

# AUS POLITIK UND WISSENSCHAFT

## The Truth and Reconciliation Commission of South Africa Report: A Review Essay

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### 1. Introduction

The South African Truth and Reconciliation Commission (TRC) came about as a result of a compromise by domestic political actors. Amnesty was one of the difficult issues that faced negotiators after the demise of apartheid. Prosecution for those responsible for gross human rights violations threatened a peaceful transition to democratic rule. Prosecution was also impossible given the fact that there was no victor from both sides of the negotiators. A compromise had to be made between the international demand for prosecution of perpetrators of gross human rights violations and the national appeal for peaceful transition, reconciliation and justice. Although amnesty was a price to be paid for peaceful transition, a line had to be drawn between blanket and conditional amnesty. A compromise was conditional amnesty on application and full disclosure of all acts committed during the apartheid era. This was given effect through legislative means in terms of the 1993 interim Constitution,<sup>1</sup> the 1996 Constitution<sup>2</sup> and the 1995 Promotion of National Unity and Reconciliation Act.<sup>3</sup> The Act established a Commission whose task was to give a complete picture about past atrocities, facilitate the amnesty process and bring national reconciliation among the people of South Africa.<sup>4</sup>

<sup>1</sup> Act 200 of 1993. The interim Constitution contained a postamble headed, *National Unity and Reconciliation* which provided that in order to bridge the gap between the past and the future of a deeply divided society there was a need for reconciliation and a need for understanding. The postamble provided that amnesty would be granted to perpetrators of gross human rights violations and further mandated the new government to set up a mechanism or a tribunal in which amnesty would be granted. This resulted in the birth of the Truth and Reconciliation Commission.

<sup>2</sup> Act 108 of 1996. Section 22 (Transitional Arrangements).

<sup>3</sup> Act 35 of 1995.

<sup>4</sup> Section 3 (1) – (4) of the Act.

## 2. The Report of the South African Truth and Reconciliation Commission

On 29<sup>th</sup> October 1998, the chairperson of the Truth and Reconciliation Commission, Archbishop Desmond Tutu submitted a final report to the President, Nelson Mandela.<sup>5</sup> The five-volume report details the nature and extent of gross human rights violations that South Africa suffered from 1960 until 1994. The release of the report was preceded by disquiet especially from political parties. The ruling ANC unsuccessfully sought an interdict to block the release of the final report. The ANC argued that it fought a legitimate war against a pariah state branded by the international community for committing crimes against humanity and therefore could not be on par legally and morally with the apartheid state. However, the ANC lost the case against the TRC. The former State President, F.W. de Klerk, successfully sought an interdict from the High Court to instruct the Commission to remove those sections of the report making him an accessory after the facts to the bombing of Khotso House in 1989.<sup>6</sup>

### (i) *Findings*

The Commission made findings in respect of the apartheid government, liberation movements and civil society.<sup>7</sup> The Commission detailed the role played by the apartheid government through a host a plethora of laws aimed at maintaining the policy of apartheid. Although the Commission found that liberation movements such as the ANC, UDF and the PAC were also responsible for gross human rights violations, the preponderance of responsibility rests with the apartheid government and its agencies.<sup>8</sup> For example, the Commission found that the IFP leader, Mangusothu Buthelezi, collaborated with the apartheid government to attack political opponents such as the ANC and the UDF; the former State President, P.W. Botha, was held responsible for the bombing of Khotso House; the apartheid government was held responsible for destabilising neighbouring countries such as Mozambique, Zimbabwe, Lesotho, Botswana and Swaziland and the issue of Mrs. Winnie Madikizela-Mandela, who was directly in control of the Mandela United Football Club which branded those opposed to its activities and killed them, was never dealt with by the ANC leadership. In respect of the gross human rights violations committed by the apartheid government on the one hand and liberation movements on the other, the Commission said:

<sup>5</sup> Truth and Reconciliation Commission of South Africa Report, October 1998, Juta & Co. Ltd, Kenwyn, Cape Town, 1998. The Amnesty Committee of the TRC continues to hear amnesty applications of perpetrators of gross human rights violations. The Committee will attach a codicil to the TRC report once it has completed its task.

<sup>6</sup> *Mail & Guardian*, 30 October 1998 at p. 3.

<sup>7</sup> *Truth and Reconciliation Commission of South Africa Report*, Vol. 2.

<sup>8</sup> *Ibid.*, Vol. 6, paras. 130 - 150.

‘68. At the same time, the Commission is not of the view that all such parties can be held to be equally culpable for violations committed in the mandate period. Indeed, the evidence accumulated by the Commission and documented in this report shows that this was not the case. The preponderance of responsibility rests with the state and its allies.

69. Even if it were true that both major groupings to the conflicts of the mandate era – the state and its allies and the Liberation Movements – had been equally culpable, the preponderance of responsibility would still rest with the state.<sup>9</sup>

The Commission not only held political parties responsible for their actions, but also apportioned blame to the health, labour and business sectors, media, judiciary and faith communities for allowing the apartheid system to flourish and prosper.<sup>10</sup>

#### *(ii) Recommendations*

The Commission has identified 21 3000 victims. Its Amnesty Committee has already granted 150 amnesties while 2000 amnesty applications (at the time of writing) still to be considered by the Committee.<sup>11</sup> The Commission has made various recommendations, the most notable being: the Commission’s recommendation that political organisations implicated in gross violations of human rights apologise to their victims or their next of kin.<sup>12</sup>

The Commission acknowledged that there was a need to transform institutions such as the judiciary, the health sector and the security forces in order to create a culture of human rights. On the economic front the public and private sectors need to be transformed in order to alleviate economic disparity through special funds, and affirmative action is considered as a mechanism of improving the lives of the disadvantaged communities.<sup>13</sup>

The Commission did not recommend lustration or purging, a procedure which was adopted by some European countries such as Germany and Czech Republics to bar people implicated in human rights violations to hold public office. The Commission concluded that such measures would be inappropriate in the South African situation, but did not explain why this was so.<sup>14</sup> Nevertheless, with regard to perpetrators who refused to apply for amnesty, the Commission recommended that the National Director of Public Prosecution

<sup>9</sup> *Ibid.*, Vol. 5, Ch. 6.

<sup>10</sup> *Ibid.*, Vol. 5, Ch. 6, paras. 151 - 158.

<sup>11</sup> *Ibid.*, Vol. 5, Ch. 2.

<sup>12</sup> *Ibid.*, Vol. 5, Ch. 8.

<sup>13</sup> *Ibid.*, Vol. 5, Ch. 8.

<sup>14</sup> *Ibid.*, Vol. 5, Ch. 8, paras. 17 - 19.

should investigate and prosecute them.<sup>15</sup> The Commission further stated that “*[i]n order to avoid a culture of impunity and to entrench the rule of law, the granting of general amnesty in whatever guise should be resisted*” in future.<sup>16</sup> Prosecution creates serious difficulties, since political leaders who have been held politically responsible for gross human rights violations have not applied for amnesty. Any attempt to prosecute them may result in a cycle of violence and killings. Purging is also not an appropriate alternative because such leaders command support within their respective constituencies.

### *(iii) Reconciliation and Restorative Justice*

The personal view of victims and perpetrators alike was that reconciliation in the new South Africa was not possible without forgiveness.<sup>17</sup> The Commission found the notion of reconciliation inextricably linked to the African concept of *ubuntu* and restorative justice.<sup>18</sup> Although the Commission found the reconciliation process a complex issue, it emphasised that reconciliation was a crucial element of a restorative model of justice. In order for reconciliation to become a reality in South Africa the Commission recommended that the State President call a *National Summit of Reconciliation*.<sup>19</sup> The purpose of the summit would be to facilitate the reconciliation process.

## **3. Apartheid as a Crime Against Humanity**

On the question of apartheid as a crime against humanity the Commission concluded that:

‘The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions... The Commission believes that international recognition should be given to the fact that this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.’<sup>20</sup>

Unlike the Commission, the Constitutional Court in *Azapo & Others v President of the Republic of South Africa & Others* 1996 (4) SA 671(CC) ruled that the South African amnesty process was permissible under the constitution and did not inquire on whether

<sup>15</sup> See the National Prosecution Act 32 of 1998.

<sup>16</sup> *Ibid.*, Vol. 5, Ch. 8, para 14. Emphasis added.

<sup>17</sup> *Ibid.*, Vol. 5, Ch. 9.

<sup>18</sup> *Ibid.*, Vol. 1, Ch. 5, paras. 80 - 100.

<sup>19</sup> *Ibid.*, Vol. 5, Ch. 8.

<sup>20</sup> *Ibid.*, Vol. 5 Ch. 6, para. 114.

under customary international law a duty to prosecute exists.<sup>21</sup> There is a strong body of academic opinion that under international customary law states have an obligation to punish perpetrators of gross human rights violations.<sup>22</sup> This argument lends support from the prosecution of perpetrators of gross human rights violations in Rwanda,<sup>23</sup> Yugoslavia<sup>24</sup> and Ethiopia.<sup>25</sup> Nevertheless, although the Commission is aware of this possibility it made it clear that any foreign jurisdiction which proceed against perpetrators of apartheid crimes will not receive the co-operation of the commission as the latter has sought to deal sufficiently with matters relating to such offences.

<sup>21</sup> This ruling attracted criticisms from critics who argued that international law received a short shrift in the *Azapo* case. See for example, *Ziyad Motala*, The Constitutional Court's Approach to International Law and its Method of Interpretation in the "Amnesty Decision": Intellectual Honesty or Political Expediency, 21 South African Yearbook of International Law (1996), 30; *Andreas O' Shea*, Should Amnesty be Granted to Individuals who are Guilty of Grave Breaches of Humanitarian Law? – A Reflection on the Constitutional Court's Approach, 1 Human Rights & Constitutional Law Journal of Southern Africa (1997), 24; *John Dugard*, Is the Truth and Reconciliation Commission Process Compatible with International Law? An Unanswered Question, 13 South African Journal on Human Rights (1997), 258; *John Dugard*, International Law and the South African Constitution, 18 European Journal of International Law (1999), 1 at 4.

<sup>22</sup> See generally discussions by *Roht-Arriaza*, State Responsibility to Investigate and Prosecute Grave Human Rights in International Law, 78 California Law Review (1990), 451; *Diane Orentlicher*, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 Yale Law Journal (1991), 2537; *Carla Ecdelenbos*, Human Rights Violations: A Duty to Prosecute, 7 Leiden Journal of International Law (1994), 7; *Christopher Joyner*, Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability, 26 Denver Journal of International Law and Policy (1998), 591; *Michael Scharf*, Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes, 59 Law and Contemporary Problems (1996), 41.

<sup>23</sup> UN SC Res. 955 (1994) creating the International Criminal Tribunal for Rwanda (ICTR). The ICTR has convicted the former Rwandanese Prime Minister, Jean Kambanda for genocide and crimes against humanity. See the *Prosecutor v Jean Kambanda* Case no: ICTR 97-23-5 (Judgement & Sentence).

<sup>24</sup> UN SC Res. 827 (1993) creating the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY was indicted and prosecuted senior officials of the former Yugoslavia including President Slobodan Milosovic. See the *Prosecutor v Milosovic & Others* Case No: IT-99-37-1 (Indictment).

<sup>25</sup> Lieutenant Colonel Mengistu Haile Mariam ruled Ethiopia from 1974 to 1991 when he was overthrown by the Ethiopian Peoples' Revolutionary Democratic Front. He fled to Zimbabwe in May 1991. Colonel Mariam has been indicted individually and collectively on charges of genocide and crimes against humanity by the Special Prosecutor's Office (SPO) created by the new government in 1992 to investigate human rights abuses by the former regime to prosecute those held to be responsible.

#### 4. Conclusion

Although the TRC was an unsatisfactory process to some, it was nonetheless what South Africans had to accept, because no other solution was politically or materially conceivable. Given the political constraints, the progress of the South African Truth and Reconciliation Commission is one of the success stories of domestic truth commissions to date. Whether what is contained in the report is an acceptable record of the past is and will continue to be a debatable issue. Both perpetrators and victims had the chance to face the apartheid beast in the eye and thus helped to lay the foundation for the reconciliation process to begin. Now the challenge, which lies ahead, is the reparation process, which is an integral part of the reconstruction and development process. Reparation to victims of gross human rights violations is a daunting and challenging task ahead of the ANC-led government especially taking into account the scarcity of resources. Although considerable progress has been made, there is still room for improvement on the South African model for any society in transition, which may opt for a truth commission in future.