

After Dictatorship

Instruments of Transitional Justice in Post-Authoritarian
Systems

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South Africa: Addressing the Unsettled Accounts of Apartheid

1 The Experience of Dictatorship

1.1 Relevant Period

The period of apartheid rule in South Africa officially lasted from 1948 until April 1994, when democratic elections took place. The policy of apartheid (Afrikaans for separateness) was formally introduced in South Africa by the National Party (NP) when it came to power in the whites-only elections of 1948. This culmination of a political, economic and social system of racial discrimination was, however, based on policies of racial discrimination practiced and legislated since the first European settlement in South Africa in 1652. Colonial rule in South Africa by Dutch and British administrations involved wars of conquest, enslavement of local peoples, the deprivation of land and political control of indigenous populations. Colonialism also saw the establishment of numerous waves of Dutch, French and British settlers occupying various parts of the country (particularly the Cape Province and Natal) in subsequent centuries. Dutch settlers who were unhappy with British rule of the Cape Province (including the abolishment of slavery) moved into the country's interior and established independent 'Boer'¹ republics, the Orange Free State and the Transvaal. This migration also involved numerous battles resulting in the conquest of land and the forced displacement of local populations.

Violent conflicts between indigenous people and European settler populations continued until the early twentieth century. The last major military confrontation was the Bambatha Rebellion (1906–1907), when the Zulu Chief challenged the introduction of a poll tax by the Natal government.

The whole period of colonial control of South Africa involved various racially discriminatory laws and the denial of political rights. In the early twentieth century this gave rise to a more united African movement of protest and resistance, particularly through the leadership of the African National Congress (ANC), which was founded in 1912 (initially as the South African Native National Congress).

The ANC led various protests against discriminatory laws and campaigned for full democracy. In the 1950s these campaigns became increasingly confrontational while retaining a principled stance of non-violence. In March 1960 the Pan Africanist

¹ Boer is the Dutch word for farmer, which is how the majority of Dutch settlers referred to themselves. Their descendants were subsequently called Afrikaners.

Congress (PAC), a breakaway group of the ANC, led protest marches against the passing of laws that required Africans to carry permits to reside in ‘white’ urban centres. At a march to a local police station in Sharpeville, police opened fire on protestors, killing 69 and injuring 180. This became known as the Sharpeville Massacre. In response to the rising tensions, the government banned the ANC and PAC along with various other political organizations. Consequently, the ANC and PAC decided that it was necessary to resort to armed struggle to pursue their goals. Many leaders went into exile and the organizations established military structures to continue their campaigns. The subsequent period up to 1994 is considered a period of armed struggle and severe authoritarian rule. This is the period that the South African Truth and Reconciliation Commission (TRC), described in chapter 2, section 10, was mandated to address.²

This period also saw the conflict expand to include neighbouring countries, especially when newly independent states (Botswana, Lesotho, Swaziland, Mozambique, and Zimbabwe) supported or provided bases for the liberation movements. The South African government also directly supported rebel groups and engaged militarily in civil wars in Angola and Mozambique. South Africa’s occupation of Namibia (since its takeover from Germany in WWI) witnessed the introduction of apartheid-style policies and fighting against the liberation war conducted by the South West African People’s Organisation.³

The end of the conflict is generally located at the day of the first democratic election on 27 April 1994. While the interim constitution was signed by the main political parties in December 1993, further violence occurred in the subsequent months, particularly involving the right-wing extremists opposed to democratic elections, and the Inkatha Freedom Party (IFP), which felt that its needs had not been sufficiently addressed in negotiations. After April 1994, further incidents of political violence such as bombings and targeted assassinations continued more sporadically, also involving mainly these two groups.

1.2 Political Background

While the National Party introduced the official state policy of apartheid in 1948, this has been described as simply a concretization of racially discriminatory policies that had been pursued for centuries in South Africa. Previous governments in South Af-

² Promotion of National Unity and Reconciliation Act (Act 34 of 1995), accessed 14 July 2021, <https://www.justice.gov.za/legislation/acts/1995-034.pdf>.

³ Guy Lamb, ‘Dismantling of the State Security Apparatus,’ in *Memory of Nations: Democratic Transitions Guide – The South African Experience*, ed. CEVRO (CEVRO, 2020), 7–17.

rica had provided very limited political rights to black⁴ citizens and had introduced laws that robbed them of critical rights and property.⁵

The National Party was established in 1914. It specifically sought to present the interests of Afrikaners (descendants of Dutch settlers) who had suffered intensely at the hands of the British during the South African War of 1899–1902. They sought to protect their rights against the dominance of British rule and the economic dominance of British settlers and to assert political and economic dominance in relation to the black majority that was escalating its demands for political rights.

Formative in the Afrikaners' identity was the memory of the South African War (11 October 1899–31 May 1902) during which the British pursued a 'scorched earth' policy of burning farms and collecting women and children into concentration camps⁶ in order to force soldiers of the Boer republics (Transvaal and Orange Free State) to surrender. More than 25,000 women and children died in these camps due to poor nutrition and living conditions. Blacks were also interned in similar under-resourced concentration camps, where about 20,000 died.⁷

A key cause of the South African War was the tension between British mining interests in the Boer republics after the discovery of gold in the Transvaal. The peace treaty asserted British economic dominance and confirmed the political rights of both Afrikaners and British settlers while denying any rights for indigenous peoples.

The National Party was established as a vehicle for Afrikaner nationalism, perceived to have been stifled by the war and the peace treaty, which sought recognition of an Afrikaner culture, support for Afrikaner economic interests and a political vision of separation of different racial groups.

The National Party first won political power in 1924 and introduced legislative changes that reduced the representation of 'coloureds' (South Africans of mixed de-

4 'Black' is used in this paper as a collective term for citizens who were not considered white. It includes groups such as Asians or those of mixed race who were all discriminated against by the predominantly white government. It is used instead of the more pejorative term 'non-white' commonly used by the apartheid government. Apartheid legislation mainly differentiated between whites, Africans, coloureds and Indians.

5 The key land ownership law that deprived Africans of land was the Natives Land Act of 1913, which restricted their right to own land to reserves that covered less than 13 percent of the country. Cf. William Beinart and Peter Delius, 'The Historical Context and Legacy of the Natives Land Act of 1913,' *Journal of Southern African Studies* 40(4) (2014): 667–688, accessed 14 July 2021, <https://doi.org/10.1080/03057070.2014.930623>.

6 These concentration camps were some of the first in modern history and received widespread condemnation once the conditions in these camps were made public in Britain by figures like Emily Hobhouse, who campaigned for an improvement of conditions.

7 The official figure is 27,927 whites, which is based on the 'Republikeinse Sterfte' lists compiled by P. A. Goldman. However, due to duplications and methodological errors, recent research has only been able to verify around 25 000 deaths. Liz Stanley and Helen Dampier, 'The Number of the South African War (1899–1902) Concentration Camp Dead: Standard Stories, Superior Stories and a Forgotten Proto-Nationalist Research,' *Sociological Research Online* 14(5), 2009: 1–14.)

scent). In 1934 the NP joined with the opposition to form the United Party. Afrikaner dissatisfaction with this compromise resulted in the re-establishment of the National Party. Unhappiness with the United Party's decision to join the Second World War on the side of the British fuelled this discontent, which led to a consolidation of Afrikaner support for the NP, which went on to win the 1948 national elections.

The National Party then embarked on implementing its policy of apartheid, which entailed a grand-scale vision of separating South Africa into a country of white citizens and separate, self-governing 'homelands' of the various African tribes. South Africa was thus considered a white state where Africans were tolerated only if they were given official permission to reside there through the migrant labour system and the issuing of passes. Urban centres, particular suburbs, were stipulated as being for whites only, resulting in the forced relocation of many thousands of residents, and sometimes the complete destruction of neighbourhoods.

Apartheid also introduced the strict racial categorization of the population, which facilitated the delineation of separate public services for different groups, which resulted in highly unequal health, education and other human services. Inter-racial marriage was outlawed, and restrictions were placed on cultural and social gatherings which sought to restrict racial mixing. Racial separation shifted from a de facto reality to a much more systematic de jure system of social control. As noted by Allister Sparks, the new policy 'substituted enforcement for convention. What happened automatically before was now codified in law and intensified when possible. . . . [Racism] became a matter of doctrine, of ideology, of theologized faith infused with a special fanaticism, a religious zeal.'⁸

1.3 Ideological Justification

Apartheid ideology is the belief that people inherently belong to different racial groups that should remain separate. In addition, it frames whites as inherently superior due to their genetic inheritance and cultural and religious ancestry. This ideology of white supremacy is historically rooted in the Afrikaner belief in being a people chosen by God, and the political dominance they exercised over others was supported by their interpretation of the Bible.

A large majority of Afrikaners belonged to the Dutch Reformed Church, a conservative, Calvinist Christian church that had long taught racial separation as a biblical injunction. Afrikaners also saw their role in South Africa as a missionary presence of bringing civilization and imposing order on the local population by ensuring the separate development of different groups. The religious foundation of apartheid imbued

⁸ Allister Sparks, *The Mind of South Africa: The Story of the Rise and Fall of Apartheid* (Johannesburg: Jonathan Ball Publishers, 2006), 190, quoted in Timothy Longman et al., 'Early Apartheid: 1948–1970,' in *Confronting Apartheid* (Brookline: Facing History and Ourselves, 2018), accessed 17 January 2022, <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction>.

it with a rigid morality, imposing strict religious rules regarding women's subervience, the severe discipline of children and respect for authority.

The ideology of apartheid was supported by scholars from the various Afrikaner universities who provided 'scientific' support in terms of biological explanations for racial differences and political and sociological support for the notion of race, racial and tribal identity and the benefits of separate development.

Apartheid policies were also intricately tied to economic policies of wealth creation and affirmative action. Protected employment was expanded for white workers through job reservation for whites among the more skilled positions in industry, and expanded state enterprises ensured high levels of employment for less skilled whites. The most far-reaching of the economic policies was the system of migrant labour. This involved African labourers being recruited from the homelands (and from neighbouring countries) to work in industries in South Africa. They were to have limited rights of residence that were strictly tied to their limited contract of employment. This ensured a large supply of cheap labour for mines and other industries that required large numbers of unskilled workers. The repressive political conditions and power of the mines meant that real African wages in the gold mines were higher in 1915 than they were in 1970.⁹

This formula was one that ensured huge profits for the mining industry while externalizing the devastating long-term health costs of the poverty stricken rural communities that supplied the labour.¹⁰ Apartheid was thus pursued in a way that brought large corporations into the design of its fundamental policy development and implementation.

Besides defending the moral premises of racial segregation, the National Party government also increasingly viewed and portrayed itself as a bastion against godless communism. Particularly in the 1960s, as the ANC and PAC received support from the Soviet Union and China, the National Party government viewed the downfall of white rule in South Africa as the doorway to communist rule. The prospect of black majority rule was portrayed as resulting in the suppression of Christianity, the nationalization of industry and the end of any form of democracy (to the extent that it still existed for whites). This vision of a communist onslaught on South Africa further entrenched determination to oppose reforms and strengthen the coercive power of the state.

The authoritarian powers of the state were thus firstly an expression of an authoritarian understanding of the nature of the social control required of a complex society, which necessitated enforced separation through grand state intervention, which in turn required intensive policing and firm rule through the use of extensive

⁹ Jill Natrass, *The South African Economy: Its Growth and Change* ²(Cape Town: Oxford University Press, 1988), 139, table 7.2.

¹⁰ Jaine Roberts, 'The Hidden Epidemic Amongst Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Works Act in the Eastern Cape, South Africa' (Durban: Health Systems Trust, 2009).

laws and bureaucratic controls. Secondly, authoritarian control became increasingly repressive in response to wide-scale black resistance to apartheid rule. This was made even more brutal in response to the shift to armed resistance by the liberation movements and the emergence of an international movement against apartheid, particularly through the support provided to the liberation movements by communist countries. The response to the ‘total onslaught’ was the development of a ‘total strategy’ in the 1980s that involved the security forces and the securitization of all aspects of South African society.¹¹

As part of the international campaign against apartheid, the UN General Assembly passed a resolution classifying the system of apartheid as a crime against humanity in 1973.¹² This resolution was, however, not supported by Western governments and right up to its demise, Western banks continued to lend money to the South African government, which was used in part to fund its security and military strategies.¹³

1.4 Structures of Persecution

Apartheid was implemented through a system of law passed by parliament and enforced through the courts. In order to maintain its own sense of legitimacy and to portray itself positively to the international community, the government sought to style itself on European systems of governance, if only to the extent that democracy was applicable to whites and the country was governed through a system of law rather than pure force. This was labelled ‘rule by law’ rather than rule of law by some commentators, as the nature and scope and discretion allowed by these laws and regulations were dramatic and openly discriminatory.¹⁴ These laws were imposed on the disenfranchised majority, which meant that the state had to develop a huge infrastructure of law enforcement. The South African government utilized the police force, the judiciary and a vast bureaucratic network of state officials to impose apartheid laws and regulations, resulting in the forced relocation of hundreds of

11 Robert Davies and Dan O’Meara, ‘Total Strategy in Southern Africa: An Analysis of South African Regional Policy since 1978,’ *Journal of Southern African Studies* 11(2) (1985): 183–211, accessed 14 July 2021, <https://doi.org/10.1080/03057078508708096>.

12 General Assembly resolution 3068 (XXVIII) of 30 November 1973 (International Convention on the Suppression and Punishment of the Crime of Apartheid).

13 Karyn Maughan, ‘Fresh bid to nail banks for helping apartheid SA,’ *Financial Mail*, 3 September 2020, accessed 17 January 2022, <https://www.businesslive.co.za/fm/features/2020-09-03-fresh-bid-to-nail-banks-for-helping-apartheid-sa/>.

14 Richard L. Able, *Politics by Other Means: Law in the Struggle against Apartheid, 1980–1994* (Cambridge University Press, 1997).

thousands of citizens and the arrest of over 17 million for contraventions of the pass laws.¹⁵

In addition to the extensive body of apartheid laws that restricted movement, interaction, and economic and social behaviour among blacks, the state also developed security laws that expanded its ability to repress political opposition. When the ANC and PAC stepped up their military campaign against the apartheid government, the state developed more sophisticated structures to persecute its opponents. This involved the development of various police and military intelligence units, public policing units and coordination bodies that ensured an elaborate and sophisticated approach.¹⁶ At the height of apartheid repression in the 1980s, the state established a National Security Management System under the control of the State Security Council, which was composed of military personnel. This structure acted as a shadow cabinet and oversaw a national network of Joint Management Centres that coordinated local-level intelligence and interventions.

Legislation was passed that gradually broadened state security powers by expanding the scope of what was considered illegal activity: it broadened the definition of terrorism, extended the powers of the security forces to conduct surveillance, arrest and detain suspects, and reduced the rights of detainees. In 1950 the parliament had passed the Suppression of Communism Act (Act No. 44 of 1950) specifically to ban the South African Communist Party, which was a close ally of the ANC. In 1967, the state passed the Terrorism Act (Act No. 83), which allowed the government to detain individuals indefinitely, which was replaced in 1982 by the Internal Security Act of 1982 (Act No. 74), which gave the government broad powers to ban or restrict organizations, publications, people and public gatherings, and to detain people without trial.¹⁷

This expansion of state repression reached a pinnacle in the 1980s when the state declared a state of emergency in 1985 in response to the mass protest campaign led by the newly established United Democratic Front (UDF). This group had brought together a wide range of civil society organizations in support of democratic change. This popular movement had gained broad support among organizations from across the racial divide and presented a broad umbrella that included both liberal and more radical political movements. The UDF and its affiliates were broadly ANC aligned, supporting its political agenda while not necessarily supporting its military campaign. The state of emergency provided additional powers for the state to censor

¹⁵ Michael Savage, 'The Imposition of Pass Laws on the African Population in South Africa 1916–1984,' *African Affairs* 85 (339) (1986): 181.

¹⁶ There was, however, competition among different agencies, particularly between the military and police structures, and different Prime Ministers gave priority or restructured these based on their cabinet preferences.

¹⁷ A more detailed list of security legislation and their provisions can be found here, accessed 14 July 2021, <https://sahistory.org.za/archive/many-faces-apartheid-repression>.

media coverage of protest events, impose curfew times and restrict people's movements, and ban organizations.

1.5 Victim Groups

In addition to its systemic and structural violence aimed at the majority of South African citizens,¹⁸ more targeted forms of persecution were developed to counter political resistance to apartheid. Political repression took on a number of forms and targeted different groups, which evolved over the different periods of apartheid rule and which responded to different state perceptions of the nature and extent of the threats they were facing.

The nature and extent of the conflict and the numerous forms of repression used by the state, along with the lack of public accounting by the apartheid government and its destruction of records, makes it difficult to present a clear and comprehensive statistical picture of the abuses during this period.

The highest number of deaths due to political violence occurred in the fighting between the ANC and IFP in the period 1990 – 1994.¹⁹ While some attacks were seemingly authorized by local political leaders, others took the form of local rivalries, internal battles within parties, personalized retaliations, etc. A second issue is the lack of state records of most offences. The state did not keep track separately of political versus criminal offences, and many of those who were killed or detained by the state were categorized simply as criminals. Only certain offences and certain security measures were specifically political (e.g. terrorism and detention under particular emergency regulations). Furthermore, the state did not maintain detailed records of offences or release figures publically. Monitoring bodies during apartheid, such as the Network of Independent Monitors, the Human Rights Commission, also focused their attention on documenting individual cases (often with a view towards legal action), and spent relatively little effort compiling accurate estimates of the numbers involved.

18 Apartheid was a system that committed political, social and economic abuses against millions of South Africans on the basis of their race and ethnicity. In terms of this broad conceptualization, tens of millions of people were victimized by being robbed of their land, deprived of their political rights and had their life chances diminished through lack of education, deprived of work opportunities, denied health services, etc. In terms of the Apartheid Convention, they can all be classified as victims of an international crime. The apartheid policies such as the migrant labour system and labour laws gave rise to very direct physical harm, such as when unsafe working conditions in the mines resulted in tens of thousands of premature deaths due to silicosis, and similar things also occurred among migrant workers who had little access to workplace protection or health services.

19 From February 1990 to April 1994, 14,807 people were killed, compared to 5,387 in the previous five years. (Brandon Hamber "‘Have no Doubt it is Fear in the Land’: An Exploration of the Continuing Cycles of Violence in South Africa," *Southern African Journal of Child and Adolescent Mental Health* 12(1) (2000): 7; South African Institute of Race Relations, *Race Relations Survey 1993/1994*, 1994, 39).

After the transition, the issue of counting particular cases has not been viewed as particularly valuable either by the TRC or by political actors. The TRC focused most of its attention on public truth telling or, as it termed it, ‘narrative truth,’ through which it sought to build public empathy and understanding (see section 2.10.1 of this report). At times it treated statistical information about abuses with disinterest, if not suspicion. In its investigations and research, the TRC made little attempt to develop accurate counts of particular phenomena. It did do some statistical analysis of the statements it received from victims and applications for amnesty. These figures were used particularly to provide a broad sense of the dynamics of conflicts in particular regions (such as the graphs in volume 3, chapter 1 of the TRC final report.) These figures are, however, by no means a census of the victim or perpetrator populations and clearly provide a very biased sample of both populations. The TRC used such statistics mostly as illustrative backdrop for its narration of the conflict dynamics in different parts of the country.²⁰

1.5.1 Political Trials, Imprisonment and Judicial Executions

The array of political offences created by the state provided a basis for a large number of political trials. Even when not convicted in these trials, this strategy ensured that political opponents spent much of their time in jail awaiting trial or in court defending themselves. According to Max Coleman (former director of the Human Rights Commission, a non-governmental organization that monitored apartheid human rights abuses),

An estimated 50,000 persons over the last 5 years [1985–1989] have found themselves in court as a result of involvement in the violence arising from mass resistance to apartheid. The vast majority has been acquitted or had their charges dropped.²¹

²⁰ In political debates, the numbers have also not featured as a key contention. Both the ANC and the NP are unable to use the numbers to their advantage in scoring political points. They are both still seen as not having fully acknowledged responsibility for the suffering they have caused. Maintaining a mutual silence about the number of deaths or other abuses at their own hands appears to serve their interests best. Where victim organizations have organized and made claims regarding the numbers of those who were victims that should benefit from reparations, the state has simply remained silent, not disputing the figures but also not confirming that tens of thousands of victims may still be entitled to reparations payments. The statistics are also at odds with the political narrative of the liberation struggle. The few members of military or police killed by the ANC (and the fact that it killed more civilians than combatants) does not align with its historical narrative of military heroism and the success of its military wing in pressuring the apartheid government.

²¹ Max Coleman, ed., *A Crime Against Humanity: Analysing the Repression of the Apartheid State* (Cape Town: David Philip Pub, 1998). Cited by SAHO, accessed 14 July 2021, <https://www.sahistory.org.za/archive/post-detention-weapons>.

While no detailed analysis of the total number of people sentenced for political offences is available²², Coleman noted that at the end of 1989 the number of political prisoners then serving sentences for ‘security offences’ was about 350, and those serving time for ‘unrest offences’ (such as participating in illegal protest or public violence) numbered somewhere between 2000 and 3000.²³

About 150 of those convicted for political offences were sentenced to death and executed.²⁴

1.5.2 Detention without Trial

Persecution was not just targeted at those operating illegally or planning violence. All forms of opposition to the state were kept under surveillance, and legislation was introduced that gave the state the power to detain suspects without charging them. Detention without trial became a widely used strategy by the police.²⁵ While specifically targeted activists had been detained in earlier periods, such detention was used on a much wider scale when protests escalated into broad social uprisings, such as during the Soweto Uprising of 1976, by the end of which about 700 people had died,²⁶ and the United Democratic Front mass mobilization campaign of 1984. It is conservatively estimated that 80,000 people were detained under security regulation between 1960 and 1989, of whom 15,000 to 20,000 were below the age of 18.

22 The two organizations that provided the most regular monitoring of political repression during apartheid were the South African Institute for Race Relations, which produced an annual report, the Race Relations Survey, and the Human Rights Commission which produced a series of reports on events and trends. The two organizations represented different ideological positions and utilized different methodologies, different definitions and covered different periods of the regime. They were also not consistent in monitoring particular forms of repression on an ongoing basis. After 1989, no attempt was made to provide an overview or summary of these various records, as their attention shifted to addressing new political and social issues in the post-transition context.

23 Coleman, *A Crime Against Humanity*. Cited by SAHO, accessed 14 July 2021, <https://sahistory.org.za/archive/many-faces-apartheid-repression>.

24 Executions in South Africa were done by hanging. According to Capital Punishment UK (accessed July 14, 2021, <http://www.capitalpunishmentuk.org/common.html>) more than 4,200 people have been executed in South Africa since 1910 and more than half of this number were hanged between 1967 and 1989, the period of intense resistance to white rule and apartheid, although it is thought that only 152 of these were for ‘political’ crimes. This figure aligns with those found on, accessed 14 July 2021, <https://www.sahistory.org.za/article/political-executions-south-africa-apartheid-government-1961-1989#:~:text=After%20the%20first%20democratic%20election,were%20dismantled%20the%20following%20year> which reports that between 1961 and 1989, about 134 political prisoners were executed by the apartheid government at Pretoria Central Prison (where most executions were carried out).

25 Coleman, *A Crime Against Humanity*.

26 Helena Pohlandt-McCormick, ‘I Saw a Nightmare...’: Violence and the Construction of Memory (Soweto, June 16, 1976), *History and Theory* 39(4) (2000): 23–44.

Among the detainees were those directly involved in protests as well as many who were seen as organizing these activities.²⁷ Organizational bans, targeted arrests and mass detentions particularly focused on student associations, trade unions, church structures, and progressive media.

1.5.3 Torture

Many of those detained were subject to torture and severe ill-treatment. The use of torture was routine and sanctioned by higher police and political authorities.²⁸ The TRC also found that,

Torture was not confined to particular police stations, particular regions or particular individual police officers (...). Torture was used by the security police and by other elements of the security forces, including the Reaction Unit, the Municipal Police, the CID and, to some extent, by the military intelligence unit of the SADF.²⁹

1.5.4 Banning

Another form of restriction imposed on many opponents was being banned.³⁰ This entailed numerous restrictions on movement and interaction, such as being restricted in the kinds and number of people one could meet, the places one could travel to and the requirement to report regularly (in many cases every day) to a local police station. In many cases this was equivalent to being under house arrest. It also meant that such people could not be quoted in the media. Banning was often used for many years against targeted individuals. Figures for the number of people banned is not clear, but is estimated to have reached over 1,800 by 1985.³¹

Many detainees were also murdered while in detention. Many of these deaths were classified as suicides or accidents, and state health officials and judicial officers

²⁷ Coleman, *A Crime Against Humanity*.

²⁸ The TRC established that the 'South African government condoned the practice of torture. The Commission held that the Minister of Police and Law and Order, the Commissioners of Police and Commanding Officers of the Security Branch at national, divisional and local levels were directly accountable for the use of torture against detainees and that Cabinet was indirectly responsible.' TRC, *Truth and Reconciliation Commission Final Report Volume 6*, 2003, 617.

²⁹ TRC, *Truth and Reconciliation Final Report, Volume 2*, 1998, 187, accessed 14 July 2021, <https://www.justice.gov.za/trc/report/finalreport/Volume%202.pdf>.

³⁰ Other similar restrictions on movement included being banished to a particular area or being listed, which mainly involved restrictions on being quoted in public documents.

³¹ Coleman, *A Crime Against Humanity*.

were complicit in covering up the true causes of these deaths. At least 67 political prisoners died while in police custody.³²

1.5.5 Assassinations

Assassinations of political opponents were carried out by specialized tactical security force units which targeted both members of liberation military forces but also civilian political opponents deemed to present a serious threat. Such units existed both within police counter-intelligence (Unit C10, better known as the unit headquartered at Vlakplaas), and within military Special Forces (Civil Cooperation Bureau). The security apparatus was also involved in training IFP paramilitaries, which were implicated in subsequent assassinations of ANC leaders. Key apartheid opponents, particularly leadership figures of the ANC, were also targeted in foreign countries through the use of parcel bombs and direct assassination. Those targeted also included high-profile supporters of the ANC who were seen as mobilizing support for the ANC cause among other constituencies. This included instances such as the bombing of the Khotso House of the South African Council of Churches on 31 August 1988 (and the attempted assassination of its Secretary General in April 1989), and the torture and murder of trade union leaders, Muslim clerics, youth and student leaders.

1.5.6 Forced disappearances

The TRC has recognized 477 cases of missing and disappeared persons from the apartheid era. Some of these disappearances served to hide evidence of torture and extrajudicial killings by security operatives. The fate and context of other disappearances are much less clear.³³

32 Mogomotsi Magome, 'South Africa Probes Apartheid-Era Death in Police Custody,' AP NEWS, February 3, 2020, accessed 14 July 2021, <https://apnews.com/article/0a4ea5b33bcef3c5d044d801d30173a7>.

33 J. D. Aronson, 'The Strengths and Limitations of South Africa's Search for Apartheid-Era Missing Persons,' *International Journal of Transitional Justice* 5(2) (2011): 262–281, accessed 14 July 2021, <https://doi.org/10.1093/ijtj/ijr013>. Determining the exact number of political disappearances is complicated by the fact that some activists were thought to have left the country to join the ANC or PAC and were not heard from again. Many who joined the ANC in exile did so under pseudonyms, which in turn made it difficult to trace their family in the event of their death. The category of political disappearance is also quite vague. Some included in this group comprise those killed during political clashes who were buried in paupers' graves when their identity was not immediately clear. It also included those executed for political offences and then buried in unmarked graves.

1.5.7 Violent repression of protests

Another common cause of death during the political conflict was the excessive use of violence by police in response to public protests. The right to public protest was severely curtailed and many public demonstrations and marches ended with police action that resulted in injuries or deaths. While the Sharpeville Massacre was the most extreme case of such abuse, police use of live ammunition or other forms of extreme force in response to protests led to hundreds of deaths over the last three decades of apartheid rule. This continued up till the final days of apartheid, with incidents like the Bisho Massacre on 7 September 1992, where 28 ANC supporters were killed by the Ciskei Defence Force.

The excessive use of violence to quell protests also resulted in the killing and injuring of many individuals who were not direct members of political organizations. The indiscriminate nature of the force used also meant that a number of people were injured or killed who were not involved in the protests.

1.5.8 State Sponsorship of Indirect Violence

The apartheid security forces often took action through less direct means against the liberation movements. Instead of directly confronting political opponents, the state sponsored competing political groups, or in some cases criminal networks, to attack the liberation movements and their allies. While weakening their opponents, this strategy also allowed the state to present itself as the guarantor of safety and order. This strategy was most effectively pursued in the late 1980s and early 1990s through the support for the Inkatha Freedom Party (IFP) in its conflict with the ANC. The IFP was initially established as a Zulu cultural movement and maintained positive relationships with the ANC. As it became a more prominent force with a clearer ethnic and political identity, its ties with the ANC soured and eventually became deeply conflicted. The ANC accused the IFP of collaborating with the apartheid government while the IFP in turn accused the ANC of being intolerant of other political groups. Most of the deaths due to political violence since the 1960s in fact occurred as a result of clashes between the ANC and the IFP.

By arming the IFP and providing security support during some of their attacks against ANC supporting communities, the state directly exacerbated a conflict that witnessed over 20,000 deaths in the internecine fighting between the two parties.³⁴ These deaths occurred almost exclusively in the two provinces of Natal and Transvaal, where the ANC and IFP were seeking to assert dominance. In Natal province both the IFP and ANC battled for control of territory, resulting in indiscriminate at-

³⁴ Stuart J. Kaufman, 'South Africa's Civil War, 1985–1995,' *South African Journal of International Affairs* 24(4) (2017): 501–521, accessed 14 July 2021, <https://doi.org/10.1080/10220461.2017.1422012>.

tacks on rural villages and the assassination of targeted leaders, with both sides being composed of Zulu speakers. In the Transvaal, particularly in the mining areas around Johannesburg, Zulu migrants housed mainly in hostels were pitted against non-Zulu migrants housed mainly in the neighbouring townships. Attempts to control particular territories, reprisal attacks and the operation of criminally connected war-lords contributed to a spiral of violence that led to particularly intensive fighting between 1990 and 1994.

In a similar fashion, the South African government provided military and intelligence support to the homeland security structures who, in turn, also repressed the liberation movements. Liberation movements also targeted these homeland structures, particularly as homeland leaders stood accused of collaborating with the apartheid state.

There is no reliable figure for the total number of people killed or tortured during the political conflict. The TRC reported that, of 9,043 statements received regarding killings, over half of these (5,695) occurred during the 1990 to 1994 period.³⁵

1.5.9 Abuses Committed by Liberation Forces

The ANC and PAC also committed human rights violations in their military campaigns. While initially targeting only security installations, they increasingly blurred the lines between military and civilian targets, and the PAC in particular viewed whites in general as legitimate targets in their attacks. At least 210 people were killed by the ANC's military wing *Umkhonto we Sizwe* (MK) before 1989.³⁶

In addition, the ANC was responsible for the torture and extra-judicial executions of their own members in the military camps they operated in other countries. This arose both in response to protests among military staff about camp conditions and the suspicions of infiltration by South African government spies.³⁷ The TRC documented a few dozen cases of torture and executions, but neither the TRC nor

³⁵ TRC Final Report, Volume 2, Chapter 7, 584.

³⁶ The TRC report found that, despite its policy to avoid civilian deaths, the majority of casualties of the ANC's Military wing's (*Umkhonto we Sizwe*) operations were civilians. It found that a total of 71 people died in such attacks between 1976 and 1984. Of these, 52 were civilians and 19 were security force members. TRC, *Truth and Reconciliation Commission Final Report Volume 6*, 277. This is also supported by subsequent more detailed research. See Janet Cherry, *Spear of the Nation: Umkhonto We-Sizwe* (Athens: Ohio University Press, 2012), accessed 14 July 2021, <https://www.bookdepository.com/Spear-Nation-Umkhonto-weSizwe-Janet-Cherry/9780821420263>; a more comprehensive list of MK operations can be found, accessed 11 May 2022, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv02918/06lv02949.htm>.

³⁷ Accessed 14 July 2021, https://sabctrc.saha.org.za/glossary/anc_camps.htm?tab=victims. Both mutinies were put down with loss of lives on both sides. Many MK members were detained in connection with the uprisings, and some were tortured. Two groups of mutineers were tried by military tribunals and seven were executed.

the ANC established a commission of enquiry or provided any specific estimates of the total numbers involved. The TRC did, however, find that:

Torture (...) was not used in a systematic or widespread way by the ANC. It was used by a limited number of ANC members who were members of the security department and in specific time periods. It was not an accepted practice within the ANC and was not used for most of the three decades with which the Commission is concerned. The relatively low number of such violations and the limited extent to which they occurred demonstrate that torture was not a policy of the ANC.³⁸

Supporters of the liberation forces also carried out attacks on people seen as collaborating with the apartheid system. Such attacks, often involving brutal killings carried out by burning people to death (necklacing), targeted suspected informers, black police officers, local government staff or state-instituted representative structures. This occurred particularly in the context of the mass mobilization in the mid to late 1980s. The TRC puts the number of such necklace deaths between 1984 (when the first such incident occurred) and 1989 at about 700.³⁹

1.5.10 Gendered Dimensions of Repression

Political violence in South Africa also had a gender dimension shaped by the patriarchal, heteronormative values of the state and shared by much of the population. Many women who were imprisoned or detained were subjected to sexual forms of torture and humiliation. Homophobia within the military also led to the establishment of ‘conversion therapy’ programmes, which used shock therapy and surgical interventions on coerced subjects.

1.5.11 Southern African regional Dimensions of Repression and Conflict

The largest number of victims of direct physical violence were the citizens of neighbouring countries (Mozambique, Zimbabwe, Namibia and Angola), where civil wars and anti-liberation struggles were fought through the sponsorship of the South African government. These victims have largely remained undocumented, but number in the hundreds of thousands, mainly civilians.

³⁸ TRC, *Truth and Reconciliation Final Report, Volume 2*, 362.

³⁹ TRC, *Truth and Reconciliation Final Report, Volume 2*, 389.

1.6 Those Responsible

Direct responsibility for human rights violations is difficult to define and to assess numerically in the South African context. This is due to a number of factors. First, the complex mix of actors and varied forms of violations that occurred without clear lines of authority.

In the TRC's final report, it acknowledged some of the challenges in allocating responsibility for much of the violence due to how the conflict played out:

In the 1990s particularly, more gross violations were carried out by members of South African society acting in what they considered to be the pursuit of a political aim than by members of political organisations acting on the express orders of their superiors. Both the state security services and guerrilla organisations such as MK [the ANC's military wing] aimed to supply such social actors with the means to achieve their aims – including weapons, information, trained personnel, and, in the case of the state, funding. It was therefore difficult to attribute direct responsibility for many violations, such as the lynchings or necklacings carried out by crowds loosely aligned to the ANC/UDF in the 1980s, and attacks carried out by social groups such as the 'witdoeke' in Crossroads, encouraged and endorsed by state security forces. (...) By the 1990s, the great majority of human rights violations, especially killings, were being carried out by persons who were not bound to a political authority.

The identities of those individuals directly responsible for human rights abuses have been established in or many cases, particularly in relation to assassinations, deaths in custody and the torture of high-profile individuals.⁴⁰ Those individuals responsible for armed attacks by the ANC and PAC have also largely been identified. These cases generally involved formal police investigations, court hearings and ultimately amnesty hearings, where many perpetrators were given the opportunity to apply for amnesty. While the facts are generally known in most of these cases, the specific details (did he jump or was he pushed from the fifth-floor window?) remain contested for some cases and legal guilt has not been established by the courts.

In cases involving deaths during mass protests or attacks on villages or townships, individual responsibility has been much less clear. Such cases involving random and low-profile individuals attracted much less investigative rigour and judicial oversight and also saw fewer amnesty applications at the TRC.

Those victims who provided statements to the TRC of 'gross human rights violations'⁴¹ generally knew the political or institutional affiliation (e.g. police or ANC supporter) of the perpetrators, but not their identities. This is likely also to be the case for the tens of thousands of other victims of human rights abuses who did

⁴⁰ Calculations of the total numbers are not mentioned in the literature. The TRC's Amnesty Committee received 293 amnesty applications from the security forces, with 229 of these from the Security Branch (TRC Final Report, Vol. 6, 182).

⁴¹ TRC defined gross human rights violations as including killing, abduction, torture or severe ill-treatment of any person.

not approach the TRC. Most individuals directly responsible for committing abuses have not been identified.

Senior police and military leadership responsibility for these abuses has also not been clearly established in most cases. Direct lines of authority between perpetrators and leadership are often obscured by the level of discretion given to lower-level officials. The commander in charge of a death squad, Colonel Eugene de Kock, was, for example, given instructions to take care of a situation and was given medals in acknowledgement of his contribution. While he was convicted for numerous murders and acts of torture, nobody was held responsible for directing him to carry out these activities. Even where there is a record of security leaders giving instructions for someone to be ‘permanently removed from society,’ this has been seen as insufficient evidence by South Africa’s prosecution authorities for holding them responsible for the murders committed.⁴²

Very few senior police applied for amnesty. The most high-profile exceptions were that of Minister of Police Adriaan Vlok and police chief General Johan van der Merwe, who accepted responsibility for authorizing the bombing of the South African Council of Churches (SACC) headquarters. They subsequently entered a plea agreement after admitting to the attempted murder of the SACC Secretary General.

In relation to torture, TRC found that,

the South African government condoned the practice of torture. The Commission held that the Minister of Police and Law and Order, the Commissioners of Police and Commanding Officers of the Security Branch at national, divisional and local levels were directly accountable for the use of torture against detainees and that Cabinet was indirectly responsible.⁴³

In its Final Report in relation to the amnesty hearings,

The Commission noted a number of words and phrases in security policy documents, speeches in Parliament and elsewhere in the mid-1980s such as: ‘elimineer’ (eliminate); ‘uithaal’ (take out); ‘fisiese vernietiging – mense, fasiliteite, fondse’ (physical destruction – people, facilities, funds); ‘maak ‘n plan’ (make a plan); ‘uitwis’ (wipe out). Numerous amnesty applicants, including senior personnel, confirmed that they had understood such words to mean killing. Major Williamson told the Committee that he understood ‘these words to have a simple meaning and that is to get rid of, kill, destroy’. Despite this, former Minister Vlok and Generals van der Merwe and Coetzee continued to assert that at no stage did the State Security Council authorise any policies that included extrajudicial killing.⁴⁴

⁴² Derek Catsam, “‘Permanently Removed from Society’: The Cradock Four, the TRC, Moral Judgments, Historical Truth, and the Dilemmas of Contemporary History,” *Historia Actual Online*, January 1, 2005. F. W. de Klerk, who subsequently became President, was identified as being at the State Security Council meeting where these instructions were this decision was made. Accessed 14 July 2021, <https://mg.co.za/news/2020-02-20-cradock-four-back-to-haunt-de-klerk>.

⁴³ TRC, *Truth and Reconciliation Commission Final Report*, Vol. 6, 2003, 617. Accessed 14 July 2021, https://www.justice.gov.za/trc/report/finalreport/vol6_s5.pdf.

⁴⁴ TRC, *Final Report*, Vol. 6, 251.

Political responsibility for specific abuses is also still not clearly established. Political leaders responsible for the design and implementation of the apartheid policies are clear. Senior politicians and state officials implicated in designing and implementing apartheid policies were ‘rehabilitated’ by the international community for their subsequent engagement in its dismantling. The nature of this responsibility and guilt is highly disputed, however, as seen in the invitation and subsequent withdrawal (after protests by victims and civil society organizations) of an invitation by the American Bar Association to F. W. (Frederik Willem) de Klerk to address its annual conference. To date, nobody has been prosecuted for the specific international crime of apartheid, either in South Africa or any other national jurisdiction.⁴⁵

Similarly, no corporate actors were held criminally or civically responsible for supporting apartheid, for providing financial support to the apartheid government or even for directly supplying equipment used by the police or the military. The TRC, as part of its mandate to examine and make recommendations on gross human rights violations committed during apartheid South Africa, held special hearings on the business sector. At these hearings, various stakeholders presented arguments regarding business complicity in the state’s apartheid policies and businesses’ direct participation in practices of discrimination and repression.

The TRC concluded that many businesses, and particularly the mining companies, were directly complicit in the policies of apartheid: ‘To the extent that business played a central role in helping to design and implement apartheid policies, it must be held accountable. This applies particularly to the mining industry.’⁴⁶ The TRC went on to state:

The first-order involvement of the mining houses and the Chamber of Mines in shaping the migrant labour system is the clearest example of business working closely with the minority (white) government to create the conditions for capital accumulation based on cheap African labour. The evidence shows that, rather than relying simply on the forces of supply and demand, the mining industry harnessed the services of the state to shape labour supply conditions to their advantage. Thus, the mining industry bears a great deal of moral responsibility for the migrant labour system and its associated hardships.⁴⁷

The TRC also found that the mining industry had neglected its obligations regarding workers’ health and safety and noted that they had not been forthcoming on the true state of health and safety in the mines during apartheid:

⁴⁵ Christopher Gevers, ‘Prosecuting the Crime Against Humanity of Apartheid: Never, Again,’ *African Yearbook of International Humanitarian Law*, 2018, accessed 14 July 2021, https://www.academia.edu/39736593/Prosecuting_the_Crime_Against_Humanity_of_Apartheid_Never_Again, <https://hdl.handle.net/10520/EJC-16b8c59195>.

⁴⁶ TRC *Final Report*, Vol. 4, Chapter 2, 24.

⁴⁷ TRC *Final Report*, Vol. 4, Chapter 2, 33.

... there appears to be some evidence that profitability ranked higher than people's lives – as evidenced by the asbestos scandal and the continued use of polyurethane in mines long after the dangers had become known. It is regrettable that more details were not forthcoming on health and safety issues from the Chamber of Mines or the Anglo-American Corporation.⁴⁸

It can also be argued that there was a broad involvement of whites as direct perpetrators, at least in engaging in military support through participation in the SADF and the police. As pointed out by historian Gary Baines,

Between 1967 and 1992, approximately 600,000 young white males were conscripted by the SADF to defend apartheid. These national servicemen were initially deployed in Namibia and Angola, but from the mid-1980s were called up to police the black townships.⁴⁹

While there is a strong understanding of the need to address the victims of apartheid, the question of who the perpetrators of apartheid were and what needs to be done to hold them accountable is not a prominent question in popular debates. While the crime of apartheid has become part of international law, it has not been pursued through criminal cases and remains unclear in jurisprudence. Framing responsibility for the crime of apartheid could include both the political authors of apartheid policies and those who committed human rights abuses in support of the maintaining the apartheid system. Civil society in South Africa has urged prosecutors involved in apartheid-era cases to include the crime of apartheid in the charges levelled against state agents accused of the murder and torture of anti-apartheid activists. Yet within the international community there has never been much appetite for pursuing accountability for such systemic violations that too closely resemble colonial-era violations or that implicate international corporate actors from the West.⁵⁰

1.7 Places of Persecution

Torture occurred in police stations across the country, but was particularly prevalent in regional police headquarters where security police were stationed. As noted by Coleman, certain police interrogation centres gained a reputation for being the sites of multiple deaths. These include:

- John Vorster Square police station in Johannesburg – seven deaths
- Johannesburg Fort Prison⁵¹ – four deaths

⁴⁸ TRC *Final Report*, Vol. 4, Chapter 2, 36.

⁴⁹ Gary Baines, 'Site of Struggle: The Freedom Park Fracas and the Divisive Legacy of South Africa's Border War/Liberation Struggle,' *Social Dynamics* 35(2) (September 1, 2009): 330–344, accessed 14 July 2021, <https://doi.org/10.1080/02533950903076428>.

⁵⁰ Gevers, 'Prosecuting the Crime Against Humanity of Apartheid.'

⁵¹ Subsequently turned into a museum, it now houses the Constitutional Court and has been re-named Constitution Hill.

- Pretoria Prison – five deaths
- Police station at Sanlam Buildings in Port Elizabeth – four deaths⁵²

Security police also operated a number of sites specifically for detaining political opponents, which served as torture centres where numerous opponents were also killed and disappeared.⁵³ The most notorious of these sites is Vlakplaas, where at least ten apartheid opponents were tortured and killed by the police intelligence unit under the command of Dirk Coetzee and Eugene de Kock.

The gallows at Pretoria Central prison (since renamed Kgosi Mampuru II Management Area) is where most of those convicted and sentenced to death for their political acts against the state were executed. In total, 4,300 were hanged on the gallows between 1960 and 1989, of whom 130 were political prisoners.⁵⁴

Robben Island, the most infamous of the South African prisons, established a maximum security wing for political prisoners from 1961 to 1991 and housed most of the imprisoned leaders of the ANC and PAC along with many other long-term prisoners found guilty of political offences. It gained the reputation of a prison where political prisoners were subjected to hard labour, torture and severe ill-treatment. There are, however, no records of prisoners being killed while detained at Robben Island.

1.8 The Form in which the Regime was Overcome

Resistance to the apartheid government involved pressure from a range of sources. After the military victories and repression of armed rebellion (ending in 1906), resistance against the government from the black population mainly took the form of non-violent resistance. This occurred largely under the leadership of the ANC, which came to particular prominence for its Defiance Campaign, launched in 1952, that specifically targeted the pass laws. Over 8,000 protesters were arrested for destroying their passes or defying the conditions of their passes.⁵⁵ The campaign was designed as a series of non-violent protests, but at times they became violent. Police responded violently, often beating protestors while carrying out arrests.

⁵² Coleman, *A Crime Against Humanity*.

⁵³ The exact number of those killed remains unknown, as contradictory accounts have emerged from former operatives. In addition to political abductions and assassinations, the unit was also implicated in non-political crimes and murders, operations to arm anti-ANC forces and operations targeting the ANC in neighbouring countries. Eugene de Kock was only found guilty of six cases of murder. For more details see: Mandy de Waal, 'Jacques Pauw on Vlakplaas' Apartheid Assassin, Dirk Coetzee,' *Daily Maverick*, March 8, 2013, accessed 14 July 2021, <https://www.dailymaverick.co.za/article/2013-03-08-jacques-pauw-on-vlakplaas-apartheid-assassin-dirk-coetzee>.

⁵⁴ Accessed 14 July 2021, <https://www.iol.co.za/the-star/place-of-the-damned-the-gallows-1194445>.

⁵⁵ Tom Lodge, 'State of Exile: The African National Congress of South Africa, 1976 – 86,' *Third World Quarterly* 9(1) (1987): 1–27.

After the Sharpeville Massacre and the banning of many political groups in 1960, the ANC and PAC turned to armed struggle. On a military level, the armed struggle was not very effective as a direct challenge to the security forces of the state. Most of its operations targeted buildings and installations to disrupt services such as power supplies and government functions, while relatively few operations directly targeted state security forces. These actions were symbolically very important in demonstrating resistance to the state and created an atmosphere of fear among the white population.

Nelson Mandela joined the ANC in 1943 and rose to prominence as a leader in its Transvaal branch, where he pushed the party to take a more militant stance. He became leader of the ANC Youth Wing in 1950 and became a prominent leader during the Defiance Campaign. After the banning of the ANC in 1960, Mandela and others founded *Umkhonto we Sizwe* ('Spear of the Nation', abbreviated MK) in 1961. Later this would be formally recognized as the military wing of the ANC. Mandela then set about establishing the structure within South Africa and travelled abroad to gain international support. He was arrested several times. In 1962 he was detained again and charged alongside other senior ANC leaders with treason. He was sentenced to five years, and later to life in prison, and was released 1990 after more than 27 years behind bars.

Resistance to the state was also mobilized by a range of trade unions and civil society groups (religious bodies, student and youth groups, etc.). These bodies organized public protests, strikes, rent boycotts, and consumer boycotts which demonstrated the broad support for democratic demands.

In the 1980s many civil society organizations joined in a united movement under the banner of the United Democratic Front, which saw the protests escalate across the country.

Within the parliament elected by whites, representatives of opposition political parties also battled for accountability and democratic reform. This faction was a minority, however, and after the gradual introduction of reforms in the 1980s, the biggest minority party was the more conservative party that opposed such reforms.

International opposition to the apartheid government came initially mainly from the newly independent African states, who provided direct support to the South African liberation movements and campaigned for apartheid to be labelled a crime against humanity. International support gradually increased and became more united, resulting in the declaration of UN sanctions and the subsequent financial crisis hastened by the closing down of international trade.

The transition formally started with the unbanning of political parties and the release of Nelson Mandela and others from jail in February 1990. The new leader of the National Party and South African President F. W. de Klerk, chose to seek a negotiated settlement with the ANC, which had consistently through its history called for negotiations. Tensions remained high, and negotiations were repeatedly suspended over the coming years while political violence escalated.

2 Transitional Justice

2.1 Political and Institutional Changes

One of the initial agreements between the parties during negotiations was on an indemnity which would allow the release of political prisoners (some of whom were required at the negotiation table) and the return of exiles who would otherwise face prosecution in South Africa. In order to implement the indemnity, the government passed Indemnity Act 1990 (No. 35) on 18 May 1990. This was a temporary indemnity that had to be renewed annually until it was replaced by the TRC's amnesty provision. This indemnity was also extended to state perpetrators and right-wing extremists who were then released from prison. The process of reviewing individual applications for indemnity was contested, as it only covered certain crimes and required disclosure by applicants of the crimes they had committed. It thus became one point of contention and a bargaining chip during ongoing negotiations.⁵⁶ A second Further Indemnity Act was passed in 1992, specifically aimed at providing the state with greater discretion to indemnify state agents before the transition. This was widely condemned for its wide discretion and lack of public disclosure of offences by applicants, and was considered to have been replaced by the subsequent TRC amnesty requirements.⁵⁷

Multi-party negotiations eventually reached a conclusion with the adoption of an interim constitution in December 1983, which paved the way for free elections, which were held in April 1994. The final sticking point in the negotiations was the demand by the National Party for an amnesty for all political offences committed during the apartheid era. This resulted in the addition of an epilogue to the interim constitution, which provided for amnesty for past offences, negotiated directly between the ANC and NP and presented as a non-negotiable to the rest of the parties.

The interim constitution stated: '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.'⁵⁸

The election was won by the ANC, who won over 50 percent of the vote, resulting in the appointment of Nelson Mandela as President. He was formally inaugurated on 10 May 1994.

⁵⁶ Louise Malinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa,' *Working Paper No. 2. Beyond Legalism* (Belfast: Institute of Criminology and Criminal Justice, Queens University, 2009).

⁵⁷ Malinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines.'

⁵⁸ Parliament of South Africa, 'Constitution of the Republic of South Africa (Act 200 of 1993)' (1993), Accessed 14 July 2021, <https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993> and staff from the SADF.

A new constitution was finalized in 1996 which confirmed most of what had already been negotiated in the 1993 interim constitution. The constitution provided a bill of rights, introduced various semi-independent institutions providing oversight of state functions and protecting human rights.⁵⁹ While appointed by parliament, these institutions have significant independence in performing their oversight roles. This also confirmed the independence of the judiciary and guarantees the rule of law.

The new democratic government immediately set about reforming military and police structures, introducing civilian oversight procedures, human rights training for police, community-police relations structures, etc. Senior leadership of the military and police were also rapidly transformed by incentives for early retirement and the appointment of new leaders.⁶⁰ No formal lustration was instituted, and those implicated in past abuses were able to retain their positions if they applied for amnesty through the TRC (as outlined in section 2.10.1).

The South African military integrated members of the ANC and PAC military wings, and senior military leadership was rapidly transformed. During negotiations it was decided that the new military would be composed of 17,000 MK members, 6,000 APLA cadres, 10,000 personnel from the homeland militaries, and 85,000 soldiers and staff from the SADF. Lower-level soldiers from the liberation movements were unhappy with the process of integration and most left the military in subsequent years and were provided with small pensions.⁶¹

The institutional reform of the police was seen as a priority, given their central role in apartheid-era abuses. The South African Police was formally renamed the South African Police Service (SAPS), the homeland police were integrated into a centralized national police service, and the approach to policing was fundamentally reconceptualized through a new policing policy⁶² and the introduction of the South African Police Service Act (No. 68 of 1995).⁶³ This Act introduced two key reforms: the establishment of an oversight body, the Independent Police Investigative

⁵⁹ Chapter 9 of the South African Constitution provides for the establishment of bodies mandated to play an independent oversight role in the operation of the state. These include Public Protector, South African Human Rights Commission, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Commission for Gender Equality, Auditor-General, Electoral Commission, Independent Authority to Regulate Broadcasting, and Broadcasting Authority.

⁶⁰ No specific figures could be found regarding the numbers of early retirements relating to these efforts in the various government departments.

⁶¹ While at least 6,000 left in 1995, figures are not available for subsequent years. Hugo Van der Merwe and Guy Lamb, "Transitional Justice and DDR: The Case of South Africa" (International Center for Transitional Justice, 2011), <https://www.ictj.org/publication/transitional-justice-and-ddr-case-south-africa-brief>.

⁶² Accessed 14 July 2021, <https://www.gov.za/documents/national-crime-prevention-strategy-summary>.

⁶³ South African Police Service Act (Act 68 of 1995), accessed 14 July 2021, <https://www.saps.gov.za/legislation/acts/act68of1995.pdf>.

Directorate (initially called the Independent Complaints Directorate), which investigated all complaints against the police, and the mandatory establishment of community police forums at all police stations to facilitate better relations and accountability. There was, however, no vetting of police, and officers who had received amnesty for committing torture were not barred from continuing their employment.

The creation of a new Constitutional Court at the apex of the judiciary saw the appointment of prominent lawyers and judges with strong reputations as human rights defenders. Other branches of the judiciary were also gradually transformed to become more racially and gender diverse and saw a human rights approach become strongly entrenched. Despite certain constitutional guarantees, the National Prosecuting Authority was subjected to political pressure and viewed as ‘captured’ by political interests who blocked the prosecution of certain politically-connected individuals.

2.2 Prosecution

During apartheid, crimes were committed by both sides – state authorities and the liberation movements – but only the latter were systematically investigated during the apartheid period. Prosecutions of state perpetrators were the exception during this period, particularly in relation to senior officials.⁶⁴ Some lower-level cases were also prosecuted, but, again, no systematic studies of the numbers involved could be found. Over 7,000 amnesty applications were processed by the TRC, both involving perpetrators who had been already convicted by the state (consisting largely of liberation force members), as well as those who feared being prosecuted for cases that had not gone to trial (consisting mostly of state officials).

During apartheid, cases of extra-judicial killings and torture were not investigated or prosecuted except in very unusual situations. Accusations of torture and killing were met with blanket denials, and only when the Goldstone Commission of Enquiry (see chapter 2, section 10 of the TRC Final Report) provided evidence of hit squad activities did the government acknowledge that its officers had played a role. Only one case of direct police involvement in a political killing was prosecuted, namely the Trust Feeds Massacre in which eleven people died and two were seriously injured. Captain Brian Victor Mitchell was convicted for the Trust Feeds Massacre that occurred in November 1988. On 30 April 1992, Mitchell was sentenced to death eleven times, which was later commuted to 30 years, imprisonment. His seven police accomplices each received an effective 15 years, imprisonment for their roles in the attack.

⁶⁴ Ronald Weitzer and Cheryl Beattie, ‘Police Killings in South Africa: Criminal Trials 1986–1992,’ *Policing and Society* 4(2) (July 1, 1994): 99–117, accessed 14 July 2021, <https://doi.org/10.1080/10439463.1994.9964687>.

After the transition, further prosecutions were pursued against alleged state perpetrators such as Eugene de Kock, who was found guilty on 89 charges, including six of murder and two of conspiracy to commit murder.⁶⁵ In some of these cases, the prosecution was put on hold pending amnesty applications. Given the imminent amnesty process that could overturn the outcome, the state was reluctant to invest in such cases.

In some cases, high-level prosecutions proceeded against those who denied any criminal responsibility. The failures of some of these cases dampened expectations for further accountability. In a review of some of these cases, Human Rights Watch and Amnesty International argued:

In October 1996, the trial of former defense minister Magnus Malan, former head of military intelligence Gen. Tienie Groenewald, and eighteen others, in connection with a 1987 massacre of fourteen family members of an ANC leader in KwaMakhutha in the former homeland of KwaZulu, now KwaZulu-Natal, ended in acquittal or discharge for all defendants. (...) The collapse of this trial was one of the main reasons why few members of the former army applied to the TRC for amnesty or co-operated seriously with other aspects of the TRC's work, including by handing over documents vital to its investigations.

...

Another important trial linked to the activities of the former Defence Force ended in acquittal in 2002. On April 11, the Pretoria High Court acquitted Dr. Wouter Basson, head of the military's covert biological and chemical warfare program in the apartheid era, of forty-six murder, embezzlement and other charges against him. Among other findings the Court ruled that the state had not proved beyond reasonable doubt that Dr. Basson had been part of a conspiracy to supply deadly drugs to military agents to murder enemies of the government. (...) The trial had been marked by allegations of judicial bias and a number of controversial decisions by the presiding judge.⁶⁶

The amnesty process provided for in the interim constitution and enacted by the TRC provided for indemnification from prosecution (or release from prison for those already convicted) for those who met the conditions in the TRC legislation. This process required that applicants provide full disclosure of the offences, proof of their political motive and proof that the offence was proportional to the objective pursued. Victims were given the opportunity to challenge these applications, and the process was conducted in public hearings that attracted extensive media coverage. Some of the testimonies provided deeply disturbing images of police demonstrating torture techniques and emotional images of victims and perpetrators embracing. The Amnesty Committee, which oversaw more than 1,000 hearings involving 1,626 applicants⁶⁷,

⁶⁵ de Waal, 'Jacques Pauw on Vlakplaas' Apartheid Assassin, Dirk Coetzee.'

⁶⁶ Human Rights Watch and Amnesty International, 'Truth and Justice: Unfinished Business in South Africa (Amnesty International / Human Rights Watch Briefing Paper,' 2003, accessed 14 July 2021, <https://www.hrw.org/legacy/backgroundunder/africa/truthandjustice.htm>.

⁶⁷ TRC, *Final Report*, Vol. 6, 36.

was mainly composed of legal professionals, but the decisions granted were widely criticized as being very lenient towards perpetrators and limited in the extent of new information provided.⁶⁸

Amnesty was granted to over 1,000 applicants, the majority of whom were from the liberation forces. Police who applied for amnesty included mainly those who were already implicated (by victim testimonies or past inquiries) or who were worried that their colleagues might implicate them in offences that had been exposed. Most state perpetrators declined this opportunity for amnesty, trusting that they would not be exposed and criminally prosecuted.

The TRC conducted investigations particularly into those cases where identified perpetrators had not applied for amnesty or where amnesty had been refused, as they were judged not to have provided full disclosure. When it concluded all the amnesty hearings and ended its term in 2002, the TRC transferred approximately 400 dockets to the National Prosecutions Office, where they were assigned to the Priority Crimes Litigation Unit, which also oversaw international crimes and organized crime, but this office failed to pursue any of the cases due to political pressure from the Minister of Justice and the Director General in the Department of Justice.⁶⁹ Despite assurances that it was investigating TRC cases, only a handful of low-level cases subsequently reached the courts over the next 15 years through the actions of the NPA regional offices. Most of these cases were of low-profile perpetrators and none resulted in heavy sentences.⁷⁰ The most prominent case was that of Police Minister Adriaan Vlok and Police chief General Johan van der Merwe. They entered a plea agreement in which they admitted to the attempted murder of the SACC Secretary General and were granted a suspended sentence. They admitted that his name was on a hit list containing other political targets, but claimed that they did not recall who else was on the list or who had provided the list.

In response to regional prosecutors filing cases regarding apartheid-era crimes, the national prosecution office decided that these cases should be centrally managed. After this decision, no further cases were pursued.

In 2007, the National Prosecution Office issued new regulations for the prosecution of apartheid-era abuses, which included provisions for declining to prosecute cases where perpetrators provided information about their abuses to the state.

⁶⁸ Jeremy Sarkin, 'An Evaluation of the South African Amnesty Process,' in *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, ed. Hugo van der Merwe and Audrey R. Chapman (Pennsylvania: Pennsylvania University Press, 2009), accessed 14 July 2021, <https://papers.ssrn.com/abstract=1367167>.

⁶⁹ The decision not to pursue such cases was later admitted by the National Prosecuting Authority in court papers, as discussed later in this report.

⁷⁰ Hugo Van der Merwe, 'Prosecutions, Pardons and Amnesty: The Trajectory of Transitional Accountability in South Africa,' in *Critical Perspectives in Transitional Justice*, ed. Nicola Palmer, Phil Clark, and Danielle Granville (Intersentia Cambridge, 2012), 443–457.

Their regulations were challenged in the High Court by victims and civil society organizations, with the court ruling in 2008 that they were unconstitutional.⁷¹

Many convicted perpetrators who had not qualified or applied for amnesty also applied for presidential pardons. In 2002, President Mbeki granted individual pardons to 33 members of the liberation forces, some of whom had been denied amnesty by the TRC. Other political parties subsequently pressured the state to also grant pardons to their members who had been convicted of various crimes. Rather than considering hundreds of similar cases individually, the President established a parliamentary committee to review such political pardons. This process covered the apartheid period and extended the time frame to 1999, which thus included various right-wing extremist clashes against black civilians and violent clashes between the ANC and IFP. The process established for this committee to recommend pardons was based on written submissions, a closed-door process involving minimal engagement with victims. Civil society also challenged this process as unconstitutional, and the Constitutional Court confirmed that the process could not proceed without much more public disclosure and substantial engagement with victims.⁷² The government chose to drop this process, and no further political pardons were granted.

Between 2008 and 2016, no prosecutions were initiated by the state despite victim demands and civil society pressure. In response, victims and civil society resorted to pursuing cases themselves. In 2015, one victim's sister approached the High Court to force the police to finalize their investigation into her sister's death and the NPA to make a prosecutorial decision.⁷³ An affidavit filed by previous head of the NPA, Vusi Pikoli, claimed that he had been under political pressure not to pursue these cases.⁷⁴ The NPA agreed to file charges, and in 2016 four men were charged with the murder of Nokuthula Similane. This case has still not been finalized. Similar pressure from victims and civil society saw the state reopen inquests relating to the deaths of others in detention, including Ahmed Timol, Neil Aggett, and Hoosen Hafjee. Additional victims' families have since come forward, putting pressure on the NPA to pursue their cases that involve torture, deaths in police custody and targeted assassinations.

In an attempt to address widescale corruption within the state and public concerns about the politicized nature of the public prosecutor, a new, more independent head, Shamila Batohi, was appointed by the newly elected president, Cyril Ramapho-

⁷¹ Nkademeng et al. versus National Director of Public Prosecutions et al., High Court of South Africa, Transvaal Provincial Division, December 2008.

⁷² Albutt versus Centre for the Study of Violence and Reconciliation and Others, South African Constitutional Court 2010.

⁷³ Till that point the police had simply treated cases as open cases and declined to pursue further investigations.

⁷⁴ David Forbes, 'Investigation 168: Long Road to No Justice for TRC Victims,' Daily Maverick, November 21, 2020, accessed 14 July 2021, <https://www.dailymaverick.co.za/article/2020-11-21-long-road-to-no-justice-for-trc-victims>.

sa, in December 2018. While Batohi has made public commitments to pursue apartheid-era cases, little progress has been achieved to date. Victims' families have had to rely on putting pressure on the NPA on a case by case basis with the support of civil society.⁷⁵

The reasons for the ANC's reluctance to pursue the prosecution of apartheid perpetrators appears to stem from a fear that such action will lead to the demands for certain ANC officials also to be indicted for crimes they had committed during apartheid.⁷⁶ This speculation is supported by the claim made in court by an apartheid operative that there was a behind-the-scenes agreement on mutual amnesty between the two sides.⁷⁷

Prosecutions of apartheid-era corruption cases have also not been pursued. Particular concern has been raised regarding apartheid-era corruption relating to international investments and arms deals at a time when there existed sanctions against the country and international financial transactions required illicit third-party facilitation. The continuity of corruption shortly after the emergence of democratic governance is both seen as a consequence of this lack of accountability and as a reason why the new government did not seek to expose such illicit transactions or to prosecute military deal fixers.⁷⁸

2.3 The Replacement of the Elites

The replacement of officials in public institutions after the transition in 1994 took place largely in the form of ANC redeployment strategies rather than official policies or public regulations. There was no systematic lustration involving any sanctions relating to past involvement in human rights abuses or involvement in apartheid policy implementation. Through their political dominance of national and (most) provincial governments, the ANC was able to appoint key officials who promoted recruitment and appointment processes that gave preference to those with connections to the ANC. The most fundamental change that was instituted came with the introduction of affirmative action, which ensured a gradual but fundamental shift in the racial composition of the public sector.

⁷⁵ Over 20 victims' families have approached the Human Rights Foundation, which has provided support in the initial cases.

⁷⁶ Amnesty granted to 27 ANC leaders was overturned by the court, which makes them liable for potential prosecution. Apartheid era figures have suggested that these cases should also be pursued if any apartheid officials are now to be prosecuted. See Human Rights Watch, 'Decision to Deny ANC Leaders Amnesty Applauded,' Human Rights Watch, 1999, accessed 14 July 2021, <https://www.hrw.org/news/1999/03/03/decision-deny-anc-leaders-amnesty-applauded>.

⁷⁷ Forbes, 'Investigation 168.'

⁷⁸ Hennie van Vuuren, *Apartheid Guns and Money: A Tale of Profit* (London: Hurst, 2018).

The interim constitution (chapter 6, section 88)⁷⁹ provided for a ‘government of national unity’, whereby minority parties that attained a certain number of seats were represented in the composition of the cabinet. Other than the specific formula applied to cabinet positions during the interim phase, the details of this shift were not spelled out in advance and are not subject to monitoring. The only publicly available indicator of this shift is the racial composition of senior staff, a body which was completely white under apartheid and has since become very integrated. No political affiliation can be accurately deduced from such racial composition, however, and political allegiance has retained a clear racial bias.

In addition to the institutional reform of various state bodies, the ANC also proceeded to replace senior leadership figures in the public sector. Senior executive positions in government structures at national, provincial and local levels were replaced, in part to reflect the demographics of the country, but also as a way of ensuring that new government policies would be implemented effectively. The ANC initiated a ‘cadre deployment’ policy, through which it actively targeted positions that were to be filled by trusted ANC members.⁸⁰

During the negotiations process from 1990 to 1994 the police embarked on a major internal reform process that sought to professionalize the service and other democratic reforms in anticipation of the changes that would be imposed by a future democratic government. The new constitutional provisions and transformation programme were thus not subject to serious contention in the transitional negotiations.⁸¹

Within the police and military, senior leadership figures were also replaced in a process that transformed the racial composition of senior executives and replaced these with individuals who had ties with the ANC. In an attempt to reassure whites who still had fears regarding their security after the transition, President Nelson Mandela retained General Georg Meiring as head of the South African National Defence Force until 1998. When the various police departments (including those of the homelands) were amalgamated, the first Commissioner of Police appointed by the President was George Fivaz, recruited from the private sector to manage the complex process of restructuring and reform (which involved the integration of all the homeland police forces into a centralized national police). Rather than vetting existing police, the reform process focused on retraining existing police, more careful recruitment of new police, the introduction of oversight mechanisms and the introduction of codes of conduct and legislation and regulations that limited the

⁷⁹ Promotion of National Unity and Reconciliation Act (Act 34 of 1995), accessed 14 July 2021, <https://www.justice.gov.za/legislation/acts/1995-034.pdf>.

⁸⁰ N. Tshishonga, ‘Cadre Deployment and Its Implications on Service Delivery in South Africa: A Human Development Capability Approach,’ *Journal of Public Administration* 49(3) (2014).

⁸¹ Mark Shaw, ‘Point of Order: Policing the Compromise,’ in *SA Review 7: The Small Miracle: South Africa’s Negotiated Settlement.*, ed. Steven Friedman and Doreen Atkinson (Johannesburg: Ravan Press, 1994).

scope of the use of force.⁸² Even where members of the police admitted to having committed human rights violations during the TRC's amnesty process, the constitutional provision ensured that no sanction, such as dismissal from a job, could be applied. Many police involved in notorious branches, such as the security police, were simply transferred to less sensitive positions. The rise in crime in South Africa after 1994 created public pressure for more effective policing, which the new political elite saw as a call for a more ruthless response, which subsequently undermined many of the human rights reform initiatives, particularly from 2000 onwards.⁸³

The new constitution provided a radical new foundation for judicial structures and conduct and an opportunity for the appointment of new judges in the apex courts, particularly the Constitutional Court, convened in October 1994.⁸⁴ While the judges initially appointed to the new Constitutional Court had strong ties to the ANC and other liberation groups, these figures were generally seen as strongly committed to human rights values rather than party loyalties. All judicial appointments were to be managed by the Judicial Services Committee and involved a transparent nomination and public interview process. The JSC is composed of representatives of legal professionals, parliamentarians and Department of Justice representatives. After conducting public interviews, they present a shortlist of candidates to the President, who then selects from this list. This selection process has been influenced by various factors, including the drive for greater racial and gender balance and demands for a clear human rights commitment among candidates. The racial and gender composition of judges has seen a dramatic change, with the percentage of white males being reduced from 98 per cent in 1994⁸⁵ to 34 per cent in 2016.⁸⁶

The courts have demonstrated their independence through regularly issuing judgements against the government and criticizing state departments for violating human rights guarantees contained in the constitution. Officials within the Department of Justice and particularly the National Directorate of Public Prosecutions were, however, less independent of political interference, as evidenced in the Minister and Director General's involvement in specific decisions regarding whether or not to prosecute apartheid-era cases.

Parastate institutions (electricity, railways, airline, phone and communications services) also underwent changes in executive leadership and board composition

82 Janine Rauch, 'Police Transformation and the South African TRC' (Centre for the Study of Violence and Reconciliation, 2004).

83 Rauch, 'Police Transformation and the South African TRC'.

84 Francois du Bois, 'Judicial Selection in Post-Apartheid South Africa,' SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2006), accessed 14 July 2021, <https://doi.org/10.2139/ssrn.2283148>.

85 du Bois, 'Judicial Selection in Post-Apartheid South Africa,' 11.

86 'The Make-Up Of South Africa's Judiciary,' *Judges Matter* (blog), 29 March 2017, accessed 14 July 2021, <https://www.judgesmatter.co.za/opinions/south-africa-judges/>.

through new appointments by ANC government ministers, and affirmative action appointments led to a gradual but dramatic shift in staffing composition.

The establishment of an economic elite was also pursued through a programme of black economic empowerment, which introduced minimum black percentage ownership (along with various gender and other criteria) for all tenders for government goods and services. The government also specified requirements of black equity ownership in key sectors. The transformation of mineral rights governance, for example, allowed the state to introduce a 26 percent black ownership requirement for mines to gain a mining license.⁸⁷ When it became clear that a small elite were gaining a disproportionate share of such contracts and licenses, new broadened criteria for inclusion were introduced in the Broad-Based Black Economic Empowerment Act (No. 53 of 2003).

These attempts to diversify the economic elite have had limited success. While a small proportion of blacks have joined the ranks of the most wealthy, disproportionate white ownership of wealth and share of income remain deeply entrenched. Most senior executive positions in large companies in South Africa are still occupied by white men.⁸⁸

2.4 Reparations

There have been two key forms of reparations in South Africa since 1994: those for victims of gross human rights violations and those for victims of land expropriation resulting from apartheid racial land laws and group areas policies.

Part of the TRC mandate was to make recommendations for state reparations for victims/survivors of gross human rights violations (including killing, abduction, torture or severe ill-treatment of any person). The amnesty granted by the TRC covered both civil and political liability for crimes committed during apartheid. Victims were thus denied the right to claim civil damages from perpetrators, and the state was seen as taking over this responsibility. The TRC directly supported victims with Urgent Interim Reparations to assist with immediate short-term needs involving payments of about 3,000 Rand (500 US dollars at the time) each to almost 17,000 victims. Through consultation with various stakeholders, the TRC developed recommendations that were published in its final report, which suggested:

- Individual financial payments to victims of roughly 20,000 Rand (3000 US dollars at the time) per victim per year for six years
- Access to support services for victims, including medical and educational support

⁸⁷ Accessed 14 July 2021, <https://mg.co.za/article/2002-01-01-sa-mine-charter-aims-for-26-black-equity>.

⁸⁸ Accessed 14 July 2021, <https://www.thesouthafrican.com/news/finance/percentage-black-south-africans-management-jobs-vs-white-citizens>.

- Community reparations to benefit those communities that were most severely affected by the violence
- Symbolic reparations such as the renaming of public spaces, schools, streets, etc.

The state was initially reluctant to act on these recommendations and only took action after victims mobilized through marches and petitions to highlight their plight.⁸⁹ In 2003, parliament approved a reparations report⁹⁰ that sought to give effect to some of the recommendations, and a budget of 800 million Rand (104 million US dollars) was allocated to the President's Fund to cover these programmes. A key provision in this programme was that individual reparations would be restricted to those victims who were registered by the TRC during its operations. Other victims who fell within the definition of victims of gross human rights violations but who did not register with the TRC would not receive any benefits.

Initial regulations were developed for paying individual victims one-off grants of 30,000 Rand (3,900 US dollars) in 2003.⁹¹ This was about a quarter of the total payment to victims suggested by the TRC.

Regulations were also developed for the provision of educational support for victims and their dependents.⁹² Victims or their families have to apply on an annual basis for support under this programme and may not earn more than a certain annual amount (193,952 Rand or 11,000 US dollars) to qualify. Support can be secured for fees, accommodation and transport up to a total of about 60,000 Rand (3,500 US dollars) annually for up to three years. Payments are made to the public education institutions directly rather than individual applicants. A total of 72 million Rand (4.2 million US dollars) has been spent on educational support to date.⁹³

The Department of Justice also published regulations for medical support for victims for public comment, but these have still not been implemented, seemingly due

89 Zukiswa Puwana and Rita Kesselring, 'Persistent Injuries, the Law and Politics: The South African Victims' Support Group Khulumani and Its Struggle for Redress,' in *Advocating Transitional Justice in Africa: The Role of Civil Society*, ed. Jasmina Brankovic and Hugo Van der Merwe (Berlin: Springer, 2018).

90 Parliamentary Committee on Reparations, 'Final Report,' 2003, accessed July 14, 2021, <https://pmg.org.za/committee-meeting/2624/>.

91 Department of Justice and Constitutional Development, 'Regulations Regarding Reparations to Victims. No. R. 1660' (2003), accessed 14 July 2021, https://www.justice.gov.za/trc/legal/20031112-gg25695_nn1660.pdf.

92 Department of Justice, 'Regulations Relating to Assistance to Victims in Respect of Higher Education Ad Training: Promotion of National Unity and Reconciliation Act of 1995' (2014), accessed 14 July 2021, <https://www.justice.gov.za/legislation/notices/2014/20141103-gg38157-gon852-trc.pdf>.

93 President's Fund, 'President's Fund Annual Report 2019–2020,' 2020, accessed 14 July 2021, <https://www.justice.gov.za/reportfiles/other/presfund-anr-2019-20.pdf>.

to coordination challenges between the Department of Justice and the Department of Health.⁹⁴

Draft regulations for community rehabilitation were shared for public input in 2018, but in the face of objections from victims and civil society have not been formally adopted. The draft regulations provide for the implementation of community projects intended to promote reconciliation, development and rehabilitation in the over 100 communities classified by the TRC as those that have been worst affected. The regulations stipulate a maximum of 30 million Rand (1.8 million US dollars) per community project.

Land restitution and land redistribution were a key political demand during the liberation struggle, but addressing these challenges involved deep structural issues of ownership and identity. At the end of apartheid, some 60,000 white landowners – less than one percent of the country’s population – controlled roughly 82 million hectares – about 86 percent of all farmland in South Africa.⁹⁵

Reparations for land expropriation by the state was implemented under the Restitution of Land Rights Act of 1994⁹⁶. This legislation provided a means for victims of expropriation due to racial discrimination (and their descendants) to lodge claims for the return of their land or to receive compensation for this loss. The Act provided for the establishment of a court (headed by a judge who is appointed by the President) and a commission (headed by a Chief Land Claims Commissioner appointed by the Minister of Rural Development and Land Reform). Since its launch in 1995, the Commission on Restitution of Land Rights and a Land Claims Court reviewed applications for land restitution, assessed the feasibility of returning the land, assessed the value, and sought a resolution involving competing claims among different claimants or between claimant and present owner. Where agreement is reached, an allocation from the state budget is made for compensation to the claimant and/or the present owner. Where such competing claims are not resolved or the value of the land is disputed, the case is escalated to the Land Claims Court, which functions as a normal court of law.

The Commission and Court faced numerous challenges arising from the difficulty of assessing the validity of claims (over many decades and generations of descendants), assessing the value of the land, and negotiating with present owners and occupants of the land. The pace of resolving these cases was thus much slower than anticipated. The Act was subject to repeated amendments over the next 15 years to extend the time frame for lodging and settling claims.

⁹⁴ Department of Justice, ‘Draft Regulations for TRC Victims – Education and Medical Assistance’ (2011), accessed 14 July 2021, <https://static.pmg.org.za/docs/110411regulations-TRC.pdf>.

⁹⁵ Edward Lahiff et al., ‘Land Redistribution and Poverty Reduction in South Africa.’ (Programme for Land and Agrarian Studies, University of the Western Cape., 2008).

⁹⁶ Restitution of Land Rights Act (Act 22 of 1994), accessed 17 July 2021, https://www.gov.za/sites/default/files/gcis_document/201409/act22of1994.pdf.

Alongside land restitution, the state also initiated a land redistribution programme that sought to make land available for black farmers. The Provision of Land and Assistance Act of 2008⁹⁷ (initially passed in 1993 and subsequently amended a number of times) authorized the Minister of Land Affairs to provide funds for purchasing land for redistribution. The constitution empowers the government to expropriate land – only with compensation – ‘for a public purpose or in the public interest’ Section 25 (2)(a)(b), including land reform (Section 25 (4)(a)).⁹⁸

Between 1994 and 2013 the government spent over 1.2 billion US dollars buying 4.1 million hectares of land for redistribution. It also spent over 1.6 billion US dollars on 1.4 billion hectares for restitution.⁹⁹ During this time, 4,860 farms were transferred to black people and communities through the redistribution programme, benefitting almost a quarter of a million people.

2.5 Reconciliation

South Africa’s TRC was a bold attempt to openly confront past human rights violations by engaging in a very public process of airing testimonies and investigating abuses to develop an official narrative. In addition to conducting investigations, assessing amnesty applications and making recommendations for reparations and non-recurrence, the TRC convened over 80 public hearings where victims and other stakeholders were given an opportunity to share their experiences and talk about the way forward.

The TRC commissioners set a tone during these hearings that encouraged a discourse of reconciliation and, while seeking accountability, they promoted discussion of dialogue and forgiveness. Similarly in the amnesty hearings, perpetrators were encouraged to express remorse and to apologize for their actions, and most applicants took the opportunity to do so (although often in a fairly cursory manner). The formal amnesty process did not provide space for direct dialogue between victims and perpetrators, and victim engagement was mainly structured as an opportunity to challenge the testimony of perpetrators. Outside the formal process, there were a number of informal interactions that were convened by TRC staff, the media¹⁰⁰ or by non-gov-

⁹⁷ Parliament of South Africa, ‘No. 58 of 2008: Provision of Land and Assistance Amendment Act, 2008.’ (2008), accessed 14 July 2021, https://www.gov.za/sites/default/files/gcis_document/201409/3178821.pdf.

⁹⁸ Mercedes Stickler, ‘Brief: Land Redistribution in South Africa’ (Focus on Land in Africa, no date), accessed 14 July 2021, <https://gatesopenresearch.org/documents/3-688> <http://www.focusonland.com/foia/en/countries/brief-land-redistribution-in-south-africa>.

⁹⁹ Accessed 14 July 2021, <https://reliefweb.int/report/south-africa/why-south-africas-land-reform-agenda-stuck>.

¹⁰⁰ See for example: Deborah Hoffmann and Frances Reid, *A Long Night’s Journey into Day*, 2000.

ernmental organizations (NGOs). Such meetings only occurred in rare instances, however.

Other public hearings included sectoral hearings, such as the business sector hearing in November 1997 and health sector hearing in June 1997. These involved testimonies from different stakeholders presenting their responsibility, victimization and recommendations for how to prevent the recurrence of abuses. These hearings sometimes built on or provided impetus for dialogue within the respective sectors.¹⁰¹

The commission sought to develop an integrated official history of the conflict and human rights violations of the apartheid era. Its final report was challenged by all the major conflicting parties (ANC, NP and IFP), who were not happy with the findings against them.

In various public speeches and in his efforts to reach out to different political and cultural groups, the new president, Nelson Mandela, stood out as the embodiment of the spirit of reconciliation, who managed to frame an image of a united country. While reviled by the extreme left and right, he managed to remain popular among a broad cross-section of the population. In his role as chair of the TRC, Desmond Tutu played a similar role by seeking to include extremely divided groups within a common discourse of a 'rainbow nation'.

The new constitution provided for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, which was established in 2002 through an Act of Parliament.¹⁰² This has been a very low-key structure that has not publically engaged in key political debates, except the conflicts that emerged relating to the removal of Afrikaans and the introduction of other languages as the medium of education in schools and institutions of higher education. The present chair of the Commission is Professor Mosoma, former Vice Chancellor at the University of South Africa. Except for the chair and deputy chair, the other 11 commissioners serve on a part-time basis.

Within civil society, numerous initiatives were formed to promote dialogue and understanding. Some initiatives established well before the transition that encouraged labour negotiations or political dialogue between the government and banned political groups were credited with laying the foundation for the eventual formal negotiations. The role of civil society in facilitating such dialogue was also critical during the negotiations process from 1989 to 1994, when violence escalated dramatically. Made possible by the National Peace Accord agreement reached between the ANC, NP, IFP and other political parties, this structure was established and funded by the state, but consisted of dozens of regional and local committees staffed by civil

101 Hugo Van der Merwe, 'Evaluation of the Health Sector Hearing: Conceptualising Human Rights and Reconciliation' (Centre for the Study of Violence and Reconciliation, 2000), accessed 14 July 2021, <http://www.csvr.org.za/docs/trc/evaluation.pdf>.

102 Parliament of South Africa, 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, Act No. 19 of 2002,' 2002, accessed 14 July 2021, https://www.gov.za/sites/default/files/gcis_document/201409/a19-02.pdf.

society practitioners. It generally managed to stabilize local political dynamics during an extended and turbulent negotiations process.¹⁰³ These committees consisted of representatives of different local political structures, which met on a regular basis to discuss problems. They were mainly chaired by NGO staff who had experience in negotiation and mediation through engagement with peacebuilding, human rights and labour conflict management projects. This national ‘architecture for peace’ promoted dialogue and sought to anticipate and address conflict as it emerged in communities where tensions were high. Along with the establishment of the peace committees, the National Peace Accord also provided for the establishment of the Goldstone Commission of Enquiry (see chapter 2.10.) and a code of conduct for police and political parties.¹⁰⁴

During the TRC process and after its conclusion, various NGOs also actively engaged in facilitating dialogue processes between divided communities or between communities and state institutions. These processes sought to deepen the dialogues initiated by the TRC in order to provide more scope for inclusion and a more sustained dialogue about the future.¹⁰⁵ The TRC had convened over 80 community hearings across the country, where victims were able to tell their stories over a one-to-three day event. While these events attracted great community interest, they only provided for about ten such stories to be shared per day. Civil society responded to the need to extend such opportunities and provide a more facilitated process that would allow for more extended and inclusive dialogues.

A national victims’ organization was established during the TRC and continues to operate and challenge the state on its unfulfilled obligations (see chapter 2, section 11). Khulumani Support Group (KSG) managed to establish itself as an organization that drew together members from across the political spectrum, even though its strongest support came from among those victimized by the state. It framed a victims’ agenda based on shared rights and grievances and united victims in a common demand for justice, particularly for adequate reparations.

KSG has experienced serious challenges in sustaining its advocacy work, in part due to the organizational challenges of maintaining a membership base and leadership accountability under tight funding conditions.¹⁰⁶

103 Andries Odendaal, *A Crucial Link: Local Peace Committees and National Peacebuilding* (Washington, D.C: USIP, 2013), accessed 14 July 2021, <https://bookstore.usip.org/browse/book/9781601271815/A%20Crucial%20Link>.

104 Phiroshaw Camay and Anne J. Gordon, ‘The National Peace Accord and Its Structures’ (Johannesburg: Co-operative for Research and Education, 2000), accessed 14 July 2021, <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv03275/05lv03294/06lv03321.htm>.

105 See for example the work of the Institute for Justice and Reconciliation at <https://www.ijr.org.za/2020/04/02/sustained-dialogues-programme-april-2020-news> and the Institute for Healing of Memories at <https://www.newtactics.org/conversation/healing-memories-overcoming-wounds-history>.

106 KSG is presently split between the board and the director of the organization, who maintains its website, accessed 14 July 2021, <https://khulumani.net>.

2.6 Laws Relating to Transitional Justice

Processing laws relating to transitional justice included a wide range of laws relating to a complete restructuring of the constitution, political system and transformation of the role of the state, while also seeking to provide accountability and compensation for apartheid-era human rights violations. A discussion of each of these laws is contained in the relevant sections of this report. The fact that each of these laws speaks to a different aspect of transitional justice that extends significantly beyond the TRC legislation (in scope and time) provides some perspective on the complexity and multi-dimensionality of this process in South Africa.

- Indemnity Act (Act 35 of 1990)
- Further Indemnity Act (Act No. 151 of 1992)
- Constitution of the Republic of South Africa (Act 200 of 1993)
- The Public Holidays Act (Act No. 36 of 1994)
- Restitution of Land Rights Act (Act 22 of 1994)
- South African Police Service Act (Act 68 of 1995)
- Promotion of National Unity and Reconciliation Act (Act 34 of 1995)
- Constitution of the Republic of South Africa (Act 108 of 1996)
- The National Archives and Records Service of South Africa Act (Act. 43 of 1996)
- National Heritage Resources Act (Act of 1999)
- Promotion of Access to Information Act (Act 2 of 2000)
- Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act (Act No. 19 of 2002)
- Regulations relating to Reparations to Victims (GN R1660 in GG 25695 of 12 November 2003)
- Broad-Based Black Economic Empowerment Act (No. 53 of 2003)
- Regulations on Exhumations, reburials and symbolic burials of deceased victims, (Notice 1540 OF 2008 – Department of Justice and Constitutional Development)
- Prevention and Combating of Torture of Persons (Act 13 of 2013)

2.7 Access to Files

The long period of negotiations preceding the transition (from 1989 to 1994) provided extensive opportunity for state security forces to destroy any documentary evidence of its activities. Much of these archives was thus destroyed before the advent of democracy. The TRC Final Report states:

The tragedy is that the former government deliberately and systematically destroyed a huge body of state records and documentation in an attempt to remove incriminating evidence and thereby sanitise the history of oppressive rule. As this chapter will demonstrate, the urge to destroy gained momentum in the 1980s and widened into a co-ordinated endeavour, sanctioned by

the Cabinet and designed to deny the new democratic government access to the secrets of the former state.¹⁰⁷

The TRC Final Report goes on to document the scale and nature of the destruction of security force records during the apartheid era and the escalation of this process during the extended negotiations.¹⁰⁸ The TRC assessed the process of record destruction and found that the National Intelligence Agency (NIA) was involved in a carefully orchestrated and systematic process of purging sensitive information that extended to the police (including homeland police), the military, the prison services and intelligence services. The TRC report (volume 1) details the various regulations and systems established during the transition years to destroy any incriminating records held by various branches of government. In some cases, such as the National Intelligence Agency's centralization of various intelligence files, these internal processes oversaw the destruction of more than 95 percent of the records of homeland intelligence services.¹⁰⁹ The TRC was given extensive powers to enter premises and seize relevant documents required for its investigations. It was, however, hampered by lack of collaboration from security forces in its attempt to identify relevant materials and was ultimately not very successful in collecting documents that provided records of human rights abuses by the state.

The new constitution adopted in 1996 provided strong guarantees of the right to access information which needed to be facilitated through legislation by the new government.¹¹⁰ The key legislation enacted, the Promotion of Access to Information Act of 2000, stipulated the procedures and conditions for accessing information, but also the conditions under which such access could be denied. The TRC handed over extensive documentation to the National Archives, which is the official government repository of current and historical documents. It houses state records for all government departments that are considered of any significance. It provides a centralized resource (and space to control access) to state records for the apartheid era.

The TRC also provided recommendations on how these should be managed by the National Archive and how they should be made accessible. Such management and access has not been achieved. Historical records relating to the apartheid era

107 TRC, *Truth and Reconciliation Commission Final Report*, 1998. See particularly Chapter 8 of Volume 1.

108 Part of the TRC's legislated remit was in fact to 'determine what articles have been destroyed by any person in order to conceal violations of human rights or acts associated with a political objective.'

109 TRC, *Truth and Reconciliation Commission of South Africa Final Report*, Vol. 1, 1998, 221, accessed 14 July 2021, <http://choicereviews.org/review/10.5860/CHOICE.37-1803>.

110 Section 32 of the South African Constitution of 1996: Access to information.

1. Everyone has the right of access to a. any information held by the state; and b. any information that is held by another person and that is required for the exercise or protection of any rights.

2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

are mainly held by the National Archives, but this archive has been criticized for lacking the basic ability and capacity to adhere to their record-keeping and oversight functions. It is also claimed that

Documents which sometimes function as weapons in the ongoing political party conflicts are being withheld or even removed. Adding to this problem, government departments often over-classify records, such as reports, which remain inaccessible until they are declassified, for which neither the National Archives and Record Services Act of South Africa (Act 43 of 1996), nor the poorly capacitated government archives, makes provision.¹¹¹

The state archives have not been helpful in clarifying what records they do contain and how these can be accessed. NGOs have sought to assess what files are available and provide support to individual victims of state repression to access files on them that are held by the archives.¹¹² They have, for example, published a list of names of individuals covered by the security files on record and then offered support for victims and relatives to access these files.¹¹³ The South African History Archive (SAHA), an NGO based at University of the Witwatersrand, also gained access to transcripts of the Section 29 inquiries (hearings held by the TRC behind closed doors):

Over a decade of requests for these transcripts, directed to the Department of Justice, finally bore fruit in December 2014, when the Department settled out of court to avoid legal action. SAHA's Freedom of Information Programme had persisted with their application in terms of the Promotion of Access to Information Act 2000 – and over 15,000 pages of text were delivered to SAHA, in four large cardboard boxes.¹¹⁴

These documents have since been analyzed and shared through media reports.

2.8 Memorial Sites

In the lead-up to the transition, the ANC had started to formulate strategies for developing and transforming memory sites and was engaged in consultation processes. The ANC's Arts and Culture Desk set up a Commission for Museums, Monuments and Heraldry (CMMH) in 1991 as a vehicle for the formulation of a national policy on museums, monuments, archives, heraldry and national symbols. The objective of the CMMH was to work towards 'a common integrated and integrating cultural

111 Gabi Mohale, 'A People's Guide to Archives and Democracy,' *Daily Maverick*, September 21, 2020.

112 Key NGOs involved in such work were the South African History Archives and the Open Democracy Advice Centre (which has since closed).

113 See, for example, SAHA support to victims to access security files: <http://foip.saha.org.za/static/apartheid-era-security-files>.

114 Accessed 14 July 2021, <https://www.dailymaverick.co.za/article/2015-05-28-the-grenade-the-murder-and-the-truth-the-trcs-section-29-inquiry-for-rownan-fernandes>.

framework that [would help] to promote the shared cultural identity and to put such identity at the centre of the development paradigm'.¹¹⁵

State memorial sites in South Africa are managed by the South African Heritage Resource Agency, which falls under the Department of Arts and Culture. Some memorial sites are, however, managed by provincial heritage resource authorities. While funded by this body, the operation of key sites is managed by semi-autonomous governing bodies appointed by the Ministry of Arts and Culture.

The most prominent of the memorial sites is Robben Island, which has also been declared a world heritage site. It is most commonly known as the prison where many of the most prominent political prisoners were held, including Nelson Mandela. It is run by the Robben Island Museum Council, which is appointed by the national ministry. The museum has been a prominent tourist site (attracting over 300,000 South African and international visitors per year). The archival records relating to the prison are housed by the Mayibuye Archives, a collaboration between the Museum and the University of Western Cape.¹¹⁶ These archives contain the prison records and interviews with former prisoners. It operates on a budget of over 200 million Rand (12 million US dollars) per year.¹¹⁷ Many ex-prisoners are employed at the museum, sometimes as guides. Yet the museum has been plagued by allegations of corruption and regular protests by the Ex-Political Prisoners' Association, which has raised concerns about the lack of support from the museum for ex-prisoners.¹¹⁸

Another prominent post-apartheid initiative that sought to address the conflict legacy was Freedom Park, which was established by the Department of Arts and Culture in 2000 specifically as

a memorial to honour those who sacrificed their lives to win freedom. ... Freedom Park was established as the South African government's response to the Truth and Reconciliation Commission. It took into account the public's need for a memorial to fittingly honour those who sacrificed their lives to win freedom.¹¹⁹

115 Geraldine Frieslaar, 'Education and Preservation of Sites of Conscience,' in *Memory of Nations. Democratic Transition Guide: The South African Experience* (CEVRO, 2020), accessed 17 July 2021, [http://www.cevro.cz/web_files/soubory/democracy-guide/democracy-guide-2019/MN-DTG%202019%20-%20\(12\)%20The%20South%20African%20Experience.pdf](http://www.cevro.cz/web_files/soubory/democracy-guide/democracy-guide-2019/MN-DTG%202019%20-%20(12)%20The%20South%20African%20Experience.pdf).

116 Details about the archives are available at, accessed 14 July 2021, <https://mayibuyearchives.org>.

117 Robben Island Museum, '2019 Robben Island Museum Annual Report,' 2020, accessed 14 July 2021, https://nationalgovernment.co.za/entity_annual/1936/2019-robben-island-museum-annual-report.pdf.

118 Nicola Daniels, 'Ex-Prisoners' Association Upset over Robben Island Council "Meeting Snub," *Independent Online*, January 27, 2020, accessed 14 July 2021, <https://www.iol.co.za/capetimes/news/ex-prisoners-association-upset-over-robben-island-council-meeting-snob-41497561>.

119 Freedom Park, 'The History of the Park,' n.d., accessed 14 July 2021, <https://www.sahistory.org.za/place/freedom-park>.

The site hosts various memorial events, ceremonies of healing and reconciliation and educational activities to create awareness of South Africa's history and the liberation struggle in particular. It occupies 52 hectares a short distance from Pretoria, almost adjacent to the Afrikaner memorial site, the Voortrekker Monument. It receives over 90,000 visitors per year, largely due to its hosting various cultural and education events.¹²⁰ It houses a museum dedicated to South African history (from pre-colonial times to the present) and garden of remembrance that includes sculptures reflecting the historical culture and values of the new democracy.

The way that the park has selected whom to honour and how to do so has proven controversial. One of its key structures, the Wall of Names, seeks to honour those who died during the conflicts that shaped the country (stretching back to colonial-era conflicts). The decision to exclude fallen SADF soldiers from the memorial elicited heated response from conservative Afrikaner groups, who saw this as a betrayal of the goal of reconciliation.¹²¹ Ordinary victims have also voiced concerns about being excluded from this process.¹²² The questions of how to define heroes, victims, and perpetrators, and whether these are mutually exclusive categories, has also proven difficult to resolve.¹²³ The park consequently decided to leave this question open by leaving space for additional names to be added at a future date.

A site that has great historical importance and is now centrally placed in the present-day debates and advocacy efforts relating to human rights is Constitution Hill in Johannesburg. It previously served as an infamous prison but now houses the Constitutional Court as well as other human rights projects and serves educational functions as well. Its management falls under the Gauteng Provincial Government's Arts and Culture Department. It occupies an 80-hectare space in the centre of the city, receives over 50,000 visitors per year and operates with a budget of 60 million Rand (3.5 million US dollars) per year.¹²⁴

120 Freedom Park, 'Freedom Park Annual Report 2018–2019,' 2019, accessed 14 July 2021, <https://www.freedompark.co.za/index.php/corporate/annual-reports/107-2019-freedom-park-annual-report>.

121 It is also interesting to note that, 'on 13 December 2018 the Unveiling of the Russian section of the Wall of Names took place at Freedom Park (...). The section comprises inscriptions with the names of 67 Soviet/Russian soldiers who sacrificed their lives to assist the liberation struggle in the region of Southern Africa, including the anti-apartheid struggle in South Africa.' Embassy of the Russian Federation in the Republic of South Africa, 'On the Solemn Unveiling of the Soviet/Russian Section of the Wall of Names Freedom Park, – Press Releases,' December 13, 2018, accessed 14 July 2021, https://russianembassyza.mid.ru/ru_RU/-/on-the-solemn-unveiling-of-the-soviet-russian-section-of-the-wall-of-names-freedom-park-13-december-2018?inheritRedirect=true&redirect=%2Fru_RU.

122 'Clouds over Attempts to Reconcile with the Past,' *The New Humanitarian*, December 15, 2006, accessed 14 July 2021, <https://www.thenewhumanitarian.org/fr/node/229198>.

123 Baines, 'Site of Struggle: The Freedom Park Fracas and the Divisive Legacy of South Africa's Border War/Liberation Struggle.'

124 Gauteng Provincial Government, 'Gauteng Provincial Government Annual Report 2017–2018,' 2018, accessed 14 July 2021, [https://provincialgovernment.co.za/entity_annual/400/2018-gauteng-gauteng-growth-and-development-agency-\(ggda\)-annual-report.pdf](https://provincialgovernment.co.za/entity_annual/400/2018-gauteng-gauteng-growth-and-development-agency-(ggda)-annual-report.pdf).

The Director of the South African History Archive, Geraldine Frieslaar, explains the historical significance of the site:

Constitution Hill came into existence in the very same space that once was a punitive symbol of the apartheid regime, and was occupied by the Old Fort Prison, which at different points in time held Mahatma Gandhi and Nelson Mandela for opposition against discrimination. Functioning as a multi-purpose urban space which includes prison buildings, a museum, the Constitutional Court and various non-governmental organizations primarily focused on social justice and human rights, Constitution Hill became one of the foremost sights in Johannesburg to commemorate the past through its guided tours, education programmes and exhibition strategies of engaging the audience through accounts of witness memory or special guided tours by ex-political prisoners, specifically those that were held in the Women's Jail. In as much as Constitution Hill serves as a sacred space for commemorating the injustices of apartheid, the precinct has also been charged with the responsibility of reinvigorating the surrounding area through its urban renewal priorities. This in itself presents a daunting challenge in the way Constitution Hill will have to navigate the demands of heritage tourism juxtaposed with preserving the sanctity of the space as a site of conscience.¹²⁵

The most comprehensive museum engagement with the apartheid period is that of the Apartheid Museum, which was established as a private independent entity in 2001 on the outskirts of Johannesburg. It was initiated as part of a casino licence application to demonstrate how the company (Gold Reef City) would attract tourism and thereby grow the economy and stimulate job creation. Consequently, Gold Reef City Casino was built and an adjacent piece of land provided for the museum. The museum is registered as a not-for-profit organization with an independent board of trustees. The museum relies on donations, contributions and sponsorships to sustain its growth.¹²⁶ Since it is a non-profit organization, information regarding its budget and number of visitors is not publicly available.

It has become a popular destination for tourists and school outings. The museum and its exhibits have been praised by some academics for its comprehensive and inclusive approach,¹²⁷ while others have criticized its imposition of a unifying reconciliation narrative.¹²⁸

Memorialization has generally taken on a more inclusive participatory approach in South Africa. Frieslaar suggests that,

125 Frieslaar, 'Education and Preservation of Sites of Conscience.'

126 South African History Online, 'Apartheid Museum – Johannesburg,' accessed 27 November 2020, <https://www.sahistory.org.za/place/apartheid-museum-johannesburg>.

127 Pieter Labuschagne, 'Balancing the Past and the Future in South Africa: A Spatial Analysis of the Apartheid Museum as an Instrument for Dealing with a Contested Past,' *South African Journal of Art History* 27 (2012).

128 Chana Teeger and Vered Vinitzky-Seroussi, 'Controlling for Consensus: Commemorating Apartheid in South Africa,' *Symbolic Interaction* 30(1) (January 1, 2007): 57–78, accessed 14 July 2021, <https://doi.org/10.1525/si.2007.30.1.57>.

Given the apartheid legacy of exclusion, post-apartheid sites of memory were also tasked with the responsibility of giving voice to the hidden and marginalized voices of society by focusing on an inclusive approach to heritage. More importantly, as “theatres of memory”, sites of memory affirm the humanity of those that suffered as a result of apartheid’s atrocities and as result the heritage landscape of post-apartheid South Africa are dotted with memorials, monuments, museums and heritage sites.¹²⁹

Some memorial sites function as ongoing projects of advocacy in relation to ongoing injustices. The District Six museum in Cape Town serves as both a testimony to a community and its inhabitants – who were forcefully removed from an inner-city neighbourhood – but also as a rallying point for the unresolved issues of land return and community-building.

Several museums and memorial sites have also been established (or are still in the process of being developed) to commemorate particular places where abuses had occurred. In November 2011, the Department of Correctional Services announced that the gallows at Pretoria Central Prison would be restored and converted into a museum. Subsequent to this announcement, on 15 December 2011, President Jacob Zuma officially opened the memorial museum and paid tribute to those who were executed for political offences.¹³⁰ Due to the location of the museum inside a prison, the museum is only accessible through appointment, as it is awaiting the construction of a separate entrance.¹³¹ Vlakplaas, where a police hit squad tortured and killed numerous liberation force members, has been also suggested as a potential site for a centre to conduct research into plants used in traditional medicine, thereby reconciling South Africa’s traditions with modern medicine.¹³² It is located on a farm 20 km west of Pretoria.

2.9 Commemorative Events

National holidays have been declared to commemorate a number of days with direct relevance to the conflict period. The selection of days and their official names were determined via negotiations with the Government of National Unity in the first months after elections.¹³³ While it has sought to include days considered important

129 Frieslaar, ‘Education and Preservation of Sites of Conscience.’

130 Accessed 14 July 2021, <https://www.sahistory.org.za/article/political-executions-south-africa-apartheid-government-1961-1989>.

131 James Mahlokwane, ‘Gallows Museum Still Not Open to Public for Safety Reasons,’ *Independent Online*, 2018, accessed 14 July 2021, (<https://www.iol.co.za/pretoria-news/gallows-museum-still-not-open-to-public-for-safety-reasons-14419781>).

132 South African Parliamentary Portfolio Committee of Arts, Culture, Science and Technology, ‘Visit to Vlakplaas from 14 to 16 December 2001,’ 2002.

133 The Public Holidays Act (Act No. 36 of 1994), accessed 14 July 2021, https://www.gov.za/sites/default/files/gcis_document/201409/act36of1994.pdf.

to different groups, the naming of these has proven somewhat controversial, as some names are seen as erasing the particular meaning associated with a historic event and reframing them with more generic, less political meaning.

16 December was declared National Reconciliation Day. Previously this day was celebrated by the apartheid government as the Day of the Covenant, in memory of their victory over the Zulu at the Battle of Blood River in 1838. In 1961 the ANC chose this day for founding their armed wing, *Umkhonto we Sizwe* ('Spear of the Nation,' or MK). After 1994, it was decided to keep this as a national holiday, which would focus on reconciliation.

21 March is celebrated as Human Rights Day, in remembrance of the Sharpeville Massacre, which occurred on that day in 1960. This has proved controversial, as the Pan Africanist Congress, which had organized the march, felt that the meaning of this memory was usurped and distorted by the ANC and the state.

27 April was declared Freedom Day, commemorating the date of the first democratic elections in South Africa, 16 June as Youth Day in commemoration of the Soweto Uprising, and 24 September as National Heritage Day to acknowledge the diversity of cultural backgrounds that comprise the country.

Women's Day commemorates 9 August 1956, when women participating in a national march petitioned against the above-mentioned pass laws.

Government events on these days are viewed by many as partisan and political, with the result that whites generally do not participate and criticism comes from other political parties as well, particularly the PAC, regarding their historical heritage being usurped by the ANC. These events thus sometimes serve more as reminders of the divisions that still face the country.

2.10 Transitional Justice Institutions

While previous sections of this report discussed certain aspects of the South African TRC (amnesty, reparations, reform recommendations, and informal dialogues), this section will focus on its work specifically relating to investigation and truth finding. First though, other more narrowly focused investigative commissions were established that preceded the TRC.

During the negotiation period and before the establishment of the TRC, both the apartheid government and the ANC had initiated investigations into abuses committed by their own members. On the side of the ANC, two commissions had been established to look into allegations of torture and extrajudicial executions that had occurred in their training camps in southern Africa.

Following the unbanning of the ANC in 1990, it came under increasing pressure to account for various allegations of human rights abuses. While it had previously conducted internal inquiries, it also responded by constituting to public bodies that published their findings. The first of these was the Commission of Enquiry into Complaints by Former African National Congress Prisoners and Detainees

(Skweyiya Commission)¹³⁴ in 1992 in response to increasing pressure to account for the human rights violations that had occurred at its detention centres in exile. The Skweyiya Commission was novel in that it constituted an inquiry into human rights violations initiated by a liberation movement, specifically one that made its findings publicly available. It was, however, criticized for its narrow mandate and powers and was soon followed by the Commission of Inquiry into Certain Allegations of Cruelty and Human Rights Abuse against ANC Prisoners and Detainees by ANC Members (Motsuenyane Commission). It operated for seven months and published its report on 20 August 1993.¹³⁵ The commission found that serious violations had occurred and recommended disciplinary action against ANC members. The ANC deferred, however, arguing that a more inclusive process that included accountability for all sides of the conflict should be pursued before any decisions about potential sanctions were made.

During this same period, the state also established an official commission of enquiry, the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, popularly known as the Goldstone Commission (as it was chaired by Justice Richard Goldstone). It was established to investigate political violence between July 1991 and the 1994 general election. The Goldstone Commission was set up as a result of the National Peace Accord, a negotiated agreement between the government, the ANC and other parties.

Commissioners were appointed for a statutory period of three years. The commission submitted 47 reports, which presented findings on violence in particular communities and particular forms of violence.¹³⁶ These reports named individuals responsible and confirmed the role of the state as a ‘third force’ that was fuelling violence. It also held the ANC and IFP responsible for their roles in the internecine conflict in the Natal province.

Truth and Reconciliation Commission

The TRC built on the work of all of these enquiries. The TRC legislation¹³⁷ was developed to give effect to the amnesty provision of the interim constitution while attempt-

134 Skweyiya Commission, ‘Report of the Commission of Enquiry into Complaints by Former African National Congress Prisoners and Detainees.’

135 The report is not available in electronic form.

136 These reports do not appear to be available electronically, but copies are held at university archives such as, accessed 14 July 2021, <http://www.historicalpapers.wits.ac.za/?inventory/U/collections&c=AK3342/R/9077> and https://www.saha.org.za/news/2017/February/three_new_donated_collections_start_off_the_sfjp_year_with_a_bang.htm.

137 Parliament of South Africa, ‘Promotion of National Unity and Reconciliation Act (Act 34 of 1995)’ (1995), accessed 14 July 2021, https://www.gov.za/sites/default/files/gcis_document/201409/act34of1995.pdf.

ing to balance this by exposing the truth and seeking accountability. The TRC was composed of three committees that worked in collaboration with each other. The Amnesty Committee, which was responsible for hearing and making findings on amnesty applications, the Human Rights Violations Committee, which was to hold public hearings for victims to share their stories, and the Reparations and Rehabilitation Committee, which was to support victims and develop recommendations for reparations. They were supported by a Research Department and an Investigations Unit, which had extensive powers to access information and call on witnesses to provide evidence.

The commission was headed by 15 commissioners selected by public nomination and an interview process and ultimately appointed by President Nelson Mandela, who chose Archbishop Desmond Tutu as its chair. The background of the committee members was mixed, consisting of scholars, lawyers, professionals and religious figures. The commission also sought to reflect some degree of political diversity. Bishop Tutu played a significant role as the chair, setting a tone of reconciliation, forgiveness and empathy with victims.¹³⁸

The TRC was established in 1995 through the Promotion of National Unity and Reconciliation Act (Act 34 of 1995). The commission combined various functions, including the granting of amnesty, the investigation of abuses, the convening of hearings to allow victims to tell their stories, and the publication of a report containing its findings and recommendations for preventing future abuses and providing reparations to victims. The period covered by the commission extended from 1960 (the Sharpeville Massacre) until the day that Nelson Mandela was inaugurated as president of the country (10 May 1994).¹³⁹

Its powers to investigate abuses and make known findings regarding those responsible for human rights violations were extensive. It was able to conduct searches and seize documents, summon suspects and witnesses to testify, and it was able to name those identified in its final report. Its remit was not just to find out the details of such abuses but also to provide an analysis of institutional and organizational responsibility for these acts:

- (a) facilitate, and where necessary initiate or coordinate, inquiries into –
 - (i) gross violations of human rights, including violations which were part of a systematic pattern of abuse;

138 Archbishop Desmond Tutu had played a high-profile role during the anti-apartheid struggle as Archbishop of the Anglican Church, Secretary General of the South African Council of Churches and patron of the UDF. While standing up to the apartheid government, he also preached a vision of reconciliation and non-racial unity. He was awarded the Nobel Peace Prize in 1984 and was recognized as a champion of justice and peace on the international stage.

139 The time frame initially went up to the date of the adoption of the interim constitution in December 1993, but subsequent extension was legislated in order to provide amnesty for violence in the lead-up to the elections in April 1994.

- (ii) the nature, causes and extent of gross violations of human rights, including the antecedents, circumstances, factors, context, motives and perspectives which led to such violations;
- (iii) the identity of all persons, authorities, institutions and organizations involved in such violations;
- (iv) the question whether such violations were the result of deliberate planning on the part of the State or a former state or any of their organs, or of any political organization, liberation movement or other group or individual; and
- (v) accountability, political or otherwise, for any such violation;

The scope of abuses investigated by the TRC was quite narrow relative to the nature of abuses committed by the apartheid government. It covered only violations of bodily integrity or acts of direct physical violence. It excluded acts of discrimination, systemic racism and mass violations of social and economic rights. The denial of education, employment or health care, and the forced removal and imprisonment of those without passes were thus not included in the ambit of the TRC. These would be considered contextual considerations that were taken into consideration in the analysis of the abuses, but would not be a target of specific investigations in terms of allocating responsibility or identifying victims.

The TRC had an Investigative Unit headed by one of the Commissioners. It consisted of approximately 50 members including: a civilian component (consisting of investigative journalists, researchers, human rights lawyers and members of NGOs); a trained police personnel component consisting of secondments from the South African Police Service (SAPS) and the National Intelligence Agency (NIA); and international secondments consisting of trained police personnel, information technology specialists and human rights lawyers from other countries.

The TRC had a budget of 250 million Rand (about 50 million US dollars in terms of the exchange rate at the time). The staff totalled around 250 when it was in full operation. Most of the budget came directly from the South African government, with only limited additional funding from foreign sources in response to the TRC's requests for support for specific projects.

The TRC started work at the beginning of 1996 and was supposed to finish within two years. But it only managed to finalize the report presented to the President on 29 October 1998 and made public on the same day. The large volume of amnesty cases and the slow pace of processing meant that the amnesty process continued for a further five years. The final report of the TRC, which integrated the findings of the amnesty process, was thus only published in 2003. The website of the TRC with the full final report is still available online.¹⁴⁰

The TRC brought out a seven-volume Final Report with its findings regarding the facts regarding human rights abuses during the period of its mandate. The first five

140 Accessed 14 July 2021, <https://www.justice.gov.za/trc/>.

volumes presented the findings emerging from the hearings and investigations, while volume six presented the findings of the amnesty and volume seven provided a list of all those who were found to be victims (along with brief details of each case).¹⁴¹

Even before its release, political parties including the ANC, IFP and NP sought to prevent the publication of certain findings. Specifically in response to a court application to prevent the publication of the report, the TRC decided to black out certain pages containing its findings regarding certain individuals' direct culpability for violations in order to avoid the delay of the report's release. The IFP also objected strongly to particular findings of culpability, while the ANC raised broader objections to the TRC's 'criminalization' of resistance to apartheid. Some corrections and retractions were subsequently published as an appendix to the 2003 report.

The main interest in the TRC was not focused on the final report and its findings. The hearings process, both that involving victim testimonies and perpetrators' amnesty applications, was the focus of public attention both in South Africa and internationally.

Significantly, the human rights violations hearings provided 1818 victims with an opportunity to recount their experiences of abuse.¹⁴² These testimonies occurred in public venues, often with hundreds of people in attendance. The hearings were covered live on radio and featured regularly in television news and weekly reports on new revelations. From 1996 to 1997, the TRC process featured prominently in South Africa's media. Public engagement with this testimony was racially divided, both in terms of the composition of the audience at public hearings and in the television viewership. Public interest in the TRC was evident in the extensive daily media coverage it received, although the level of interest was also racially skewed, with the proportion of black television viewers being three times higher than that of whites.¹⁴³

2.11 Victims' Associations

Various support structures were set up to provide advocacy and legal and psychological support to detainees and prisoners during apartheid. Victims and their families were most directly represented by their own political organizations, however, as they were generally targeted for their activities on behalf of these organizations.

Victims only started organizing collectively outside of political structures in the lead-up to the TRC. NGOs that provided support to victims during this period also

¹⁴¹ The TRC did not publish a popular or summarized version of the report, and most South Africans did not have access to the full report.

¹⁴² Audrey R. Chapman and Patrick Ball, 'The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala,' *Human Rights Quarterly* 23(1) (2001): 1–43.

¹⁴³ Gunnar Theissen, 'Object of Trust and Hatred: Public Attitudes toward the TRC,' in *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, ed. Audrey R. Chapman and Hugo van der Merwe (Pennsylvania: Pennsylvania University Press, 2009), 202.

facilitated their development of an independent structure and voice. Two such groups (emerging from the services of CSVR and Trauma Centre for Victims of Torture and Violence) emerged to form the Khulumani Support Group (KSG), which established itself as an independent body representing victims from across the political spectrum. It established numerous branches and boasted a membership of over 100,000. The KSG became a key lobby group pushing the TRC for more effective support to victims and pressuring the government to implement the recommendations of the TRC (see <https://khulumani.net>, last accessed 14.07.2021). The KSG worked in collaboration with other NGOs that formed the South African Coalition for Transitional Justice in 2007 in order to lobby for various unfinished tasks of the TRC, including the implementation of full reparations, extending reparations to victims who had not appeared before the TRC, and prosecutions of those who had not received amnesty, among other things.

A smaller network comprised mainly of the families of those killed in detention or assassinated by the apartheid government emerged in 2018, when some cases started to gain attention by the re-opening of inquests and the renewed investigations by the National Prosecuting Authority. These efforts to pursue justice have been supported by the South African Foundation for Human Rights.¹⁴⁴

2.12 Measures in the Educational System

Shortly after the transition in April 1994, the new government undertook short-term action to revise the curriculum, which, according to the educationalist Jonathan Jansen,

...was presented as an attempt to alter in the short term the most glaring racist, sexist and outdated content inherited from the apartheid syllabi, which were still widely used in the aftermath of the first post-apartheid elections in April of the same year.¹⁴⁵

This first period of reform also occurred during the Government of National Unity, where the politics of compromise limited the introduction of more radical curriculum reform. A second phase of more serious reform began after the 1999 elections. Initially, the subject of History was considered too difficult to navigate and did not receive much attention from the Education Department. The history of apartheid was covered only in secondary school education at grade 12, and as an elective that was

¹⁴⁴ Accessed 14 July 2021, <https://mg.co.za/article/2019-08-08-00-npa-reopens-apartheid-cases>.

¹⁴⁵ Jonathan Jansen, 'Rethinking Education Policy Making in South Africa: Symbols of Change, Signals of Conflict,' in *Educational in Retrospect: Policy and Implantation 1990–2000*, ed. An Kraak and Michael Young (Pretoria: HSRC Press, 2001), 40–57.

not available in all schools. Once a clearer history teaching agenda was established, specific themes became the focus of grade 12 history curriculum in 2008¹⁴⁶

- The impact of the Cold War in forming the world as it was in the 1960s;
- The realization of *uhuru*¹⁴⁷ in Africa, 1960s–1970s;
- Forms of civil society, 1960s–1990s;
- The impact of the collapse of the USSR in 1989;
- The emergence of South Africa as a democracy from the crisis of the 1990s;
- Globalization: meaning and trends; and
- Ideologies and debates around the constructed heritage icons from the period and today.

At the same time, twelve history textbooks were approved for use in schools, which were left with much discretion on which texts to use. The teaching of apartheid history proved very difficult for many teachers who had themselves lived through this period and who were given little support in how to present a very emotional and contested period in a professional manner. Some NGOs, such as Shikaya in the Western Cape, sought to fill this gap by training history teachers to teach history in a way that was sensitive to the diversity of perspectives but was also guided by certain values regarding human rights and democracy.¹⁴⁸

In 2018, the Minister of Education appointed a new History Ministerial Task Team to look at overhauling the history curriculum and explore the possibility of making it a compulsory subject for all students. It was due to report back in 2020.¹⁴⁹

2.13 Coming to Terms with the Past through the Media

The work of the TRC was extensively covered by the media. This included direct radio broadcasts of its victims' hearings and amnesty hearings. Coverage of these hearings was also regularly featured in the evening state television news bulletins and daily independent newspapers. A weekly television show ('TRC Special Report') on the activities of the TRC proved particularly popular, at one point being the most popular show on South African television.¹⁵⁰

Viewership of this coverage was very divided, with black South Africans being much more inclined to follow news coverage and white South Africans being

¹⁴⁶ Elize S. van Eeden, 'South Africa's Revised History Curriculum on Globalism and National Narratives in Grade 12 Textbooks,' *Historia* 55(1) (2010): 110–124.

¹⁴⁷ Uhuru is Swahili for 'freedom', in reference to independence from colonial rule.

¹⁴⁸ Accessed 14 July 2021, <https://www.thesouthafrican.com/news/teaching-apartheid-history-south-africa-challenges/>.

¹⁴⁹ Accessed 14 July 2021, <https://www.gov.za/speeches/history-curriculum-18-dec-2018-0000>.

¹⁵⁰ A more detailed analysis of this viewership is provided in the concluding section.

much less interested. The political slant of the media was also very different in Afrikaans and English newspapers, reflecting clear anti- and pro-TRC angles.

During and after the TRC, a number of video documentaries explored particular events and individual stories that emerged due to the TRC hearings. These documentaries gained extensive coverage. They include

- ‘Where Truth Lies’ (directed by Mark Kaplan) 1999
- ‘Prime Evil’ (directed by Jaques Pauw) 2000
- ‘Between Joyce and Remembrance’ (directed by Mark Kaplan) 2004
- ‘Black Christmas’ (directed by Mark Kaplan) 2016

Since the end of the TRC, media coverage of stories of the apartheid era have significantly declined. There has been a dearth of any further investigative journalism into apartheid-era abuses, and further revelations of the truth about this period have come through the work of NGOs and academics. Where new information has been released or new judicial proceedings have been brought forward, the media have, however, given these events significant coverage.

2.14 Coming to Terms with the Past through Art

The abuses of the apartheid era feature in numerous films, plays, books and works of art. These are, however, mostly not in the mainstream or popular realm. While the theatre and the arts were critical media for public engagement in resistance to apartheid, coverage of this era has given way to more contemporary themes of ongoing injustices, intolerance and public education regarding violence, AIDS and other social challenges.

The dramatic dynamics involved in personal storytelling and confrontation between victims and perpetrators provided a rich foundation for theatre, and many productions drew on this to frame theatre productions that explored the personal and political dynamics of the post-transition period. These plays were widely acclaimed for their ability to engage audiences and communicate the complexity and moral ambiguity of these processes. The most prominent theatre productions included:

- ‘Ubu and the Truth Commission’ (1997)
- ‘The Story I Am About to Tell’, created in collaboration with the Khulumani Support Group (1997)
- ‘Nothing but the Truth’ (2002)
- ‘The Dead Wait’ (2002)
- ‘Truth in Translation’ (2006)
- ‘Truth and Reconciliation’ (2011)

A number of novels, both by already prominent authors and new voices, have also used the backdrop of the TRC as inspiration. These novels have also been welcomed as a way of

providing the TRC and people's testimonies with a productive afterlife, for challenging definitions of trauma, truth and reconciliation, for inviting readers to keep the dialogue about the past open, and to think actively about the strategies adopted in addressing that past and their implications in the present.¹⁵¹

Not only have South African authors used the TRC as a backdrop for their stories, they also treat it as an inspiration to dig more deeply into the complex issues that surfaced. Paul Gready notes that the 'outcome of the presence of the past has been an outpouring of autobiographical and historical fiction, autobiographies and memoirs, and generically hybrid texts; and one key trigger was the TRC'.¹⁵² He argues that novels have not simply 'duplicated the TRC's dominant discourse of 'speaking truth to reconciliation,' but also unpacked the silences and 'unfinished business' of apartheid and the TRC and 'have also shone a light on issues such as the enduring appeal of revenge and retribution, the prevalence of informing and betrayal on both sides of the political divide, the complicity of white beneficiaries in apartheid's crimes, and the complexity of certain black identities (e.g., those designated "colored" who "played white").'¹⁵³

Some of the most critically praised novels include:

- Nadine Gordimer, 1998, 'The House Gun', Routledge
- J.M. Coetzee, 1999. 'Disgrace', Penguin (awarded the Booker Prize)
- Gillian Slovo 2000. 'Red Dust'. Virago
- Sindiwe Magona, 2000. 'Mother to Mother'. Beacon Press
- Achmat Dangor, 2001. 'Bitter Fruit'. Kwela Books
- Njabulo Ndebele's, 2003. 'The Cry of Winnie Mandela', Picador
- Zoe Wicomb. 2006. *Playing in the Light*. The New Press
- Patrick Flanery. 2012 *Absolution*. Penguin Random House

A number of films were also inspired by the stories that emerged through the TRC. These ranged from local to Hollywood productions with international film stars. None of these films were viewed as successful in capturing the complex politics or difficult personal journeys undertaken by the characters. As one critic noted, 'the Truth and Reconciliation Commission – although it possesses all the intrigue,

¹⁵¹ Francesca Mussi, 'The South African TRC and Its Narrative Legacies,' 2020, 1–39, accessed 14 July 2021, https://doi.org/10.1007/978-3-030-43055-9_1.

¹⁵² Paul Gready, 'Novel Truths: Literature and Truth Commissions,' *Comparative Literature Studies* 46(1) (2009): 156–176.

¹⁵³ Gready, 'Novel Truths: Literature and Truth Commissions'.

power and excitement of a courtroom-style drama like ‘12 Angry Men’ – has invariably been sensationalized into a showcase of trauma-as-entertainment.’¹⁵⁴

The most prominent productions include:

- ‘Red Dust’ (2004)
- ‘In My Country’ (2004)
- ‘Zulu Love Letter’ (2004)
- ‘Forgiveness’ (2004)
- ‘The Forgiven’ (2017)

3 Stocktaking: Successes and Failures of Transitional Justice in South Africa

3.1 Successes in Coming to Terms with the Past and their Causes

The transitional justice process in South Africa was hailed by international commentators as a success and a model for other countries to follow. Internally, though, the legacy of the transition and the transitional justice process have been hotly debated. Where successes are noted, they come with caveats about the costs of attaining these and their limitations in relation to the ultimate goals being pursued. This section covers the impact on victims and public perception, as these things do mark significant successes despite shortcomings.

3.1.1 Impact on Victims

While highly contested, the provision of amnesty for perpetrators in exchange for disclosing the truth, alongside the state’s commitment to investigate and provide reparations for past abuses, was accepted by most victims. The TRC process of focusing on victim testimonies and acknowledging their suffering was also experienced as very affirming. Still, the TRC process did not result in sufficient new information or adequate reparations for victims and left most dissatisfied and their suffering unacknowledged. The failure of the state to act on TRC recommendations by pursuing prosecutions and provide adequate reparations was seen as a betrayal.¹⁵⁵ The TRC

¹⁵⁴ Accessed 14 July 2021, <https://africasacountry.com/2012/02/south-africas-trc-on-film>.

¹⁵⁵ See specifically David Backer, ‘Watching a Bargain Unravel? A Panel Study of Victims’ Attitudes about Transitional Justice in Cape Town, South Africa,’ *International Journal of Transitional Justice* 4(3) (November 1, 2010): 443–456, accessed 14 July 2021 <https://doi.org/10.1093/ijtj/ijq015>; Sizwe Phakathi and Hugo Van der Merwe, ‘The Impact of the TRC’s Amnesty Process on Survivors of Human

process also failed to reach the majority of victims affected by human rights violations during apartheid.

The transitional justice processes set in place to address victims' needs were appropriate and legitimate. But they were not effectively implemented and the state ultimately failed to carry through on its implicit commitment to justice and reparations for victims.

Key factors explaining the successes are the strong human rights advocacy faction within the ANC, which worked with human rights advocates in civil society and a broad network of victims to establish a victim-centred TRC and to campaign for the implementation of its recommendations.

3.1.2 Public Responses to the TRC Process and Perceptions about the Past

The TRC process was one that was deemed necessary and legitimate by the majority of South Africans, and its contribution to truth and reconciliation was perceived as positive. These views are deeply divided along racial lines, however. Whites opposed the TRC (along with other reforms undertaken by the new government) and blacks supported it before, during and after its conclusion.¹⁵⁶

Due to the highly politicized nature of the TRC, it was unable to directly build public consensus about the violations that had occurred during apartheid. Due to its transparent operation and the credibility of its work among most scholars and the media, it was able to provide an authoritative account of this period that has become a key reference point for history texts and cultural engagement. It also appears that younger generations of whites are more open to this account of their history.¹⁵⁷

Attitudes towards reconciliation across racial lines are no longer directly related to resentment regarding gross human rights violations. While the TRC appears to have ameliorated this source of mistrust, the bigger question of continued inequality and the failure of reparative measures for socio-economic injustices now present the main causes of racial mistrust and conflict.¹⁵⁸

Rights Violations,' in *Truth and Reconciliation. Did the TRC Deliver?*, ed. Audrey R. Chapman and Hugo van der Merwe (Pennsylvania: Pennsylvania University Press, 2009).

156 Hugo Van der Merwe and Kathleen Sensabaugh, 'Truth, Redress and Reconciliation: Evaluating Transitional Justice from Below,' in *Rethinking Reconciliation: Evidence from South Africa*, ed. Kate Lefko-Everett, Rajen Govender, and Donald Foster (Cape Town: HSRC Press, 2016), 25–44.

157 One common understanding established by the TRC about apartheid history was that the apartheid government committed terrible crimes against those struggling against the system. According to the IJR's 2013 Reconciliation Barometer Survey, over a decade since the conclusion of the TRC, 79 percent of black South Africans still believe this TRC-established finding to be true, but only 59 percent of white South Africans believe this statement.

158 IJR, 'SA Reconciliation Barometer Report' (Cape Town: Institute for Justice and Reconciliation, 2019), accessed 14 July 2021, <http://www.ijr.org.za/home/wp-content/uploads/2019/12/800108-IJR-Barometer-Report-2019-final-web.pdf>.

3.2 Failures in Coming to Terms with the Past and their Causes

3.2.1 The Persistence of Poverty and Inequality

The persistence of socio-economic inequalities has been as a critical failure of the transition process as a whole. While a range of transitional justice processes have been utilized to address the range of apartheid legacies relating to cultural, social, economic and political rights, the fundamental economic system and its related racial inequalities have not been significantly transformed. Benefits provided to improve living conditions for most South Africans have been very mixed. While there have been dramatic improvements in the provision of certain basic services such as electricity and water, levels of poverty have remained persistently high, and the gap between rich and poor has increased since 1994, making South Africa one of the most unequal societies in the world in 2015, with a Gini coefficient of 0.63.¹⁵⁹ Ownership of land and other economic resources has not been effectively addressed, which presents the most serious challenge to reconciliation.

This failure is a result of, among other factors, the compromises made during the negotiated transition, the self-interest pursued by the new political elites, and the failure of the new government to root out corruption and implement development policies that would benefit the majority of citizens.

3.2.2 Democratic and Human Rights Culture

Human rights are strongly entrenched in the South African constitution, in its judicial institutions and in various laws introduced since the end of apartheid. And yet a culture of human rights and democracy has not replaced the authoritarianism rooted in various state institutions and the political parties. Given the long history of colonialism, repression and armed conflict, shifting such a culture is a major challenge.

While the TRC's approach of preaching empathy and reconciliation was generally welcomed, it failed to contribute significantly to building human rights awareness and contributing to human rights institutions. The transitional justice process provided an opportunity to demonstrate and operationalize key aspects of democratic citizenship, such as the way it engaged citizens in policy development, framing victims' needs in terms of rights and state obligations, holding senior officials accountable, facilitating access to information and facilitating democratic dialogue. These opportunities were largely wasted, as the transition was treated as an exceptional, tempo-

159 'The World Bank in South Africa: Overview,' Text/HTML, World Bank, 2019, accessed 14 July 2021, <https://www.worldbank.org/en/country/southafrica/overview>.

rary process focused more on building empathy and framing a moral discourse than shaping accountability processes and a discourse of rights.¹⁶⁰

3.2.3 Prosecutions of Perpetrators

As noted in earlier sections, there have been very few prosecutions of perpetrators who were implicated in human rights violations and who had not applied for amnesty. Due to political interference, the judicial process has been compromised. While prosecutions are now being resuscitated due mainly to victims and civil society efforts, the prospects of justice for most victims are remote after so much time has passed. A key element of this political lack of will is the fact that ANC leaders and combatants also face potential prosecution for cases from that era, and prosecutions of apartheid state officials will create pressure for a more balanced approach to addressing past abuses. This impunity for apartheid-era human rights abuses has contributed to a broader climate of impunity for those who are politically connected and who are seen as operating above the law, whether this relates to corruption or to other forms of abuse of office.

3.2.4 Corporate Accountability

While the TRC raised awareness of corporate complicity in apartheid-era abuses, its engagement with the need for accountability and transformation of this sector was quite superficial. The significance of this shortfall only became apparent at a later point, when the scope of suffering was fully revealed and new information about corruption surfaced.

The failure of effective transformation of the business sector in South Africa means that corporate accountability for past or ongoing violations remains remote. The narrow focus of transitional justice on the state's responsibility for abuses meant that the opportunity for pursuing corporate responsibility and reparations for victims was lost. The increased alignment of interests between corporate actors and new political elites has reduced the prospect of justice in this regard.

¹⁶⁰ Hugo Van der Merwe, 'What Did the TRC Teach South Africa about Democratic Citizenship?,' in *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On*, ed. Mia Swart (Brill Nijhoff, 2017), 169–185.

3.2.5 Institutional Reform

Institutional reform was pursued with an agenda of both introducing new democratic values and promoting greater representivity of the population. While this was very successful in relation to certain institutions (e.g. judiciary), many state institutions failed to undergo a shift in culture. Some state institutions have also become mired in corruption and have failed to fulfil their role in promoting development. This can partially be attributed to the lack of a sufficient skills base in South Africa (particularly due to the apartheid education system and the exclusion of black professionals from key positions during apartheid), but is also a result of the appointment of politically connected figures to executive and oversight positions in various state bodies that play a critical role in economic development, such as providing electricity, water, and transport.

Police reform has failed to fundamentally shift the culture from an authoritarian oppressive force to one of service delivery and accountability. In part, the lack of effective accountability or vetting in the transitional justice process undermined efforts to rid the institution of its worst elements. Additional factors, such as the recruitment and training process for new members being more focused on transforming the racial composition, the appointment of trusted political allies to key positions, and the public pressure to get crime under control meant that human rights did not remain a key focus of reform processes. The extent of abuses committed by the police thus remains a serious concern.

3.3 Summary Reflections

The transition process in South Africa was the product of a negotiated settlement which sought to resolve legacies of deep structural challenges and serious human rights violations. The transitional justice process was a very ambitious initiative that introduced innovative approaches and sought broad participatory engagement with victims and affected groups. It played a significant role in shaping a new culture of confronting the past, but fell short particularly in carrying through on its ambitious mandate to provide effective accountability and reparative justice. 25 years after the transition, the legacy of apartheid remains only partially addressed.

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