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TRUTH COMMISSIONS

A Comparative Study

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South Africa

ESTABLISHMENT

LEGAL BASIS	The South African Parliament established the Truth and Reconciliation Commission through The Promotion of National Unity and Reconciliation Act No. 34 of 1995.
NAME OF COMMISSION	Truth and Reconciliation Commission. (Abbreviation: TRC)
DATE OF ESTABLISHMENT	December 1995

COMPOSITION

NUMBER & NATIONALITY OF COMMISSIONERS	All 17 commissioners were South African nationals.
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CONTEXT

BACKGROUND	Between 1948 and 1990 South Africa was governed under statutory apartheid, although discriminatory legislation existed for hundreds of years in the country before that. The apartheid system resulted in the civil and political rights of black South Africans being severely curtailed. Society was unequally segregated. Blacks were, <i>inter alia</i> , subjected to inferior educational and health services. The rise of liberation movements, notably the African National Congress (ANC) and the Pan Africanist Congress (PAC), resulted in internal resistance that was quelled with violence, police brutality, detention, torture and restrictions on the freedom of expression and movement.
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POLITICAL TRANSITION

International sanctions and embargoes, internal resistance and the end of Cold War politics resulted in a political stand-off between the apartheid regime and the liberation movements. Political movements were unbanned in 1990, Nelson Mandela and other political leaders were released from prison and exiles were allowed to return home. This resulted in extensive political negotiations and in 1994 multi-racial democratic elections were held, with Nelson Mandela becoming President of a democratic South Africa.

TYPES OF HUMAN RIGHTS' VIOLATIONS

The TRC legislation defined gross human rights' violations narrowly as "killing, abduction, torture or severe ill-treatment of any person." These violations occurred in a range of situations that included political imprisonments, the forced removal of black people from places designated as "white" areas. In addition, violations were committed by agents on both sides of the conflict during confrontations between apartheid armed forces and liberation movements. Certain violations of human rights such as Bantu education, land distribution and forced removals did not fall within the mandate of the TRC. These matters were handled by other commissions and government initiatives.

MANDATE

The "Promotion of National Unity and Reconciliation Act," No.34 of 1995 mandated the TRC to "promote national unity and reconciliation ... by ... restoring the human and civil dignity of ... victims ... by recommending reparation measures in respect of them." It goes further to define reparations as "any form of compensation, *ex gratia* payment, restitution, rehabilitation or recognition." The TRC was further tasked with promoting reconciliation and national unity, while uncovering as much truth as possible. The mandate specifically noted that the Commission was to investigate gross violations of human rights defined as, "the killing, abduction, torture, or severe ill-treatment of any person."

YEARS COVERED

1960-1994

PERIOD OF OPERATION

December 1995 – October 1998. When the Commission's Report was handed to the President, not all of the amnesty applications had been reviewed. The final amnesty Report was submitted in an additional volume on March 21, 2003.



JUDICIAL POWERS

The TRC had the power to subpoena, the ability to grant amnesty, and the power of search and seizure.

NAMING NAMES

Those applying for amnesty for gross violations of human rights were required to offer public testimony under cross-examination before a panel of judges, acknowledging guilt and detailing his or her involvement in politically-motivated crimes.

RECOMMENDATIONS

The TRC's major recommendations included: instilling a culture of human rights by way of laws, free and fair elections, in civilian educational institutions and in police and military academies; transformation of the education sector, provision of shelter, access to clean water and health services, and creation of job opportunities; a wealth tax; initiatives to counter racism; strengthening of the security apparatus and the rule of law; consideration of prosecutions where amnesty had not been sought or had been denied; and granting of individual and community reparations. The Commission also recommended that those who publish works for commercial sale that draw substantially on the TRC's work offer a portion of the profits derived from such publications to the President's Fund for reparations and rehabilitation. It was further recommended that there be no lustration.

FINAL REPORT

In October 1998, the *Truth and Reconciliation Commission of South Africa Report* was presented to President Mandela after certain omissions were made at the request of former President, FW de Klerk, which implicated him in certain gross violations of human rights, without affording him an adequate opportunity to respond. In addition, the ANC appealed to the courts to stop the release of the Report due to the Commission's criticism of the ANC's liberation struggle. The ANC's application was overruled, allowing the Final Report to be released to the President and the media. The Final Report is widely accessible.

TRANSITIONAL JUSTICE COMPONENTS

TRUTH TELLING

The emphasis on truth telling in the TRC was based on the supposition that the country could not move forward without uncovering the truth. Moving forward meant striving for a greater sense of national unity and reconciliation, restoring



the dignity of those who suffered, and learning from the past so as to avoid the repetition of past wrongs and the creation of a society governed by human rights and the rule of law.

The TRC operated on a decentralized basis with one main office, four regional offices and sub-regional offices to reach as many South Africans as possible. Statements were taken from victims by trained statement takers at the Commission's offices, in communities, and through the designated statement-taker program. The process was strictly voluntary and those that did provide statements relayed personal experiences of gross human rights' violations (detentions, abductions, beatings, burnings, torture, rape, and murder) and stories of those close to them. This process was intended to facilitate a cathartic experience for victims who were finally able to tell their stories, establishing a personal and narrative truth. The statements were then categorized into one of four types of violations (killings, abduction, torture and severe ill-treatment) as outlined in the Act. In order to establish a factual or forensic truth, a team of investigators attempted to corroborate the basic facts of the statements based on court records, newspaper articles, death certificates, etc. Over a span of two years, more than 21,000 statements were collected.

A characteristic feature of the TRC was that it operated transparently and held over fifty public hearings which were open to the media and widely disseminated through the radio, television and newspapers. Establishing a public awareness and record of the TRC's work was important to reach the goal of societal acknowledgment of the country's past, which created space for healing and restorative truth. Because these hearings were often the first opportunity for victims to face their perpetrators, the Commission ensured that "briefers" were available to provide support to those testifying. The TRC further offered a witness protection program for those concerned about their safety.

To understand how apartheid was woven into all aspects of society there were five types of hearings aimed at establishing a social or "dialogue" truth. These were victim, event, special (children and youth, women, conscription), political party, and institutional (business, legal community, the health system, prisons, faith communities, the media) hearings. The selection of those who spoke publicly during these hearings was based on statements received that broadly



represented a particular type of abuse, with special attention given to gender, age, race and geographical locations.

The truth-telling process was facilitated by the willingness of victims to tell their stories and by the Commission's subpoena power, ability to grant amnesty and search and seizure rights. Truth telling was further promoted through amnesty hearings at which applicants for amnesty were required to make full disclosure of the gross human rights' violations they had committed, their motives and perspectives, and evidence of the authorization of such violations as required in the TRC Act. Some of this information was provided in the written application for amnesty, with more detail elicited at the amnesty hearings. Further investigations of the alleged crimes were undertaken by the Commission and applicants were cross-examined by a panel of judges.

AMNESTY

The TRC provided for conditional amnesty for applicants who fully disclosed the truth and whose crime was politically motivated. Of the 7,116 applicants, 1167 were granted amnesty while the remainder were rejected, mostly because they fell outside the TRC's mandate.

PROSECUTIONS

These have been limited. In 1995, a trial took place of former Minister of Defense, Magnus Malan, and 19 other former senior military officers for a massacre in 1987; it ended in the acquittal of all the accused. In 2002, Wouter Basson, the former head of the country's secret chemical and biological warfare project, was also acquitted of murder. These dismissals were widely criticized in some circles, being attributed to the "non-transformation" of the judiciary. Clive Derby-Lewis, Janusz Walu , Eugene de Kock, Ferdie Barnard and other prominent apartheid operatives have been convicted in court and continue to serve jail sentences.

The rejected amnesty applicants and those who chose not to apply are still subject to prosecution under established criminal law. For the response of the government to prosecutions see 'Post-Commission Prosecutions' below.

REPARATIONS

The Committee on Reparations and Rehabilitation made recommendations aimed at the restoration of the human dignity of victims, by way of political, social and economic initiatives. The South African government, however, took five years to respond to these recommendations, reducing the recommended



TRC reparation payments to individuals to a one-off payment of R30,000 per person found by the TRC to be a victim. Some victims have since become involved in lawsuits for reparations against multinational corporations that violated international sanctions in conducting business in apartheid South Africa. Although initially opposing this development, the South African government has since acknowledged the right of victims to sue for damages under the alien tort law in New York courts.

FINDINGS

The TRC took testimony from approximately 21,000 victims, just over 2,000 of whom appeared at public hearings. The Commission found that the majority of gross human rights' violations were committed by the state through its security and law-enforcement agencies. Between 1990 and 1994, records were systematically destroyed and the Commission reported that the National Intelligence Agency was still destroying records as late as 1996. While recognizing that in terms of Just War theory the response of the liberation movements against the apartheid regime was justified (*jus ad bellum*), the defense of apartheid was declared illegitimate. At the same time, however, the Commission found that the liberation forces were guilty of acts of human rights' violations in the process of executing the war (*jus in bello*).

REPARATIONS

See under 'Transitional Justice Components'

POST-COMMISSION PROSECUTIONS

There were few prosecutions after the TRC. In 2005 the National Director of Public Prosecution was given discretion not to prosecute after the prosecution policy was amended. In 2008, however, the Pretoria High Court ruled that the amended prosecution policy was unconstitutional, unlawful and invalid. In 2007, President Mbeki created a "Special Dispensation for Presidential Pardons for Political Offences" aimed at giving the Prosecutor's office the power to effect plea bargains. Civil society organizations challenged the pardons process, and the Constitutional Court unanimously passed judgment in their favor. In October 2010, the government responded to the judgment and released the names of 149 offenders, being considered for pardon for a total of 652 offences.



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