

South African Truth Commission

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The dismantling of South African apartheid culminated in a multi-racial democratic election in 1994. ANC leader Nelson Mandela became president, and an interim constitution was drafted and enacted.[1] After the 1994 elections, an integrated South African legislature enacted a series of laws to facilitate the transition away from the apartheid regime. The Promotion of National Unity and Reconciliation Act of 1995 (Unity Act)[2] established a Truth and Reconciliation Commission (TRC or Commission) to investigate gross human rights violations[3] perpetrated by both state actors and members of liberation movements[4] between 1960 and 1994, the period of legalized apartheid.[5] Nelson appointed Archbishop Desmond Tutu, a Nobel Peace Prize winner who had advocated nonviolent resistance to apartheid, as chairperson.[6]

The Commission had an annual budget of about \$18 million U.S., funded by South African taxpayers and international donors.[7] The TRC commenced operations in 1995 and published the first five volumes of its report in 1998.[8] The Amnesty Committee continued operations through 2001, publishing the sixth volume in 2003.[9]

Committees

The Committee on Human Rights Violations was authorized to take, investigate, and verify victim testimony.[10] The Committee consisted of a chairperson, at least two commissioners, and not more than three other members, all appointed by the Commission.[11] The Committee took the testimony of over 21,000 victims,[12] with 2,000 giving testimony at public hearings[13] widely disseminated on television, radio, and in print.[14]

The Amnesty Committee was authorized to grant or refuse amnesty to individuals who committed human rights abuses.[15] The Committee consisted of a chairperson, who had to be a judge,[16] a vice chair, two commissioners, and one other “appropriately qualified” South African, all appointed by the President after consultation with the Commission.[17] See “Amnesty Program” subsection below.

The Reparation and Rehabilitation Committee was authorized to develop reparation and rehabilitation policy recommendations for the new South African government.[18] The Committee consisted of a chairperson, who was also a commissioner, a vice-chair, who was also a commissioner, and up to 5 other members, all appointed by the Commission.[19] See “Reparations Program” subsection below.

The Unity Act required the TRC to make recommendations for a witness protection program[20] and to ensure that the identity of vulnerable witnesses remain concealed.[21] The Report provides little information on how many witnesses participated in this program, but by one third-party estimate over 100 state witnesses were given protection after testifying against former police colonel Eugene de Kock.[22] While there is no record of retaliatory violence against victims or amnesty applicants,[23] an extensive 1998 survey workshop administered by the Center for the Study of Violence and Reconciliation found that applicants and victims did feel endangered during and after their participation at the Commission.[24]

The TRC Report also found that government records, including documentary evidence of the workings of the security apparatus, were destroyed in massive quantities between 1990 and 1994.[25] The National Intelligence Agency continued destruction of records through 1996 in defiance of two government orders to cease and desist.[26] While these efforts complicated the Commission’s mission, the report asserts that they did not preclude a clear view of apartheid.[27]

Mandela’s government fully endorsed the reports and apologized on behalf of the state.[28] The government later failed, however, to implement many of the TRC Report’s recommendations, particularly in the area of reparations.[29] ANC President Thabo Mbeki felt that the 2003 Report was too critical of the government’s response,[30] but

public opinion sided with the Commission. The government established a monitoring body in 2006 to ensure that recommendations were implemented, especially those related to reparations and exhumations.[31]

Amnesty Program

Before the Amnesty Committee granted amnesty, an amnesty application was submitted by the applicant and then reviewed, investigated, and granted/rejected by the Amnesty Committee.[32] A successful application had to meet the following criteria:

- A violation of human rights must have occurred. Less serious crimes would not be forgiven.[33]
- The act had to occur within the specified time period (1960-1994).[34]
- The violation had to be “associated with a political objective.”[35] As part of this criterion, the applicant had to be an affiliate of one of the political parties to the conflict, e.g., NP or ANC.[36] To determine whether the act was political, the Committee could consider the motive, objective, whether it was directed against the state or an individual, whether it was committed on behalf of a political organization, and the proportional relationship between the act and the political objective.[37]
- The applicant had to admit fault (possibly with an excuse/justification like self-defense).[38]
- The applicant had to make a “full disclosure of all the relevant facts.”[39]

Amnesty had significant legal consequences. Any pending legal proceedings were terminated,[40] and those serving a sentence for the forgiven act were immediately released.[41] Any criminal record of the offense was also expunged.[42] Amnesty resulted in immunity against both criminal and civil liability,[43] but civil judgments that had already been granted for the forgiven act were not reversed. Amnesty afforded transactional immunity, unless the Committee later discovered that the applicant had failed to make full disclosure.[44] Furthermore, the names of those granted amnesty were made public.[45]

While NP had argued for blanket immunity during negotiations on the establishment of the Commission, the Unity Act eventually provided for case-by-case determinations of individual amnesty.[46] The Committee received over 7,000 amnesty applications, granting 849 and rejecting 5,392.[47] The Commission’s Final Report named individual perpetrators and formally recommended that prosecution be considered for those denied amnesty, when evidence existed.[48]

South Africa’s amnesty program is the broadest in history among comparable truth commissions, and many believe that amnesty has helped with the reconciliation process. Full disclosure provided a semblance of accountability and promoted reconciliation through apology. Moreover, the Commission was arguably in the best position to rule on amnesty, since it had the best information and verification procedures.

Legal Relationship between TRC and Domestic Legal System

The TRC operated outside South Africa’s domestic legal system, but the Amnesty Committee’s amnesty decisions were binding on domestic courts.[49] The Commission had powers of subpoena, search, and seizure enforced by domestic law enforcement officials.[50] Subpoenaed individuals were entitled to legal counsel, but they had to answer questions truthfully, even if such answers were self-incriminating.[51] Information and evidence obtained by the TRC during amnesty proceedings, however, whether by testimony or by subpoena, was not admissible in domestic courts.[52]

While 5,392 amnesty applications were rejected, few of these individuals were later prosecuted.[53] Several high-level former police officials were convicted for the 1989 attempted murder of Reverend Frank Chikane, while former Defense Minister Magnus Malan and 19 affiliates were acquitted.[54] Thousands of other rejected applicants remained untouched. A new National Prosecution Policy enacted in December 2005 gave the National Director of

Public Prosecutions wide discretion not to prosecute.[55] In December 2008, however, the High Court in Pretoria struck down this law, allowing prosecutions to continue.[56]

Reparations Program

TRC's Reparation and Rehabilitation Committee was tasked with making recommendations on reparations to victims. The 1998 report made extensive recommendations for financial, symbolic, and community reparations.[57]

The Committee decided that only those who testified to the TRC about their harm were eligible for reparations, a decision that significantly increased the number of testimonies.[58]

The Committee recommended that each victim or family receive approximately \$3,500 USD each year for six years, for an aggregate grant of \$640 million.[59] Because degrees of suffering would be difficult to price, the committee recommended the same reparation for each individual.[60] South Africa had one of the strongest economies on the African continent, so these reparations would amount to about 0.25% of annual GDP. Moreover, the Committee found that some corporations were unjustly enriched by apartheid.[61] Taxes on the public and on these beneficiaries would fund the reparations.[62]

After delays, the South African government made a modest one-time payment to 21,000 victims that was far lower than what the Committee recommended.[63]

[1] See United States Institute of Peace, Truth Commission: South Africa, United States Institute of Peace Web site, available at www.usip.org/resources/truth-commission-south-africa. Hereafter USIP.

[2] Promotion of National Unity and Reconciliation Act (South Africa, 1995), available at http://ftp.fas.org/irp/world/ras/act95_034.htm. Hereafter Unity Act.

[3] Unity Act Preamble.

[4] Id. § 20(2).

[5] Id. § 3.

[6] See USIP, footnote 1 above.

[7] Id.; 1 Final Report 300.

[8] Truth and Reconciliation Committee of South Africa, Final Report, vols. 1-5 (1998), hereafter 1-5 Final Report.

[9] Truth and Reconciliation Committee of South Africa, Report of the Amnesty Committee (2003), hereafter 6 Final Report.

[10] Unity Act ch. 3.

[11] Id. § 13.

[12] 2 Final Report 1.

[13] USIP, footnote 1 above.

[14] 1 Final Report 352-363.

[15] Unity Act ch. 4.

[16] The Act defines "judge" as that defined by § 1(1) or § 3 of the Judges' Remuneration and Conditions of Employment Act (1989). Id. § 17(3).

[17] Id. at § 17.

[18] Unity Act ch. 5.

[19] §24

[20] Unity Act § 35.

[21] Unity Act § 33(2)(b).

[22] Paul van Zyl, Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission, 52 Journal of International Affairs (1999).

[23] But see 6 Final Report 343 ("IFP applicants who made allegations of intimidation were found to be in genuine danger and were placed in witness protection programmes").

[24] Center for the Study of Violence and Reconciliation, Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report (1998), available at

<http://www.csvr.org.za/wits/papers/papkhul.htm>.

[25] E.g., 2 Final Report 1-2.

[26] Mail & Guardian, South Africa: More Truth Commission Files Disappear (October 25, 2002).

[27] 2 Final Report 2.

[28] Nelson Mandela, Statement on receiving the report of the TRC (October 29, 1998), available at

<http://www.anc.org.za/ancdocs/history/mandela/1998/nm1029.htm>. [29] 6 Final Report 96.

[30] Thabo Mbeki, Statement to the National Houses of Parliament and the Nation (April 15, 2003), available at

<http://www.anc.org.za/ancdocs/history/mbeki/2003/tm0415.html>.

[31] USIP, footnote 1 above.

[32] 6 Final Report 17-35.

[33] 6 Final Report 7.

[34] 6 Final Report 8.

[35] Unity Act § 17; 6 Final Report 8.

[36] Unity Act § 20(2).

[37] Id. at § 20(3).

[38] 6 Final Report 7.

[39] Unity Act § 17; 6 Final Report 10.

[40] Unity Act § 20(8)(a).

[41] Id. at §20(8)(b).

[42] Id. at §20(10).

[43] Id. at §20(7)(a),

[44] 6 Final Report 10. The Final Report makes no mention of such a reversal actually occurring.

[45] Id. at §20(6).

[46] 1 Final Report 52.

[47] 6 Final Report 19; USIP, footnote 1 above. The rest of the applications were withdrawn by applicants. Id.

[48] 6 Final Report Section 3.

[49] Id. at 14.

[50] Unity Act § 29; 1 Final Report 54.

[51] Unity Act § 34; 1 Final Report 334, 349.

[52] Unity Act § 31(3).

[53] IRIN News, In-Depth: Justice for a Lawless World? Rights and reconciliation in a new era of international law (2006), available at <http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59489&Coun....>

[54] USIP, footnote 1 above.

[55] Shaun Benton, New Policy on Apartheid Crimes, South Africa.info (January 26, 2006), available at

http://www.southafrica.info/services/rights/trc_prosecutions180106.htm.

[56] Comfort Euro, Court Clears Way for Prosecution of Cases from Apartheid Era in South Africa, New Liberian (May 5, 2009), available at <http://newliberian.com/?p=801>.

[57] 5 Final Report 170-176.

[58] Id. at 175.

[59] Id. at 187.

[60] Id. at 184.

[61] 6 Final Report 726-727.

[62] 6 Final Report 162.

[63] IRIN News, footnote 52 above.