earlier criteria,” see Parker, "Politics of Indemnities," 6.

“subject to high levels of secrecy.”⁷⁵ Furthermore, equal political representation on the deciding committee was not achieved because the “three ANC nominees refused to participate because of a ruling that deliberations had to be held in secret.”⁷⁶ The secrecy of the operation was problematic, and was, according to Keightley:

not very successful in lending clarity to the indemnity process or in fostering the notion of objectivity. This is not to suggest that the committees, comprising three judges of the superior courts, were partisan to government interests. It is in particular in relation to the proceedings of these committees, and in particular the secrecy surrounding them, that criticism may be levelled.⁷⁷

However, media reports at the time identify that some of the judges assigned to the committee on “hard-cases”, including judges who had enforced Apartheid laws, may have been perceived as less credible.⁷⁸ The secrecy further exacerbated a perception that the earlier principles agreed to in order to identify political prisoners were not necessarily equally applied.⁷⁹ This perception arose from the indemnification of people whose crimes did not fit the established criteria, including violence towards civilians.⁸⁰ According to Keightley, the committee structure used to make the early decisions on who met the criteria to receive indemnity followed the development of the indemnity process, meaning that a small group of select people was responsible for decisions pertaining to indemnity.⁸¹ This was problematic because of the secret nature of the adjudication, which led some to

⁷⁵ Keightley, "Political Offences and Indemnity in South Africa," 338-339.

⁷⁶ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 4, page 51.

⁷⁷ Keightley, "Political Offences and Indemnity in South Africa," 351.

⁷⁸ Ivor Powell, “Govt going back on prisoners deal, says ANC,” *Sunday Star*, March 31, 1991.

⁷⁹ Keightley, "Political Offences and Indemnity in South Africa," 353.

⁸⁰ *Ibid.*, 353-354.

⁸¹ *Ibid.*, 355.

question the process given what seemed to be unequal application of the criteria and the lack of transparency in the indemnity process as a whole, given the secrecy with which the committees operated.⁸²

The later iterations of the indemnity process exacerbated the problem of secrecy. The Indemnity Amendment Act 1992 (Act no. 124) and the Further Indemnity Act 1992 (Act no. 151) were problematic given their ability to obscure information, never-mind gathering and publicizing it. In the former, indemnity was granted under these provisions, which also provided for the “disposal of articles seized in connection with the investigation.”⁸³ The Further Indemnity Act “extended indemnity to state offenders and provided for total secrecy regarding the actions for which individuals sought indemnity.”⁸⁴ The impact of these agreements was controversial. The Further Indemnity Act was seen as an effort by the state to ensure security forces were protected. Parker notes that the “Further Indemnity Act was thus widely seen as a form of self-indemnity conducted in secret.”⁸⁵ The Further Indemnity Act stipulated significant secrecy around the application and adjudication process. This act restricted access to information, those approved for indemnity under the Further Indemnity Act would be named, but their crimes and victims would not be made public.⁸⁶ André du Toit also recognizes there were unintended consequences such that mainly opposition forces sought and were granted indemnity under

⁸² Keightley, "Political Offences and Indemnity in South Africa," 352-355.

⁸³ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 13, 475.

⁸⁴ *Ibid.*, 475.

⁸⁵ Parker, "Politics of Indemnities," 2.

⁸⁶ Lynn Berat and Yossi Shain, "Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase," *Law & Social Inquiry* 20, no. 1 (Winter 1995): 178.

the Further Indemnity Act while few state security forces sought indemnity under the Act.⁸⁷ Making an important observation in the implementation of the Further Indemnity Act, du Toit identifies that it “did require amnesty applicants to make personal disclosures—except that all procedures, hearings and decisions under the Act were cloaked in official secrecy.”⁸⁸ This illustrates that information gathering and truth-seeking were not the priority with these indemnity processes.

Prior to the TRC, another interim Committee was established to deal with lingering indemnity considerations.⁸⁹ To deal with these applications, before the TRC and after the 1994 democratic election, the ANC Government established a committee headed by Brian Currin, the national director of Lawyers for Human Rights to process indemnity applications that had not be dealt with prior to the election.⁹⁰ As McEvoy outlines, “the committee considered 1,200 individual applicants who claimed their offenses were political and recommended indemnity in 260 cases.”⁹¹ This link between the administrations, but prior to the TRC, illustrates the challenge of completing what ended up being a continuing process.

⁸⁷ du Toit, "A Need for 'Truth': Amnesty and the Origins and Consequences of the TRC Process," 413.

⁸⁸ *Ibid.*, 413.

⁸⁹ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 4, page 52. See also, Steve Matthewson, “Human rights abuses probed,” Pretoria New, 7 June 1994, The Brian Currin Collection, AL3065, B 25-B72, B143, South African History Archive, Constitution Hill, Johannesburg, South Africa.

⁹⁰ Parker, "Politics of Indemnities," 2; Sarkin, *Carrots and Sticks*, 46. See also Steve Matthewson, “Human rights abuses probed,” Pretoria New, 7 June 1994. See also “Statement by the Minister of Justice, Mr Dullah Omar on Amnesty/Indemnity” undated, unpublished, Goldstone Commission Collection, NMAP 2015/52, 4.81, 4.82, folder 182, Nelson Mandela Centre of Memory, Johannesburg, South Africa.

⁹¹ McEvoy, "Prisoner Release and Conflict Resolution," 36. See also Mallinder, "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa," 49-50.

While the amnesty deliberations continued, and an agreement to amnesty was included in the 1993 Interim Constitution, the framing of the provision of amnesty shifted once again. Through the TRC, amnesty was justified as a means to uncover information about the past regime, with a recognition that “Nuremburg-style trials” were not possible, nor necessarily desirable.⁹² Although amnesty was essentially a condition for the transition, its deployment through the TRC illustrates that it underwent a process of conversion to be used as an information-gathering mechanism. This process is illuminated by the Goldstone Commission’s deliberations on amnesty, prior to the TRC.

9.3 The Goldstone Commission and Information Gathering

This section explores the roots of amnesty’s re-deployment towards information-gathering at the TRC. A part of the justification for the conditionality of amnesty through the TRC was the potential to use amnesty to gather information. In the intervening period, while the negotiations were ongoing, the potential for amnesty to be used more instrumentally for information gathering was proposed by the Commission of Inquiry for the Prevention of Public Violence and Intimidation. This discussion with regards to information gathering is important because the potential of offering something in *exchange* for information during the transition played out in an important way in the period leading up to the democratic elections and the establishment of the TRC.

⁹² For an overview of the debate see, Emily H. McCarthy, "South Africa’s Amnesty Process: A Viable Route Toward Truth and Reconciliation?," *Michigan Journal of Race and Law* 3 (1997): 186-193. Other references to the Nuremburg discussion include for example, Alex Boraine, "Truth and Reconciliation in South Africa: The Third Way," in *Truth V. Justice*, ed. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 143; Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor* (New Haven and London: Yale University Press, 2000), 66.

Conversations around amnesty occurred during the tenure of the Goldstone Commission but amnesty was not formally used to gather information until the TRC. This illustrates an interaction between three elements that inform Mahoney and Thelen's framework of gradual institutional change. The political context, the institution itself, and the type of change-agent at work suggest that the possibility of deploying amnesty for a different purpose gained potential but the environment and the institution were not conducive to change.⁹³ After the democratic election, the political environment and altered composition of the power-holders offers some insight into the re-deployment of amnesty at the TRC. However, consideration of amnesty by the Commission of Inquiry for the Prevention of Public Violence and Intimidation illustrates the potential variation of possible functions for amnesty. As this section and the next demonstrate, amnesty's deployment as an information-gathering measure at the TRC highlights the final shift in the purpose of amnesty in the period under consideration.

In order to ascertain facts, in the quest for information from perpetrators and witnesses, discussions of amnesty emerged related to the Goldstone Commission operations.⁹⁴ The Goldstone Commission articulated the political value of granting amnesty in investigating the allegations of violence by state apparatus. Daniel Terris identifies that "in August 1992, Richard Goldstone took advantage of the public spotlight to offer a bold proposal. He called for an amnesty for those who agreed to testify before the Commission about matters relating to the promotion of violence."⁹⁵ Analysts suggest

⁹³ Mahoney and Thelen, "A Theory of Gradual Institutional Change," 15.

⁹⁴ Berat and Shain, "Retribution or Truth-Telling," 176.

⁹⁵ Daniel Terris, *The Trials of Richard Goldstone* (New Brunswick: Rutgers University Press, 2019), 83.

that the purported purpose of amnesty in these considerations was as a means of access to information.⁹⁶ In Graeme Simpson's submission on the proposed legislation for amnesty/indemnity and the TRC, he identifies that the Goldstone Commission:

stimulated debate over the merits of a general amnesty, resulting from the Commission's call for such an arrangement in order to better facilitate its task of gathering information on the activities of the SADF, the SAP, and the KwaZulu police, as well as the military wings of the ANC and the PAC. Albeit on different grounds, the issue of indemnity or amnesty was once again linked to the concern for the disclosure of information relating to (political) criminal acts.⁹⁷

As early as 1992, a periodical reflects that Goldstone "calls for an amnesty to enable him to investigate fully the activities of the SADF, the SAP, the KwaZulu Police and the military wings of the ANC and the PAC, in response to the UN recommendations on violence."⁹⁸ Notably, this report reads: "Judge Goldstone makes his commission available to assist political parties in working out the details of any amnesty that would lead to full disclosure, combat violence and start the process of reconciliation."⁹⁹ This already hints at the idea of amnesty for information. Mallinder suggests that "this appears to be the first occasion where an individualised process in which amnesty was offered in exchange for truth was suggested in South Africa, although at this moment it was suggested to deal with ongoing violence rather than crimes of the past."¹⁰⁰ However, media coverage of the Harms

⁹⁶ Berat and Shain, "Retribution or Truth-Telling," 176. See also, Mallinder, "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa," 32.

⁹⁷ Graeme Simpson, "*Proposed Legislation on Amnesty/Indemnity and the establishment of a Truth and Reconciliation Commission.*" *Submission to the Minister of Justice, Mr Dullah Omar MP, June 1994*, <https://www.csvr.org.za/publications/1718-proposed-legislation-on-amnestyindemnity-and-the-establishment-of-a-truth-and-reconciliation-commission>.

⁹⁸ South African Conflict Monitor, August to November 1992, Centre for Socio-Legal Studies, University of Natal, 5. NMAP 2015/52, GCI file 139, Nelson Mandela Centre of Memory, Johannesburg, South Africa.

⁹⁹ *Ibid.*, 5.

¹⁰⁰ Mallinder, "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa," 32.

Commission also identified the inability to offer amnesty as a hindrance to witness participation for fear of self-incrimination.¹⁰¹ Undoubtedly, the credibility of the Goldstone Commission's operation as discussed in Chapter 7 increased the legitimacy of the discussion with the Commission of Inquiry for the Prevention of Public Violence and Intimidation.

The fourth interim report of the Commission of Inquiry for the Prevention of Public Violence and Intimidation, at the end of 1993, marks another turning point in the amnesty debate. This report revealed evidence that the Commission had uncovered on a hit squad operating in the KwaZulu Police (KZP) Force. The evidence pointed to the connection between the SAP, the KZP, and the hit-squad allegations.¹⁰²

Under the transitional administration structures, the Transitional Executive Council (TEC) established a Task Force to investigate the hit squad allegations. Within this task force, a further request for an amnesty in exchange for information is identified. The Preliminary Report of the TEC Investigation Task Group, released in December 1993, states that a request was made to the TEC "that a provision be made for the indemnification of witnesses or informants where the information supplied would lead to a reduction in hit squad activities but would expose the informant to a criminal prosecution."¹⁰³ However, periodical reports in February 1994 illustrate that the decision had yet to be made:

¹⁰¹ Sarah Sussens, "The toothless watchdog," Sunday Star, June 10, 1990. South Africa Institute of Race Relations (SAIRR), Press Cuttings, Part A, 1928-1998, AD 1912, H110, Harms Commission 1990-1991, file J3, Wits Historical Papers, William Cullen Library, Johannesburg, South Africa.

¹⁰² Commission of Inquiry regarding the Prevention of Public Violence and Intimidation, "Fourth Interim Report," 6 December 1993.

¹⁰³ "Preliminary Report of the TEC Task Group," Unpublished, NMAP 2015/52 GCI, NMAP 4.4.4, file 160, Nelson Mandela Centre of Memory, Johannesburg, South Africa.

The TEC says it will consider granting indemnity to people who are prepared to give evidence on alleged hit squads in the KwaZulu Police. The matter will be discussed with the Goldstone Commission and the task group appointed by the TEC is preparing a report on the alleged hit squads.¹⁰⁴

There was no agreement on amnesty, despite the recommendation, and having few, if any, other means to facilitate participation by those who would have been able to advance the investigations.¹⁰⁵ This is also particularly interesting, because the Interim Constitution had been published in the Government Gazette at the end of January in 1994.¹⁰⁶ This suggests that the agreement was secured and the prospects of the amnesty after the transition, while not outlined in detail, were protected. As du Toit points out, “when the amnesty issue resurfaced, as in Justice Goldstone’s revelation to President De Klerk of high level SA Security Police involvement in ‘Third Force’ operations in February 1994, no reference was made to the possible relevance of the amnesty agreement.”¹⁰⁷ The purpose here is not to explain why the agreement did not emerge. Rather, the focus is on the change that the institution of amnesty itself underwent. These considerations at the Goldstone Commission are important in tracing the conversion within the institution. As Terris articulates, “for the moment, then, Goldstone’s August 1992 suggestion went nowhere. Three years later, however, amnesty would return as a major feature of South Africa’s Truth and

¹⁰⁴ South Africa Conflict Monitor: February/March 1994, Centre for Socio-Legal Studies, University of Natal, 4. NMAP 2015/52, GCI, Box 36, Folder 139, 02526, Nelson Mandela Centre of Memory, Johannesburg, South Africa.

¹⁰⁵ “Preliminary Report of the TEC Task Group.”

¹⁰⁶ du Toit, “A Need for ‘Truth’: Amnesty and the Origins and Consequences of the TRC Process,” 415.

¹⁰⁷ *Ibid.*, 415.

Reconciliation Commission.”¹⁰⁸ An analysis into the political environment helps to theoretically situate the emergence of the changing potential goals for amnesty.

The requests for amnesty/indemnity by the institutions investigating the state’s involvement in hit squads emerged during the constitutional negotiations, after the earlier indemnity processes had been established. The discontent with the Further Indemnity Act, 1992 and a seeming hesitancy towards further amnesties suggests that the context of the request helps to explain the lack of institutional deployment. In particular, the deployment of information-gathering amnesties needs to be understood in the context of contentious negotiations and transitional administrative structures (through the Transitional Executive Council). Although information-gathering had been a substantial justification for amnesty in the TRC’s truth-seeking process, and despite the credibility that the Goldstone Commission had developed, the eventual deployment of amnesty to facilitate information gathering rested on the legitimacy of the post-transitional environment.

Whereas the Government, with the support of negotiating parties, established the Goldstone Commission to investigate and report on the causes of violence in the hopes of curbing it, the democratically elected government established the TRC with the goals of promoting “national unity and reconciliation.”¹⁰⁹ However, it was the Goldstone Commission’s focus on ongoing violence that is used to justify the value of the indemnity/amnesty. As the 1993 preliminary Task Force posited:

It has become evident that persons who have been implicated in such activity are willing to provide evidence to the Task Group and/or to the Goldstone Commission and that such information would lead to the prosecution and exposure of persons who co-ordinate these activities in Natal... It should be stressed that this measure, which

¹⁰⁸ Terris, *The Trials of Richard Goldstone*, 83.

¹⁰⁹ *Promotion of National Unity and Reconciliation Act*.

is envisaged will be a highly selective indemnification process, would strengthen all those mechanisms currently charged with the task of preventing violence and intimidation such as the Goldstone Commission.¹¹⁰

With this framing, the decision not to adopt these measures is important because it suggests that the application of a contentious tool of information gathering, at a time fairly close to the election, could not necessarily be agreed upon by the multi-party TEC. The Interim Constitution had not yet taken effect, meaning that the Postamble in the Interim Constitution that contained the amnesty provisions was not yet in force.¹¹¹

In this context, the potential for parties to block change can be characterized as ‘high’ since the TEC operated based on relative consensus.¹¹² Furthermore, as discussed further below, amnesty has been identified as a ‘deal-breaker’ in the transitional negotiations. The persistence of disagreement about the issue and its inclusion very late in the process demonstrates the difficulty in reaching agreement about it. In this way, the change in environment and institutional parameters after the transition facilitated the eventual change in the deployment of amnesty and its associated goals. But, the Goldstone Commission arguably also influenced another dimension of these parameters in terms of the recognition of the *potential benefit* of using amnesty in this way.

The discussions by the Goldstone Commission and the reports of the Goldstone Commission influenced the environment in another way. The information uncovered by

¹¹⁰ Preliminary Report of the TEC Task Group.

¹¹¹ Johnny de Lange, "The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission," in *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 22. Sarkin, *Carrots and Sticks*, 50.

¹¹² John Hatchard and Peter Slinn, "The Path Towards a New Order in South Africa," *International Relations* 12, no. 4 (1995): 10.

the Goldstone Commission demonstrated the need for further investigation. Goldstone writes, for example, “it is generally accepted that the revelations of the Goldstone Commission, particularly those implicating the South African Police and the military, made it more difficult for de Klerk to resist the ANC demand for some form of accounting.”¹¹³

These investigations reiterated that there was information to glean from the state’s security forces.¹¹⁴ The credibility of the Commission of Inquiry for the Prevention of Public Violence and Intimidation connects here too, for impartial investigations could be used to justify further information-gathering or truth-seeking measures.

The agreement to amnesty, established in the Interim Constitution of 1993, necessitated some structure for its facilitation after the transition. The TRC, which had been under discussion in civil society for several years, became that tool. During the tenure of the Goldstone Commission, however, the political conditions were not conducive to further institutional change as they had been after the transition. The Commission of Inquiry for the Prevention of Public Violence and Intimidation recognized the need and potential value of amnesty-in-exchange-for information given the information that it uncovered. The conditions were more conducive to change after the election with the Government of National Unity after agreement to the amnesty clause in the Interim Constitution. The institution of indemnity/amnesty persisted throughout the 1990s, albeit with different goals. After the election, the conditions were favourable to change once more, and the final outcome of the conversion process is evident.

¹¹³ Goldstone, *For Humanity: Reflections of a War Crimes Prosecutor*, 66.

¹¹⁴ *Ibid.*, 57.

As du Toit reminds readers, the ANC's position since 1992 had been that an amnesty could not be considered except by a democratically elected government.¹¹⁵ Veto points were thus lower after the election, as transitional interests were more stable given the entrenchment of some measure of amnesty in the Interim Constitution. The inclusion of amnesty in the Interim Constitution meant that the deliberations about the institution moved away from *if* it would be secured to considerations of *how* it would be enacted. These dynamics opened the space for what Thelen calls "political renegotiations" about the institution itself given the political changes.¹¹⁶ Considering the eventual re-deployment of amnesty through the TRC, the deliberations and investigations of the Goldstone Commission are important precursory elements in tracing the shift in the institutions' purpose.

It is important to consider that the relationship between 'truth' and 'amnesty' had been ongoing during the negotiations. du Toit outlines the general trajectory of the discussion arguing that the value of truth and information was used as a counterpoint to the provision of general or blanket amnesties but also recognized as potentially coterminous features of the transition.¹¹⁷ He also suggests that there was a disconnect between the ongoing public debate about truth and amnesty and the private discussions of the constitutional negotiations.¹¹⁸

¹¹⁵ du Toit, "A Need for 'Truth': Amnesty and the Origins and Consequences of the TRC Process," 412.

¹¹⁶ Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan*, 33.

¹¹⁷ du Toit, "A Need for 'Truth': Amnesty and the Origins and Consequences of the TRC Process," 408-411.

¹¹⁸ *Ibid.*, 414.

9.4 The Amnesty Process and the South African TRC

The inclusion of amnesty in the Interim Constitution stemmed from state-security forces' threats of destabilization in light of potential prosecution.¹¹⁹ The amnesty component of the negotiations threatened to prevent an agreement to the Interim Constitution until the very end; the amnesty agreement was added to the Interim Constitution as a postamble.¹²⁰ The inclusion of the amnesty clause in the interim constitution, on which the TRC mandate based the approach to amnesty, was intended in part to "ensure that security forces would protect the result of the first democratic election and the black majority rule government against possible right-wing or security force attempts to overthrow it."¹²¹ Thus, while the rationale for the amnesty arrangement continued the negotiated bargain, the mechanism through which this 1993 agreement was later to be facilitated demonstrated a shift in the justification for amnesty. Paul van Zyl characterizes the TRC as "an attempt to restore moral equilibrium to the amnesty process."¹²² Tying amnesty to questions of justice and truth-seeking once again shifted the institution's purpose.

The TRC became the vehicle for amnesty after the 1994 election in South Africa. The decision to adopt a truth commission reflected the earlier negotiations.¹²³ The provision to grant amnesty in the mandate of the TRC is one of the unique features of the

¹¹⁹ Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," *Journal of International Affairs* 52, no. 2 (1999): 651. See also Sarkin, *Carrots and Sticks*, 49.

¹²⁰ McCarthy, "South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation?," 193-194.

¹²¹ Sarkin, *Carrots and Sticks*, 49.

¹²² van Zyl, "Dilemmas of Transitional Justice," 653.

¹²³ de Lange, "The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission," 23.

South African process. Particularly, the notion of a conditional amnesty, and not a blanket amnesty, required the development of processes and protocols to facilitate applications, disclosures, and decisions in order to determine who would be granted amnesty.¹²⁴ The “conditionality” of the amnesty, that is the provision of amnesty when the criteria of sufficient disclosure for crimes of a political nature was met, was a means through which amnesty could be individualized.¹²⁵ This individualizing attempted to structure a non-blanket approach to amnesty.

In light of the compromise on amnesty, amnesty itself is framed as a measure to achieve the objectives of the bill establishing the Truth and Reconciliation Commission, specifically “to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past.”¹²⁶ With respect to amnesty, a specific function of the commission was to:

facilitate and promote the granting of amnesty in respect of acts associated with political objectives, by receiving from persons desiring to make a full disclosure of all the relevant facts relating to such acts, applications for the granting of amnesty in respect of such acts, and transmitting such applications to the Committee on Amnesty for its decision, and by publishing decisions granting amnesty, in the Gazette;¹²⁷

The Amnesty committee was established to facilitate these provisions. The Amnesty committee, one of three operational committees of the TRC, worked between 1996 and 2001.¹²⁸ The Amnesty committee was initially composed of a chairperson, vice

¹²⁴ *Truth and Reconciliation Commission of South Africa Report: Volume Six*, Section 1, Chapter 5, page 83.

¹²⁵ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 1, page 7.

¹²⁶ *Promotion of National Unity and Reconciliation Act*.

¹²⁷ *Promotion of National Unity and Reconciliation Act*, Section 4C.

¹²⁸ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 10, 267. *Truth and Reconciliation Commission of South Africa Report: Volume Six*, Section 1, chapter 4, page 54.

chairperson and three representative South African citizens.¹²⁹ However, two amendments to the Act increased the number of personnel resulting, in 1997, in a 19-member committee that included judges, advocates, and attorneys.¹³⁰

Individuals could apply for amnesty for crimes of a political nature that were committed between March 1, 1960 and May 10, 1994.¹³¹ The TRC required individuals to apply for amnesty, self-initiating the testimony, rather than just receiving amnesty in exchange for testimony.¹³² Chapter 4 of the National Unity and Reconciliation Act, “Amnesty Mechanisms and Procedures” specified the criteria for determining whether an act was of a political nature.¹³³ The amnesty process required applicants to submit an application, after which the committee would determine whether it met the basic requirements for consideration (in accordance with the specified criteria). Applications were separated based on the type of crimes under consideration, and applications dealing with “gross violations of human rights” had to be heard in public.¹³⁴ The Amnesty Committee reviewed individual applications to ensure that the criteria for amnesty were met. 1,167 people were granted amnesty, and 145 were granted partial amnesty. In total

¹²⁹ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 10, 267.

¹³⁰ Sarkin, *Carrots and Sticks*, 68; *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 10, 268.

¹³¹ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 10, 267. An amendment to the Interim Constitution expanded the eligible time-period.

¹³² Slye, "Amnesty, Truth, and Reconciliation: Reflection on the South African Amnesty Process," 172-173.

¹³³ *Promotion of National Unity and Reconciliation Act*.

¹³⁴ Definition of Gross Human Rights Violations in *Truth and Reconciliation Commission of South Africa Report: Volume Six*, Section 1, Chapter 1, page 11. See also, van Zyl, "Dilemmas of Transitional Justice," 655.

7,116 amnesty applications were submitted.¹³⁵ Only about 2,500 of the 7,000 applications submitted met the criteria for crimes of a political nature.¹³⁶

Significant scholarly attention has been focused on the uniqueness of a truth commission being given the power to grant amnesty. It was the first time that this type of arrangement had been formalized within a truth commission process.¹³⁷ Assessments and critiques of the amnesty process in South Africa are numerous, and this type of evaluation will not be reiterated here because of the thematic breadth of these inquiries.¹³⁸ The purpose of the analysis here however is how amnesty itself underwent a conversion process through its inclusion in the TRC. The change in amnesty's purpose is evident by comparing the earlier indemnity processes with the expectations of amnesty's deployment at the TRC.

The discussions that preceded (and accompanied) the establishment of the TRC legislation focused on the value of the 'truth' in the transitional period. This discussion ties into amnesty's re-framing. In his opening speech to the "*Healing the Past Conference*," Minister of Justice Dullah Omar stated that human rights violations "should be investigated, recorded and made known."¹³⁹ In outlining the proposed provisions for the

¹³⁵ Sarkin, *Carrots and Sticks*, 107-108.

¹³⁶ *Ibid.*, 114.

¹³⁷ Boraine, "Truth and Reconciliation in South Africa: The Third Way," 141-157; du Bois-Pedain, *Transitional Amnesty in South Africa*; du Bois-Pedain, "Accountability Through Conditional Amnesty: The Case of South Africa," 238-262; Mamdani, "Amnesty or Impunity?," 32-59; Sarkin, *Carrots and Sticks*; van Zyl, "Dilemmas of Transitional Justice," 647-667; Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001); Wilson, "The Myth of Restorative Justice," 531-562.

¹³⁸ See for example: Jonathan Allen, "Between Retribution and Restoration: Justice and the TRC," *South African Journal of Philosophy* 20, no. 1 (2001): 22-41; Jennifer J. Llewellyn and Robert Howse, "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission," *The University of Toronto Law Journal* 49, no. 3 (1999): 355-388; Mamdani, "Amnesty or Impunity?," 32-59; van Zyl, "Dilemmas of Transitional Justice," 647-667.

¹³⁹ Boraine and Levy, *The Healing of a Nation?*, 2-3.

TRC, he states that “a pre-condition for indemnity or amnesty is full disclosure.”¹⁴⁰ The TRC Report highlights the professed value of the exchange of truth for amnesty, suggesting that the “individual amnesty has demonstrated its value... freedom was granted in exchange for truth. We have, through these means, been able to uncover much of what happened in the past.”¹⁴¹ The value of amnesty in exchange for information emerged as part of the justification for the amnesty inclusion in the Postamble.¹⁴²

The TRC Report highlights the instrumentality of amnesty in pursuit of truth. The Report states that “the amnesty process was also key to the achievement of another objective, namely eliciting as much truth as possible about past atrocities.”¹⁴³ The revised justification for amnesty was complex. The narrative that emerged from the TRC’s operation focused on the value of amnesty for information gathering purposes, although this was a political enactment of the previous agreement in the interim constitution. The narrative of the value of truth and information thus supplanted the context of the bargain.¹⁴⁴ As du Toit argues the necessity of ‘truth’ in the context of the transition appeared prior to the eventual establishment of the truth commission.¹⁴⁵ In 1992, for instance the ANC’s

¹⁴⁰ Ibid., 5.

¹⁴¹ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 1, page 7.

¹⁴² du Toit, "A Need for ‘Truth’: Amnesty and the Origins and Consequences of the TRC Process," 414.

¹⁴³ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 5, page 120.

¹⁴⁴ du Toit refers to this “tension” and the need to clarify the roots of the TRC, du Toit, "A Need for ‘Truth’: Amnesty and the Origins and Consequences of the TRC Process," 419.

¹⁴⁵ du Toit, "A Need for ‘Truth’: Amnesty and the Origins and Consequences of the TRC Process," 393-419.

response to its own internal inquiry highlighted the potential value in a truth commission that included the state.¹⁴⁶

That the institution of amnesty became entwined with the idea and value of truth helps to highlight the shift in the institutional deployment of amnesty. This redeployment illustrates the final goal that amnesty was used for in the time period under investigation in this project. With weak veto possibilities under the Government of National Unity, and with the amnesty secured, tying amnesty to information offered a middle path in the aftermath of the transition. Simpson recognizes that the presence of the parties previously in conflict within the government of national unity is important in understanding the emergence of the TRC.¹⁴⁷ The Interim Constitution and the Government of National Unity that followed were guided by continued consensus-based decision-making.¹⁴⁸ Furthermore, despite the recognition of the amnesty agreement, there was relative ambiguity in the Interim Constitution about how the process would be carried out. To revisit the language, the Postamble stipulated that Parliament would address the means through which amnesty would be deployed: “providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.”¹⁴⁹ This meant that the democratically elected government would be responsible for determining what the process, if any, would look like. This can be considered, as outlined by Mahoney and Thelen, “a high level of discretion

¹⁴⁶ Eric Doxtader and Philippe-Joseph Salazar, eds., *Truth and Reconciliation in South Africa: The Fundamental Documents* (South Africa: New Africa Books, 2007), 80-81.

¹⁴⁷ Simpson, “‘Tell no Lies, Claim No Easy Victories’: A Brief Evaluation of South Africa’s Truth and Reconciliation Commission,” 226.

¹⁴⁸ Hatchard and Slinn, “The Path Towards a New Order in South Africa,” 17.

¹⁴⁹ Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 597.

in interpretation/enforcement.”¹⁵⁰ Conversion in the long-standing institution of amnesty can be explained by the environment in which the truth commission was established and the relative ambiguity in the process to facilitate and justify amnesty.

9.5 Effects on Truth-seeking at The TRC

The effect of the earlier indemnity processes and the secrecy clauses had longer term impacts on the available information about those political crimes that had been committed in the past. This section discusses the tensions that resulted from indemnity/amnesty’s gradual change over time, particularly because the earlier institutional deployments were used to prevent information and investigation. When the institution was redeployed as a mechanism of information-gathering, the information gleaned was constrained by the earlier institutional goals. While changes to the procedural elements of amnesty in the TRC addressed some of the procedural shortcomings of earlier indemnity schemes, they were not able to redress the legacy of secrecy. Access to information about the past was limited, at least in part, by the earlier indemnity decisions and the access to information of state records.¹⁵¹

This tension in procedural adjustment and the legacy of past decisions also highlights the significant degree of transformation in the institution’s deployment. Here, components of change are seen in the effort to transform processes from the earlier indemnity committees and the later TRC provisions on issues of transparency, public information about the process, and information about the associated political crimes. The committee

¹⁵⁰ Mahoney and Thelen, "A Theory of Gradual Institutional Change," 19.

¹⁵¹ Piers Pigou, "False Promises and Wasted Opportunities? Inside South Africa’s Truth and Reconciliation Commission," in *Commissioning the Past: Understanding South Africa’s Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002), 48, 56-57.

responsible for amnesty in the TRC was more transparent in its decisions, aided by the public nature of proceedings (except when the Committee deemed it necessary for hearings to be held in private) and the necessary publication of amnesty decisions.¹⁵² As the Amnesty Committee report stipulates:

Where amnesty was granted, the Committee informed the applicant and the victim of the decision and also, by proclamation in the Government Gazette, published the full details of the person concerned as well as the specific act, offence or omission in respect of which amnesty was granted.¹⁵³

Rather than the secrecy and limited details of the previous investigations, the TRC made efforts to ensure that the public had information about the crimes for which it granted amnesty. This is significant in light of the value placed on information in exchange for amnesty.

One example of institutional efforts to increase information gathering was the creation of the investigation unit, operating with the Human Rights Committee and the Amnesty Committee. It has been characterized as a central component of the commission's work,¹⁵⁴ though the capacity to conduct thorough investigations has been criticized.¹⁵⁵ The intention behind such investigations was to gather more information about particular events under consideration by the TRC, including corroborating information in statements and public hearings, and investigating details for amnesty applications.¹⁵⁶ There was, however,

¹⁵² Sarkin, *Carrots and Sticks*, 61. See also, Anurima Bhargava, "Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission," *Columbia Law Review* 102, no. 5 (2002): 1308, 1331; du Bois-Pedain, *Transitional Amnesty in South Africa*.

¹⁵³ *Truth and Reconciliation Commission of South Africa Report: Volume Six*, Chapter 1, page 14.

¹⁵⁴ Pigou, "False Promises," 50. See also, *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 11, page 330.

¹⁵⁵ Pigou, "False Promises," 58-59.

¹⁵⁶ *Truth and Reconciliation Commission of South Africa Report: Volume One*, Chapter 11, pages 326, 332-333, 334-335, 270.

a counterpoint to the emergent information from the structure of this process. As du Bois-Pedain identifies, investigations were only conducted into those amnesty applications that met the criteria upon initial review. As such, those applications for which amnesty was denied categorically, were not used as a source to identify further information “for truth-related purposes alone.”¹⁵⁷ However, efforts to corroborate amnesty decisions went beyond the previous indemnity legislation, despite limitations in process.¹⁵⁸

The earlier process also meant engagement challenges. A significant component that demonstrates the change between the earlier indemnity processes and the amnesty at the TRC is the recognition that those who benefitted from the earlier indemnity provisions had little incentive to participate in the TRC. An influential element identified by du Bois-Pedain and Sarkin is that earlier decisions about indemnities limited the pursuit of truth through the conditional amnesties as envisioned by the TRC process.

Sarkin identifies that the earlier processes of indemnity altered the “amount of truth” that emerged through the amnesty process.¹⁵⁹ Framing the analysis this way, Sarkin points out that the expectation of information in exchange for truth was limited by the fact that many people who could have contributed information to the historical record did not have reason to participate in the amnesty process because their records (and sentences) had already been addressed.¹⁶⁰ du Bois-Pedain suggests, somewhat differently, that those who had not been tried or convicted for “gross human rights violations as defined in the TRC

¹⁵⁷ du Bois-Pedain, *Transitional Amnesty in South Africa*, 179.

¹⁵⁸ Pigou, "False Promises," 58-59.

¹⁵⁹ Sarkin, *Carrots and Sticks*, 194, 195.

¹⁶⁰ *Ibid.*, 195, 198-199.

Act” still ‘had to approach the Commission to receive indemnity from criminal civil liability.’¹⁶¹ Sarkin also identifies that ten people who had been granted indemnity earlier sought amnesty through the TRC because those who had been indemnified either did not know the parameters of the indemnity or because they sought to have the conviction for which earlier indemnity had been granted expunged.¹⁶² This number is significant in relation to the total number of people who might not have applied for amnesty at the TRC because of earlier indemnities.

The number of people who benefitted from the earlier indemnity process and early release is difficult to identify, but a 1995 report suggests approximately 14 000 people applied for indemnity under the 1990 and 1992 Acts, and just over 10 000 applications were successful.¹⁶³ Sarkin contends that “the effect of indemnities on the amnesty process must have been dramatic. Unfortunately, the extent of this will never be known.”¹⁶⁴

While the TRC was envisioned as a means through which information could be gathered *in exchange for* amnesty, the actual reach of the process was somewhat limited, despite adjustments in the design of the process in light of earlier experiences. The change to the practice is evident in both the mechanics of the institution’s deployment and the purpose. The process through which the TRC Amnesty Committee deliberated upon, and granted amnesty, was far more transparent than the earlier indemnity processes. The reason

¹⁶¹ du Bois-Pedain, *Transitional Amnesty in South Africa*, 43.

¹⁶² Sarkin, *Carrots and Sticks*, 196.

¹⁶³ Parker notes that the 3500 amnesty decisions proffered by the Government shortly before the election are thought to comprise the category of ‘unsuccessful’ applications. Parker, "Politics of Indemnities," 4. See also: du Bois-Pedain, *Transitional Amnesty in South Africa*, 41 - 42. Sarkin, *Carrots and Sticks*, 47.

¹⁶⁴ Sarkin, *Carrots and Sticks*, 195.

for this change was the transformation of indemnity and amnesty from a state protection mechanism, to a negotiating arrangement, and finally to an information-gathering mechanism.

While the amnesty dimension of the TRC is often presented as one of the exceptional features of the transition, as du Bois-Pedain and Sarkin illustrate, it also provides an example of how earlier institutions and decisions impacted the truth-seeking and amnesty processes.¹⁶⁵ Building upon this recognition, this chapter has argued that the institution of amnesty itself underwent a process of gradual institutional change during early 1990s. Tracing these influences provides an example of institutional conversion through the transition. This analysis does not address the debate on the capacity or performance of the South African TRC's handling of amnesty. Rather, the focus is on the conversion process within the institution of amnesty.

Conclusion

This chapter has argued that the process of conversion, as a mode of gradual institutional change, helps to explain the persistence of the institution of amnesty and the change it underwent in order to be used as a tool of information-gathering at the TRC. The chapter recognized the roots of indemnity legislation in the Apartheid regime as a tool of social order. It then traced the use of indemnities through the political negotiations to maintain the transitional negotiations through to the TRC. Finally, the chapter argues that the goal of amnesty changed again with respect to information gathering. As such, amnesty was used for at least three different goals within the time period under consideration: public

¹⁶⁵ du Bois-Pedain, *Transitional Amnesty in South Africa*, 23-29, 40-43; Sarkin, *Carrots and Sticks*, 31-54.

order, bargaining, and information gathering. The persistence of the institution of amnesty through the transitional environment is explained by its gradual change. The uncertain political environment and incorporation of different political preferences after the initiation of the transition in 1990 created conditions through which the use of amnesty was renegotiated and deployed.

Chapter 10

10 Conclusion

The dissertation answers two related questions. First, what role, if any, did earlier investigative institutions play in shaping South Africa's Truth and Reconciliation Commission (TRC)? This dissertation argued that the TRC was influenced by the development and operation of the Commission of Inquiry for the Prevention of Public Violence and Intimidation. This commission of inquiry, also known as the Goldstone Commission, transformed institutional elements of information gathering that had been used by the repressive Apartheid regime. Second, the dissertation answered the question, what were the Goldstone Commission's contributing institutional developments, and how do we characterize these contributions? I have argued that the Commission of Inquiry for the Prevention of Public Violence and Intimidation contributed to the institutionalization of truth-seeking in South Africa. The operation of the Goldstone Commission illustrates gradual institutional change in institutional modalities used for information gathering purposes. These institutional changes help to explain the institutional foundations of the TRC. Focusing on three institutional modalities of information gathering, I trace the role that the Goldstone Commission played in the gradual institutional change toward stronger truth-seeking measures.

To answer these questions, I have presented an argument in several steps. First, I outlined the conceptual and institutional challenge of the shared institutional structure of commissions of inquiries and truth commissions. I have pointed to the tension that when redressing legacies of abuse and past harm, states may have to rely on institutional structures that were used to perpetuate harm, even in times of transition. In the South

African case, several of the institutional features of the TRC had also been used during Apartheid to maintain the Apartheid system. I have explored this tension in relation to the persistence of institutional frameworks including the commission of inquiry, witness protection, and amnesty that had been used by the Apartheid system.

Second, I argue that the Commission of Inquiry for the Prevention of Public Violence and Intimidation did not fall into the same pattern of earlier commissions of inquiry that served Government interests and power relations. The founding parameters of this institution made possible gradual changes in relatively entrenched institutional systems. The Goldstone Commission's establishment, during the negotiating period, acknowledged and attempted to rectify the constraints of the previous institutions and this had a lasting impact. I have argued that the adjustments made by the operation of the Goldstone Commission laid a valuable foundation for the South African TRC.

Third, I have demonstrated the ways that the Goldstone Commission redressed some of the legacies of the Apartheid investigations in a way that facilitated its own credible investigations and also created favourable conditions to establish later truth-seeking efforts in the form of the TRC. To develop this part of the argument, I analyzed two other information-gathering institutions implicated in gradual institutional change: witness protection and amnesty. I argued that each of these institutional modalities underwent changes that can be explained as processes of conversion. These changes were enabled, in part, by the Goldstone Commission's operations. The Goldstone Commission garnered credibility due to the consensus in its establishment and its impartial investigations. As a result of the built-in provisions for adjustment in its founding legislation, there was space for the Commission to respond to emergent needs.

The Commission recognized the inadequacy of existing witness protection measures during its operations. The development of witness protection measures within the Goldstone Commission itself demonstrates incremental adjustment in the institution of the commission of inquiry based on the limitations of the state-provided structure. Using the provisions of the Goldstone Commission, the Commission incorporated witness protection within its structures. This strengthened the information-gathering capacities. Similar witness protection measures were later used by the TRC. Inclusion in the TRC mandate suggests a recognition of the value of this institutional adjustment even after the transition.

Tracing the case of amnesty, I argued that although the institution persisted in its use during Apartheid and the negotiations, it was not used for the same purpose throughout. I have argued that despite not being used by the Goldstone Commission, indemnity/amnesty is still a valuable illustration of how earlier institutional features underwent gradual change to be used for information gathering. Whereas amnesty had been used to protect state actors under Apartheid, it transformed during the period under consideration to a negotiating tool and then to an information-gathering mechanism. Although amnesty underwent a significant process of conversion toward information gathering and this was used in a novel way by the TRC, the earlier deployment of the institution had lasting impacts on its application.

The process of conversion is evident in each of these institutional modalities. The institutions persisted but the transitional environment provided the opportunity for changes in their application as the transition unfolded. Significantly, undergoing a process of incremental institutional change impacted the truth-seeking mechanisms that followed.

This analysis points to the importance of considering institutional histories in understanding truth commissions established in transitional periods.

10.1 Contribution

The thesis has argued that understanding the design and operation of the South African TRC cannot be easily extricated from earlier state-led investigations. The TRC can be better understood in light of its predecessor investigations, even if the earlier was not intended as a precursor. Read in this vein, this thesis has argued that part of the reason the TRC was able to be deployed as it was derived from the important work that was undertaken by a precursor institution, the Commission of Inquiry for the Prevention of Public Violence and Intimidation. This thesis has offered a novel investigation of the lineage of the TRC using historical institutionalism. When analyzed using a framework of path dependence and theories of gradual change as has I have done in this project, it is possible to trace how institutional modalities changed over the course of the 1990-1995 period, despite persistent institutional frameworks. The evidence presented here suggests an important informative influence in addressing credibility challenges, modifying institutional design limitations, and changing goals of institutional practice.

This dissertation is not arguing that ‘miniaturized’ or ‘quasi’ truth-seeking measures necessarily have to precede transitional justice measures. Rather, its innovation is that it argues that the experience afforded by a previous regime may warrant further attention in the design and implementation of truth-seeking measures. The conditions alter these

potentials.¹ The case has been made through this dissertation that in the South African case particularly, the governance of truth-seeking after transition and upheaval likely benefited from the incremental adjustment of institutionalized truth-seeking that was made possible, in part, by the Commission of Inquiry for the Prevention of Public Violence and Intimidation's mandate and emergence as a negotiated component for constitutional talks. The conditions under which such adjustments are possible, or the particulars of the adjustments themselves, warrant consideration in further research.

This dissertation did not argue that the implementation of the TRC depended on the Goldstone Commission, rather it has argued that the credible operation of the Goldstone Commission had important effects on the institutional development of the TRC. This dissertation has interrogated how existing institutions, re-tooled, may facilitate information gathering. In the South African case, the Goldstone Commission can be made sense of through a framework of gradual institutional change because of the history of the commission of inquiry in South Africa, the influence of the negotiation period on the Commission's design, and the operation of the Commission itself. An important contribution of this dissertation is the recognition that the persistence of institutional structures plays an important role in how transitional justice institutions are implemented. Further, the possibility that it may be these very institutions that are redeployed for truth-seeking, as transitional justice measures, gives insight into what measures can be taken in the building and design of transitional justice institutions to mitigate reversion or continuity of the status-quo.

¹ On the significance of conditions and the potential impacts see, Samar El-Masri, Tammy Lambert, and Joanna R. Quinn, eds., *Transitional Justice in Comparative Perspective: Preconditions for Success* (Palgrave Macmillan, 2020).

There is significance in the recognition that truth-seeking measures may be influenced by a process of gradual institutional change. It highlights that the existing institutional structures are difficult to remove. The path dependent nature of certain institutional features may both constrain and enable transitional justice. In addition, in South Africa even in contentious and uncertain periods, there was the potential for meaningful change within the confines of the old regime. Once this gradual change was initiated, it affected longer-term truth-seeking. This potential for change is relevant for settler-colonial societies or other post-colonial societies that grapple with questions of justice and redress in institutionally entrenched political systems.

This project also makes a contribution in its empirical and theoretical evaluation of the Commission of Inquiry for the Prevention of Public Violence and Intimidation. This investigative body played an important role in the transitions and negotiations and has been under-assessed. As Fanie du Toit points out, the relative smoothness of the elections and aftermath in the TRC has supplanted attention from developments in the peace negotiations and the National Peace Accord.² This Commission offers important insights into the value of violence investigations that may not be included within the transitional justice lexicon.

10.2 Findings and the literature

The findings speak to the existing literature on truth commissions in several ways. This project engages with the literature on the design and implementation of truth commission

² Fanie du Toit, "A Broken Promise? Evaluating South Africa's Reconciliation Process Twenty Years On," *International Political Science Review* 38, no. 2 (2017): 173.

processes and attempts to discern best practice.³ Scholars have focused important attention on the applicability of transitional justice mechanisms to local needs.⁴ It participates in the conversation with respect to how specific institutional modalities may apply in certain contexts and suggests that their successful inclusion may depend on how they have been used historically. It also contributes another empirical entry point into the “evolutionary” dimensions that Beattie recognizes in the development of truth commissions.⁵ Where Beattie focuses on the development of successive iterations of the truth-seeking process after the transition in Germany, this project suggests there is also value in exploring the relationship between successive investigations even before transition. This research also contributes to the conversation on the conceptualization of truth commissions. There is still important discussion on the definition and the idea of the truth commission itself. By taking as the outcome of interest the South African TRC and suggesting that an earlier commission of inquiry played an important role in structuring the truth commission, this dissertation speaks to the conceptual challenge of truth commissions and their treatment

³ Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006); Joanna R. Quinn and Mark Freeman, "Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa," *Human Rights Quarterly* 25, no. 4 (Nov. 2003): 1117-1149; Taylor and Dukalskis, "Old Truths and New Politics," 671-684; "Truth Seeking: Elements of Creating an Effective Truth Commission."

⁴ Laurel E. Fletcher, Harvey M. Weinstein, and Jamie Rowen, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* 31 (2009): 163-220; Wendy Lambourne, "Transitional Justice and Peacebuilding after Mass Violence," *The International Journal of Transitional Justice* 3 (2009): 28-48; Lundy and McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up," 265-292; Millar, "Western Theory and Local Practice," 177-199; Rosemary Nagy, "Transitional Justice as Global Project: critical reflections," *Third World Quarterly* 29, no. 2 (2008): 275-289.

⁵ Andrew H. Beattie, "An Evolutionary Process: Contributions of the Bundestag Inquiries into East Germany to an Understanding of the Role of Truth Commissions," *The International Journal of Transitional Justice* 3 (2009): 229-249.

within and outside the field of transitional justice.⁶ This is important because, if, on the one hand, truth commissions are treated as isolated measures of transitional justice, separate from their institutional predecessors, there is the potential to miss the underlying constraints associated with being a certain type of commission of inquiry. On the other hand, without taking into account earlier investigations, other attempts at truth-seeking may be overlooked, despite their potential value.

The early work that informs much of the field's understanding of truth commissions is based on institutional structures that were called commissions of inquiry; a clearer nominal distinction emerged around the South African Truth and Reconciliation Commission.⁷ This distinction between the commission of inquiry and the truth commission matters for how we understand each of these mechanisms. Where Stanton sees the potential for a 'social' process to emerge from both of these measures, the consensus that there is or ought to be a symbolic divergence for particular commissions to fit under the banner of transitional justice warrants further clarification.⁸ Conceptually, the dissertation's tracing of the definitional components between the two institutions, the commission of inquiry and the truth commission, highlights the difficulty in making clear distinctions between the two, but such a distinction is necessary. This tension is not fully resolved in the dissertation but the interrogation of the concepts suggests that there may be a temporal element to the discussion; when the truth commission emerged and solidified

⁶ Eric Brahm, "What is a Truth Commission and Why Does it Matter?," *Peace & Conflict Review* 3, no. 2 (2009): 1-14; Dancy, Kim, and Wiebelhaus-Brahm, "The Turn to Truth: Trends in Truth Commission Experimentation," 45-64; Freeman, *Truth Commissions and Procedural Fairness*, 40-69.

⁷ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2002), 256-262.

⁸ Kim Pamela Stanton, "Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies" (Doctor of Juridical Science University of Toronto, 2010).

itself (or was solidified) as a symbolic project of redress, its institutional lineage became overshadowed by the demands placed upon it. Here, the dissertation helps to articulate the value in continuing to interrogate the lineage of state-led investigations.

Sitze's concluding reflections that the field of transitional justice perpetuates "necessary silence" on issues that are difficult to reconcile with the theorized values of transitional justice also bear further consideration by the field.⁹ There is not space in a project of this kind to take on this issue in its entirety. However, the continuation of the colonial-state apparatus, or at the very least, the redeployment of similar such processes opens up several lines of questioning, which this dissertation addresses in a small part.

The field, in its emergence, needed to specify the nature of individual transitional justice mechanisms and theorize the justification for particular transitional justice mechanisms.¹⁰

This research participates in the shift away from the normative implications of the field towards the use of existing frameworks in other subfields to better understand the mechanics of the design, implementation and operation of truth-seeking measures.

The analysis of the limitations imposed on the transition and the TRC through the operation of earlier investigatory bodies and the potential mediating effects thereof necessitates an acknowledgment of the continuity of institutions. In addition, delving further into questions of lineage and design raises additional points for investigation to

⁹ Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (Ann Arbor: The University of Michigan Press, 2013), 251.

¹⁰ Arthur discusses the early discussions about the value of each mechanism, see Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 321-367. Kritz outlines the specific mechanisms in Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. See also, Hayner's early exploration of truth commissions, for example, Priscilla B. Hayner, "Fifteen Truth Commissions — 1974 to 1994: A Comparative Study," *Human Rights Quarterly* 16, no. 4 (1994): 597-655.

determine how the decisions made during the transitional period evolved over time. This type of analysis is also important for the debates on how transitional justice mechanisms map onto varied contexts. This research speaks to the idea of context specificity by demonstrating the value of domestic gradual institutional change on the institutionalization of practices associated with transitional justice.

Accounting for earlier investigative processes may be a way to assess how elements like political will are demonstrated prior to the establishment of a truth commission. Efforts to define and measure political will and transitional justice are emerging in the transitional justice literature.¹¹ The research presented in this dissertation illustrates that the adoption of an earlier investigation, furnished with a broad mandate and resources enabled an acknowledgement of violence prior to the transition and the truth commission that followed. Engaging with the concept of political will as it pertains to truth-seeking and truth commissions prior to, or without, a transition, may be helpful in assessing truth commission processes in situations where a transition has not been attempted or has not been achieved.¹² This is particularly relevant for settler-colonial states grappling with redress where institutional structures often remain unchanged.¹³

The dissertation also makes an empirical contribution to the literature on institutional continuity and change. The analysis offers some insight into the continuity of

¹¹ Phuong N. Pham, Niamh Gibbons, and Vinck Patrick, "A Framework for Assessing Political Will in Transitional Justice Contexts," *The International Journal of Human Rights* (2019): 1-17.

¹² Brian Grodsky, "Justice Without Transition: Truth Commissions in the Context of Repressive Rule," *Human Rights Review*, no. 9 (2008): 285; Hayner, "Fifteen Truth Commissions," 281-297.

¹³ On settler colonial harms see: Patrick Wolfe, "Settler colonialism and the elimination of the native," *Journal of Genocide Research* 8, no. 4 (2006): 387-409. See also, Jennifer Balint, Julie Evans, and Nesam McMillan, "Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach," *The International Journal of Transitional Justice* 8 (2014): 194-216.

structures, despite, or because of, their repressive capabilities. While the continuity of the structures of the commission of inquiry and truth commissions has been acknowledged and investigated, the focus has tended to be on elements of continuity in these structures. Sitze, for instance traces the persistence of both the commission of inquiry and the institution of indemnity and highlights their continued use without sufficient change to address the needs of justice.¹⁴ In a similar vein, du Toit queries whether there has been sufficient change in state-led investigations in South Africa because of the amnesty agreement.¹⁵ However, exploring the process as one of gradual institutional change highlights the innovations within the institutions during the period under consideration and illuminates different degrees of transformation.

10.3 Implications

A central implication of this work is a further caution that truth-seeking implements ought not be transplanted from one society to the next. While the process of truth-seeking and the use of truth commissions in particular has garnered normative favour, insufficient attention has been paid to *how* the truth commission itself can be established. The bureaucratic and institutional components that the TRC in South Africa needed in order to operate were significant. The actual investigatory modalities that emerged were themselves influenced by both the structures that preceded them and the operation of the Commission of Inquiry for the Prevention of Public Violence and Intimidation. This calls into question the centrality of the South African case as *the* ‘model’ on which truth commissions are based.

¹⁴ Sitze, *The Impossible Machine*.

¹⁵ André du Toit, "A Need for ‘Truth’: Amnesty and the Origins and Consequences of the TRC Process," *International Journal of Public Theology* 8 (2014): 393-419.

The South African TRC may not be replicable without recognition of the institutional developments that preceded it.

This project has identified a specific set of conditions that facilitated the credible operation of the Commission of Inquiry for the Prevention of Public Violence and Intimidation, which in turn had an important influence on the TRC. The adjustments that occurred between the institutions were based on environmental features, particularly the transition negotiation setting, and leadership. However, the governance legacies that necessitated institutional change in information-gathering practices must be taken into account. More broadly, the implication is that the institutional design of truth commission processes is contending with internal and external pressures and constraints. This is not to suggest that witness protection programmes, for example, should not be part of other truth commissions. If witnesses cannot be protected, either by existing laws or through a formal truth commission, critical questions ought to be raised about the viability of a truth commission project under such conditions.

In this way, the study undertaken here demonstrates one way that context informs transitional justice efforts. It does so through its explanatory contribution on the institutionalization of truth-seeking practice; separating the normative value of truth-seeking or restorative justice from the potential implications of the context itself on structuring and mediating the truth-seeking process. A further implication is the recognition that important information gathering can take place before formal transitional justice mechanisms are implemented. This has been recognized with respect to the

literature on “unofficial truth projects”, but also has impacts on state-led investigations.¹⁶ Context is important in understanding the conditions under which such information-gathering practice perpetuates the status-quo or whether and how such practices might be valuable for later truth-seeking efforts.

In terms of truth commission evaluation, this dissertation offers a different framing that may help to better understand factors that contribute to the strength or weakness of truth commissions.¹⁷ From a theoretical perspective, it suggests that institutional features that affect how truth commissions are designed and operate may be rooted further back in time and institutions. Although criteria for more successful truth commissions and factors affecting legitimacy are developing in the field, these elements may also be implicated by previous experience with similar institutions.¹⁸ From an evaluation standpoint, this necessitates an assessment of limitations in the design and operation of truth commissions to explain success or failure.¹⁹ From a practical perspective, if more attention is given to the possibility that factors that affect truth-seeking processes are rooted in past institutions

¹⁶ Louis Bickford, “Unofficial Truth Projects,” *Human Rights Quarterly* 29, no. 4 (2007): 994-1035; Padraig McAuliffe, “Surrogacy and Resistance: Evolving Patterns in Unofficial Truth Commissions and Truth Projects,” in *The Global Impact and Legacy of Truth Commissions*, ed. Jeremy Sarkin (Cambridge: Cambridge University Press, 2019), 269-292.

¹⁷ On evaluations see for example: Anita Ferrera, *Assessing the Long-term Impact of Truth Commissions: The Chilean truth and reconciliation commission in historical perspective* (New York: Routledge, 2015), 17; Hayner, *Unspeakable Truths*, 25; Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*, 8-10.

¹⁸ Angela D. Nichols, *Impact, Legitimacy, and Limitations of Truth Commissions* (Cham: Palgrave Macmillan, 2019); Jeremy Sarkin, “Redesigning the Definition a Truth Commission, but Also Designing a Forward-Looking Non-Prescriptive Definition to Make Them Potentially More Successful,” *Human Rights Review* (2018): 349-368.

¹⁹ Here, Goodin’s argument that institutional design ought to reflect both the goals of the institution and their fit with the broader context of their implementation is particularly insightful. See Robert E. Goodin, “Institutions and Their Design,” in *The Theory of Institutional Design*, ed. Robert E. Goodin (Cambridge: Cambridge University Press, 1996), 33-34.

and experiences, then there is an increased prospect for making necessary adjustments to truth commissions based on these experiences. In practice, the operation of earlier investigations themselves may provide insight into how truth-seeking processes may be carried out, enabling those responsible for implementation to adjust elements like design or timing.

10.4 Future research

There are a number of elements that would benefit from further research as a result of this dissertation. The institutional focus on the Goldstone Commission in this project narrowed the scope. Expanding assessments of the Goldstone Commission and the democratic transition from other theoretical perspectives will further understandings of both this specific commission of inquiry and the patterns of establishing commissions of inquiry during contentious periods.

One important next step is to evaluate how this process of institutionalization plays out in other cases and different conditions. This includes other countries engaged in transitional truth-seeking processes but also other mechanics of institutionalization, such as the influence of external actors. The process of institutionalization discussed in this dissertation is domestic. It also occurred prior to the entrenchment of the transnational network of transitional justice scholars and practitioners.²⁰ How the institutionalization of truth-seeking is affected by efforts facilitated or accompanied by international pressures is an important line of inquiry. It is important because of the adoption of parallel transitional

²⁰ Kimberly Theidon, "Editorial Note," *The International Journal of Transitional Justice* 3, no. 3 (2009): 295-300.

justice mechanisms, and the influence of the advocacy for transitional justice efforts in states with varied levels of institutional capacity.

A related line of reasoning that warrants further consideration is how truth-seeking is institutionalized over longer periods of time and the impact of transitional justice mechanisms on this institutionalization. Access to information is a rather understudied element or potential output of truth-seeking processes. Whether and how freedom of information or access to information laws and implementation are impacted by truth commission processes may be a useful indicator that can be used to evaluate the longer-term institutionalization of truth-seeking measures.

Finally, a dimension that has not been covered in the dissertation is an exploration of how earlier truth-seeking measures influence the adoption of future transitional justice mechanisms. This line of research would be particularly insightful to mitigate ‘all or nothing’ responses to transitional justice implementation. With critiques leveled at ever broadening mandates, understanding how transitional justice mechanisms may evolve to include overlooked dimensions in earlier processes, or emergent shortcomings, may be illustrative.²¹ For example, further understanding of the conditions under which narrow iterations of truth-seeking may be implemented successively may reduce pressures placed on truth commissions to meet all truth-seeking needs at one time. Such analyses of successive Chilean mechanisms of transitional justice are emerging.²² This line of

²¹ On mandates see, Pablo de Greiff, "“Truth without Facts”: On the Erosion of the Fact-Finding Function of Truth Commissions," in *The Transformation of Human Rights Fact-Finding*, ed. Philip Alston and Sarah Knuckey (Oxford: Oxford University Press, 2016), 284-292.

²² Cath Collins, "Truth-Justice-Reparations Interaction Effects in Transitional Justice Practice: The Case of the ‘Valech Commission’ in Chile," *Journal of Latin American Studies* 49 (2016): 55-82.

interrogation is valuable based on the theorized value of truth and assessing the best vehicle to access information about human rights violations.

The Goldstone Commission played a significant role investigating violence during South Africa's transition from Apartheid to democracy. Its investigations and reports offered an impartial assessment of the causes of violence at a time when violence was rampant. On certain issues, it was the first time information and evidence was made public by an official source. Its credibility was a testament to its leadership and the environment through which it navigated its operation. The symbolism and reach of the TRC captured worldwide attention. The Commission of Inquiry for the Prevention of Public Violence and Intimidation has remained somewhat modest. Its operation and contributions to transformation in South Africa ought not be overlooked because it operated prior to the democratic elections. Indeed, the Commission of Inquiry for the Prevention of Public Violence and Intimidation played an important role in South Africa's democratic renewal.

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Curriculum Vitae

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EDUCATION

- 2020 Ph.D. Political Science and Transitional Justice & Post-Conflict Reconstruction, Department of Political Science, Western University
- 2011 Master of Arts, Political Science
Department of Political Science, University of Calgary
- 2009 Bachelor of Arts (Honours), Political Science
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PUBLICATIONS

Edited volumes

- 2020 Samar El-Masri, Tammy Lambert, and Joanna R. Quinn (editors). *Transitional Justice in Comparative Perspective: Preconditions for Success* (Palgrave Macmillan, February 2020).

Book Chapters

- 2020 Samar El-Masri, Tammy Lambert, and Joanna R. Quinn, "Moving Forward: The Possibilities that Obtain from Ameliorating the Context to Create Conditions for Success," in *Transitional Justice in Comparative Perspective: Preconditions for Success*, edited by Samar El-Masri, Tammy Lambert, and Joanna R. Quinn (Palgrave Macmillan, February 2020), 217-227.
- 2020 Samar El-Masri, Tammy Lambert, and Joanna R. Quinn, "Changing the Context: Can Conditions Be Created That Are More Conducive to Transitional Justice Success," in *Transitional Justice in Comparative Perspective: Preconditions for Success*, edited by Samar El-Masri, Tammy Lambert, and Joanna R. Quinn (Palgrave Macmillan, February 2020), 1-17.

AWARDS

- 2017 Social Science and Humanities Research Council of Canada, Doctoral Award
- 2016 Ontario Graduate Scholarship
- 2015 Ontario Graduate Scholarship
- 2014 Ontario Graduate Scholarship
- 2010 Queen Elizabeth II Graduate Scholarship (Masters)
- 2010 Alberta Graduate Student Scholarships
- 2009 Social Science and Humanities Research Council of Canada, Masters
- 2009 Dean's Research Excellence Award

CONFERENCES

Paper Presentations

- 2018 "Classifying Truth Commissions: Expectations of Political Commitment," Canadian Political Science Association Annual Conference, Regina, SK, May 31.
- 2016 "Truth Commission Credibility in Transitional Contexts," Canadian Political Science Association Annual Conference, Calgary, Alberta, May 29.
- 2014 "Evaluating Reconciliation Potential through the Canadian TRC," Evaluating the Impact of the Truth and Reconciliation Commission of Canada, London, Ontario, May 8.

Poster Presentations

- 2017 "Foundations or Pretence? Situating Precursory Investigative Institutions and Truth Commissions," Canadian Political Science Association Annual Conference, Toronto, ON, May 31.

Workshop Participation

- 2018 Invited panel member, "Institutional Safeguards," at *Exploring the Pre-Conditions of Transitional Justice* conference, The Centre for Transitional Justice and Post-Conflict Reconstruction, Western University, June 14-15.
- 2018 Invited workshop member, *Exploring Forensic and Other Evidence in Transitional Justice and Post-Conflict Reconstruction*, Western University, March 9.

2015 “Conceptualizing Reconciliation in the Canadian Truth and Reconciliation Commission,” Western Political Science Research Forum, London, Ontario: March 7.

TEACHING EXPERIENCE

Western University, Department of Political Science

Comparative Politics

2017	Instructor	Introduction to Comparative Politics (Online)
2015-2016	Teaching Assistant	Introduction to Comparative Politics

International Relations

2017	Teaching Assistant	Introduction to International Relations
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Transitional Justice

2016	Teaching Assistant	Problems in Transitional Justice and Post-Conflict Reconstruction
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