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Natalie Minev

August 25, 2008

Final Research Paper

The Chilean and South African Truth Commissions: a Comparative Assessment of
their Truth-Seeking Processes and their Key Recommendations

I. INTRODUCTION

Truth commissions emerged onto the international scene during the 1990s as part of the Third Wave of democratization, particularly in Latin America and South Africa. These temporary bodies vested with official authority to investigate and report on past periods of gross human rights violations have been experimented with as transitional justice mechanisms by over two dozen countries since the late 1980s. However, it is still difficult to clearly define what makes a truth commission successful in its goals of seeking the truth of the past and creating greater social reconciliation. By examining the truth commissions of Chile and South Africa, two countries whose truth commissions were among the largest and most groundbreaking at the time of their democratic transitions, this paper seeks to develop a better understanding of the factors and conditions that enable truth commissions to achieve their goals.

The first and second sections of this paper will lay a broad groundwork on the background of truth commissions and clarify the parameters of this project.

The third section will focus on Chile, first examining the context in which the

commission formed, followed by a four-stage assessment of the truth commission's work and an examination of key recommendations in the areas of reparations, the rule of law, and human rights. The fourth section will treat the South African experience in the same manner. The paper will conclude with a discussion of insights gained by comparing the Chilean and South African truth commissions as well as suggest questions for future research in the area.

II. GENERAL BACKGROUND ON TRUTH COMMISSIONS

A. Definition of Truth Commissions

Truth commissions are official bodies established to investigate a country's past period of human rights abuses or violations of international humanitarian law. Usually created at a point of political transition, they complete their work with the submission of a final report containing conclusions and recommendations.¹ Priscilla Hayner's classic definition puts forth four criteria that characterize truth commissions. First, truth commissions focus on the past. Second, truth commissions do not focus on a specific event of abuse, but rather attempt to paint a broader picture of long-term patterns of human rights violations. Third, truth commissions usually exist for a temporary and/or pre-defined amount of time to collect their findings, and the body dissolves after submitting its report. Lastly, truth commissions are vested with authority (either

¹ Quinn and Freeman (2003). "Lessons Learned: Practical Lessons Gleaned from the Inside the Truth Commissions of Guatemala and South Africa." *Human Rights Quarterly*. 1119.

by the nation's government or by international actors) that may give the truth commission greater access to information, provide it with greater security, and allow it to have greater impact in delivering its report.²

Emily Rodio expanded our understanding of truth commissions by noting that there are two subtypes of truth commissions. The first subtype includes those accompanied by an amnesty provision, wherein perpetrators may be granted amnesty for their crimes in return for participation and full disclosure in the truth commission's truth-seeking process. The second subtype includes those truth commissions which are not accompanied by an amnesty provision, thereby allowing for potential prosecution of perpetrators at a later date.³

South Africa's Truth and Reconciliation Commission (TRC) was the first truth commission ever to employ an amnesty provision in its work. Conversely, the Chilean National Commission on Truth and Reconciliation did not have the legal authority to grant amnesty, though an existing amnesty law put in place by the former military regime effectively protected perpetrators from prosecution at that time.

B. Purposes of Truth Commissions

At the end of the 20th century, countries undergoing political transitions began to use truth commissions to address systematic human rights violations

² Hayner (1994). "Fifteen Truth Commissions—1974 to 1994: A Comparative Study." *Human Rights Quarterly*. 604.

³ Rodio (2007). "Settling Past Accounts: Assessing the Impact of Truth Commissions on Democratization." Paper presented at International Studies Association, 2007. 4-5.

carried out either by a former abusive regime, opposition forces, or both. As of 2008, over two dozen countries have established truth commissions as transitional mechanisms. Elin Skaar notes in her work that truth commissions, bodies that stop short of prosecuting perpetrators, generally emerge out of political compromise between a strong outgoing regime and strong public demand for accountability.⁴ Truth commissions are assumed to serve manifold purposes for countries in transition.⁵ First, they are established with the goal of clarifying and acknowledging the truth about past human rights violations that occurred in the country, thereby establishing a clearer, more accurate historical record that may shed light on painful events that have been hidden, denied, or disputed between different sectors of society. Second, truth commissions are inherently concerned with victims and focus on their needs and interests. This may involve ensuring a safe and supportive environment for victims to tell their stories, suggesting reparations for victims and their families, and aiding in the investigation of victims' whereabouts and ultimate fate. Third, truth commissions, although they are not judicial bodies, can contribute to justice and accountability by forwarding the evidence they compile to the country's courts. Individual truth commissions have the ability to determine whether or not they will disclose the names of perpetrators, a decision which has important implications in bringing these individuals to justice. Even if truth commissions

⁴ Skaar (1999). "Truth commissions, trials—or nothing? Policy options in democratic transitions." *Third World Quarterly*, 1109.

⁵ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*.

choose not to name individual perpetrators, they may still identify those institutions or groups responsible for human rights violations and hold those groups publicly accountable. Fourth, truth commissions outline institutional responsibility for crimes and make recommendations to reform institutional structures and laws that enabled abuses to occur. With the goal of preventing future human rights abuses, these recommendations are presented to the new transitional government for implementation. Finally, truth commissions attempt to promote reconciliation and reduce tensions that result from past violence. This goal is based on the assumption that if both victims and perpetrators come forward to tell their stories and acknowledge events of the past, those groups may be able to more peacefully coexist with each other in society.

Ideally, the work of truth commissions can positively affect multiple facets of a state. For the families of victims, the truth-seeking process may offer a way to discover the whereabouts and fate of a loved one. For perpetrators, it may present an opportunity to break with the past, to confess and reflect upon sins, and to reintegrate back into society. For the new transitional government, the work of the truth commission may help to underscore to the nation as well as the international community a separation from a history of human rights violations and can also help obtain greater domestic political legitimacy.⁶ Finally, for the transitional society, a truth commission's work can help to heal a nation in the aftermath of a traumatizing and oppressive regime.

⁶ Hayner (1994). "Fifteen Truth Commissions—1974 to 1994: A Comparative Study." *Human Rights Quarterly*. 604.

C. Factors that May Impact the Efficacy of Truth Commissions

Multiple factors can significantly enhance or obstruct the work of a truth commission. While some of these factors can be determined by the body that establishes the truth commission or by the truth commission itself, others remain outside of a commission's control. The following will highlight those factors that particularly impacted the work of the Chilean and South African truth commissions, but it is by no means an exhaustive list of factors that contribute to truth commission success or failure.

(1) Scope of mandate. A truth commission's mandate lays out the parameters of its investigation. The mandate should clearly define the types of violations and time period that will be investigated. Furthermore, abuses included in the mandate should be representative of the most egregious human rights violations that occurred during the period in consideration. Too broad of a mandate may overwhelm a truth commission; an overly limited or unrepresentative mandate may undermine the legitimacy of the body as well as shortchange victims and their relatives.

(2) Length of duration. Depending on how long a period of human rights violations a truth commission investigates, its length of duration to compile testimony, investigate, and deliver a report should last anywhere from nine months to two and a half years.⁷ Sufficient time is necessary to appoint

⁷ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 221.

commissioners, to organize staff and methodology, and most important, to fully engage in the truth-seeking process. An indefinite amount of time or an ambiguous deadline for achieving these objectives may cause the commission's work to lose momentum as well as public support.⁸

(3) Legal powers. Truth commissions can be vested with numerous legal powers that can aid them in their search for truth. The power to subpoena witness testimony as well as documents from critical sectors of the government can help the truth commission create a clearer picture of past abuses and understand more clearly which parties were responsible. Similarly, the power to grant amnesty to perpetrators in return for their participation and full disclosure of their involvement in past abuses is a powerful way to unearth new information and perhaps discover the whereabouts or cause of death of victims. Without these critical legal powers, a truth commission may be left at the mercy of branches of government or perpetrators from the former state who may be unwilling to testify and whose uncooperative behavior may undermine the truth commission's investigation.

(4) Identifying perpetrators by name. A truth commission may choose whether or not to publicly name names of perpetrators it finds to be guilty of human rights violations. Those who advocate naming names believe it contributes to accountability, justice, and furthers the possibility of reconciliation

⁸ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 223. The Uganda truth commission faced the dilemma of an undefined amount of time to complete its work—investigations ended up dragging on intermittently and without coherence. The commission did not compile or present a final report.

and forgiveness between victims and perpetrators. Those truth commissions that choose not to name names may do so because accusing an individual of committing a crime without the opportunity to defend herself in a court of law violates due process and undermines the rule of law in the transitional state. Additionally, naming names of perpetrators in a volatile political environment in which the former regime is still powerful may ignite instability or reprisals.

(5) Political climate. The political dynamics of a transitional state can determine how much investigative authority a truth commission will have. If the former regime accused of human rights violations still wields significant power in the country, the transitional government establishing the truth commission may conscientiously limit the body's investigative powers, stop short of direct accusations or naming names, or attempt to spread responsibility equally among the former regime as well as opposition forces. Such political concessions may be made to preserve stability or prevent old conflicts from inflaming. However, these concessions may also obstruct justice, anger victims and their relatives, and keep hidden critical information needed in illuminating the country's past. If the former government does not wield significant power, there may be an environment in which political negotiation between two or more powerful parties in the nation takes place. Negotiation especially among the former state and the new transitional government may enable a united vision for change and reconciliation for the future of the country, and may

encourage greater cooperation of all sides to contribute to the truth-seeking process.

III. PARAMETERS OF THIS PROJECT

Comparative analysis of country experiences with truth commissions, in this case South Africa and Chile, provides a framework for understanding the conditions which can affect the likelihood of success of a particular truth commission. This paper's comparison of the Chilean and South African experience with truth commissions will utilize the specific tasks set forth in each commission's respective mandates to trace how successful each commission was at achieving its goals in four stages of the truth-seeking process I have developed. In the first stage, the formation stage, the truth commission is established, its powers, mandate, and time limit are articulated, and other logistics such as staff and budgeting are put in place. In the second stage, the investigation stage, the truth commission collects testimony from victims and/or relatives, obtains information from perpetrators or government agencies, and accumulates research from non-governmental organizations. The third stage of the process is the report stage, wherein the truth commissioners compile their final report, which includes their findings and recommendations. In the acknowledgement stage, the last stage of the process analyzed here, the public responds to the truth commission's presentation of the report. This stage is

of importance because the response of victims and their relatives to the report may signal whether the truth commission's work was satisfactory or lacking in certain areas. The behavior of the transitional government, the former regime, and opposition forces in response to the release of the report as well as the reforms it puts forward may also set the stage for how well the commission's recommendations fare in the post-truth commission environment. Through each of these four stages, I will examine how comprehensively the truth commission achieved its stated goals.

The second half of the analysis will look at key recommendations put forward by each truth commission and the extent to which the recommendations were implemented in the years after the commission dissolved. Including a discussion about the implementation of recommendations after the conclusion of the commission's work is important because there is a conspicuous lack of research on implementation of truth commission recommendations in the existing body of literature.⁹ I have chosen to examine three critical recommendations for each truth commission covering the areas of reparations, the rule of law, and human rights. A brief synopsis of the original recommendation will be followed by evidence of whether the reform was implemented fully, partially, or not at all.

⁹ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 168.

The findings and analysis of this paper draw from several different sources. First, the primary documents of the Chilean and South African truth commission reports were utilized. Second, existing literature in the social sciences on truth commissions contributed to this research paper. Finally, Human Rights Watch and Amnesty International annual country reports on Chile and South Africa were used to trace the implementation of reforms suggested by the truth commissions.

IV. CHILE

A. Context of the Formation of the Chilean Truth Commission

In September 1973, General Augusto Ugarte Pinochet, head of the army, overthrew the civilian government led by leftist president Salvador Allende. The coup d'état occurred in the midst of a tumultuous period of political polarization, popular violence, and skyrocketing inflation. The military government established by Pinochet employed brutal anticommunism tactics, economic reform, and widespread repression of opposition or subversion.¹⁰ Repressive and authoritarian tactics used included murder, indefinite detainment, kidnappings ("disappearances"), torture, and mass arrests.¹¹ The military declared a state of siege that began the date of the coup and ended

¹⁰ Kirtz, ed. (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume II: Country Studies. 453.

¹¹ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 35.

on March 1978. It was during this five-year period that the worst human rights violations took place: most of the approximately 3,000 extrajudicial executions, “disappearances,” and deaths under torture committed by state agents throughout the military government date from this period.¹² Thousands more were detained and illegally tortured.¹³ In 1978, Pinochet instituted an amnesty law which prevented the prosecution of human rights violations that took place during the 1973-1978 period.

Numerous institutions participated and/or enabled human rights abuses to occur during Pinochet’s brutal regime. The Dirección de Inteligencia Nacional (DINA) intelligence agency as well as its successor, the Central Nacional de Informaciones (CNI) led the effort in executing, capturing, detaining, exiling, and torturing thousands of civilians and suspected members of the opposition.¹⁴ The judiciary, though still in place, did not challenge the regime’s official version of events or protect human rights, fostering an environment in which impunity reigned.¹⁵

Though Pinochet maintained the support of the political right in the country, he narrowly lost a plebiscite held in 1988, forcing him to step down and call elections the following year. Patricio Aylwin, of the center-left Christian Democratic Party, was later officially elected president in March 1990. The

¹² Human Rights Watch Annual Report, Chile, 1999.

¹³ Human Rights Watch Annual Report, Chile, 1999.

¹⁴ Kirtz, ed. (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume II: Country Studies. 453.

¹⁵ The Report of the Chilean National Commission for Truth and Reconciliation, chapter 2, part 4.

transition came after over a decade of mass protests against Pinochet's regime. However, as the new transitional democratic government assumed power, countless political constraints remained as an overshadowing legacy of the former brutal regime. In addition to the 1978 Amnesty Law, which was still in place, Pinochet had amended the Chilean constitution in 1980, ensuring that he remained commander-in-chief of the armed forces until 1998 and then a senator for life. Additionally, the amended constitution gave Pinochet the right to appoint nine senators, thereby creating a right-wing opposition bloc in the Parliament that basically guaranteed obstacles to new reforms.¹⁶

B. Assessment of the Chilean Truth Commission

1. Formation stage

One month after being elected in April 1990, President Aylwin established the National Commission for Truth and Reconciliation via presidential Supreme Decree No. 355. The truth commission was both a response to great public demand for inquiry into the brutalities of Pinochet's seventeen-year rule as well as part of a human rights platform that the new coalitional government committed itself to immediately after taking office. Aylwin appointed eight commissioners who came from legal, human rights, or government professions (the commission was often dubbed the Rettig Commission after the head

¹⁶ Human Rights Watch Annual Report, Chile, 1990.

commissioner, lawyer and former senator Raúl Rettig). The commissioners were also evenly distributed along the political spectrum, Aylwin's way of communicating that the commission's work would be done fairly and in good faith.¹⁷ The commission was granted a duration of six months with a possible three-month extension. The time period to be investigated covered September 11, 1973, the date of the military coup of Allende's government, to March 11, 1990, the date the new transitional government took office.

Critical choices made by President Aylwin during the National Commission for Truth and Reconciliation's formation would significantly limit the commission's investigation and its findings as well as impact the overall response to the commission's work after it released its report. First, the commission was decreed by the executive branch rather than by members of Parliament. Arguably, this decision was made to ensure that the creation of the commission would not be halted by the right-wing opposition bloc in the Senate. It was also a choice that would allow the transitional government to avoid inciting confrontation with members of the right and the military.¹⁸ However, because the truth commission was formed in a process that was almost solely conducted by the members of the new transitional government, there was silence as well as vehement refusal from the military to condone the commission's work and goals, which prevented the commission from accessing critical information it needed

¹⁷ Kirtz, ed. (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume II: Country Studies. 463.

¹⁸ Ensalaco (2000). *Chile Under Pinochet: Recovering the Truth*. 183.

to conduct investigations. The presidential decree laid out the mandate for the commission to fulfill, which consisted of four tasks:

- (1) To establish as complete a picture as possible of those grave events, as well as their antecedents and circumstances,
- (2) To gather evidence that may make it possible to identify the victims by name and determine their fate or whereabouts,
- (3) To recommend such measures of reparation and reinstatement as it regards as just,
- (4) To recommend the legal and administrative measures which in its judgment should be adopted in order to prevent actions such as those mentioned in this article from being committed.¹⁹

A number of features during this stage of the commission's existence seemed to predict a thorough investigation of the past. The commission was provided with a staff of sixty members that included legal experts, interviewers, law students, and human rights workers who would be assigned to researching individual cases in-depth. In addition, the commissioners, as noted above, included some of the most respected figures in law, government, and human rights activism who brought together diverse political perspectives with a united goal to reveal the truth, foster reconciliation and justice, and respond to victims' needs.

More significantly, however, some of the greatest limitations placed on the Chilean truth commission were solidified during this stage: namely, its limited length of operation, its limited definition of human rights violations in its mandate, the absence of critical legal powers, and its inability to identify perpetrators by name. Though the mandate covered a time span of almost

¹⁹ Supreme Decree No. 355.

two decades, the decree proclaimed that the truth commission would have at most nine months to complete its work, which included organizing the institution, hiring staff, registering cases, interviewing victims' relatives, conducting investigative research and coming to conclusions on cases, and finally, compiling a final report. Hayner notes in her work that the general optimal time period for truth commissions to complete their work is one to two years, based on analysis of the work of other truth commissions.²⁰ This time limit of less than one year presented the commission with an enormous case load, with legal teams taking on 200 cases each.²¹

Because of the commission's limited time of operation, the types of human rights violations to be investigated were also curtailed substantially. The commission was mandated to investigate "disappearances after arrests, execution, and torture leading to death committed by government agents or people in their service, as well as kidnappings and attempts on the life of persons carried out by private citizens for political reasons."²² These parameters failed to address the tens of thousands of Chileans who were tortured in situations that did not result in death, illegal detentions that did not result in death, or forced exiles.²³

In addition, since it was established by presidential decree and not congressional mandate, the commission did not possess subpoena powers and

²⁰ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 321.

²¹ Ensalaco (2000). *Chile Under Pinochet: Recovering the Truth*. 198.

²² Supreme Decree No. 355.

²³ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 303.

thus did not have the legal authority to compel testimony from witnesses.²⁴ Only authority vested by the Parliament could have established this legal authority for the commission. The absence of this critical power considerably limited the commission in its objective to illustrating a complete picture of the period of abuses and discover new evidence, since it could not induce unwilling perpetrators to give their side of the story nor provide to the commission important evidentiary documents about past abuses. Aylwin's insistence that the truth commission was not a court of justice but rather an information-gathering body additionally prevented it from having the power to identify by name the perpetrators it would find guilty of crimes, even though many of the names of these perpetrators were well-known in society.²⁵ This limitation would seriously undermine the credibility and impact of the report upon its release.

2. Investigation stage

The Chilean truth commission's investigative work began in June 1990. This included registering cases, determining which cases fell into the commission's mandate, interviewing witnesses, cross-referencing information with governmental and nongovernmental agencies, contending with the armed forces and police, and transmitting new evidence to the courts. By the time the commission began to operate, some 3,400 alleged cases of human rights

²⁴ Kirtz, ed. (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume II: Country Studies. 465.

²⁵ Ensalaco (2000). *Chile Under Pinochet: Recovering the Truth*. 193.

violations involving death had been registered with the commission, a figure that reflected the enormity of abuses during Pinochet's regime. Still thousands upon thousands of other cases of torture and detention fell outside of the commission's mandate and could not be examined.²⁶

The commission's investigative work was aided greatly by charity and human rights groups in the country, including the Vicariate of Solidarity, which had filed 8,700 writs of habeas corpus between 1973 and 1988 as well as collected extensive archives on cases, and the Chilean Human Rights Commission, which had gathered thousands of case files since 1978.²⁷ Similarly, the process of interviewing family members of victims proved to be a valuable well of information as well as a deeply emotional, sometimes cathartic experience for both commission staff and relatives telling their stories. These in-depth, one-on-one interviews detailing cases of torture and violent interrogations, killings followed by disappearances, and deaths in war tribunals would constitute the flesh and blood of the commission's final report. The details of these findings were forwarded to the courts in hopes of future prosecutions.

However, those investigative limitations placed on the commission in its establishing decree would manifest many difficulties for the commission in its gathering of information. Mark Ensalaco describes the obstacles placed before the commission with the absence of subpoena powers:

²⁶ Hayner (1994). "Fifteen Truth Commissions—1974 to 1994: A Comparative Study." *Human Rights Quarterly*. 621.

²⁷ Ensalaco (2000). *Chile Under Pinochet: Recovering the Truth*. 197.

...by denying the commission the power to subpoena witnesses and documents (President Aylwin) made it difficult for the commission to perform even its more modest investigatory function. The commission was given the authority to gather evidence from voluntary witnesses, and to take measures to protect their identity. The commission also had the authority to request reports and documents from all governmental agencies and to gain access to any sites it deemed necessary to visit. But the commission did not possess the legal authority to demand documents or access to important locations, much less to compel the testimony of unwilling witnesses. Consequently, the documents turned over by the military and police were selective.²⁸

Indeed, there was very little cooperation from those institutions that participated in torture. The Ministry of Justice, the Civil Registrar, and the Chilean police and armed forces responded to most of the commission's requests for evidence by claiming that documents and other records of those killed and disappeared had been burned or destroyed.²⁹ These last two institutions possessed the most critical information necessary for the commission to construct the truth of past events as well as to find out the whereabouts and fates of victims. In addition, the military was almost entirely silent in participating in the interviewing process, even with the knowledge that the commission would not name names and that they were still covered by the 1978 Amnesty Law. Only one active police and

²⁸ Ensalaco (2000). *Chile Under Pinochet: Recovering the Truth*. 196.

²⁹ While the navy and air force cooperated with the commission more than the others listed above, their participation also remained limited. The Report of the Chilean National Commission for Truth and Reconciliation. Part 1, chapter 1.

one air force official indicated willingness to offer testimony to the commission.³⁰ Rettig was asked in a later interview why the commission never requested an interview with General Pinochet. His answer was simply, “No. That, of course, would not have been possible.”³¹ His revealing statement gives insight into how fragile the political climate in Chile was at the time of the commission’s work and how this environment directly influenced the limited extent to which the truth of past crimes would be discovered in the commission’s investigation stage.

3. Report stage

The breadth of the National Commission on Truth and Reconciliation’s report was impressive by the existing standards for truth commissions at the time. In February 1991, its completed report consisted of over 2,000 pages. The final report identified 2,279 victims that fit within its mandate and reported that 642 cases were still unresolved. The report articulated a comprehensive explanation of its methodology as well as a political and historical context into the turn of events beginning in 1973. It then detailed in three designated time periods the types of human rights violations that occurred, which institutions were responsible, and how multiple sectors of Chilean society reacted to the ongoing abuses. The report was particularly critical of the Chilean judiciary in its acquiescence to the military government and its lack of independence in

³⁰ The Report of the Chilean National Commission for Truth and Reconciliation. Part 1, chapter 1.

³¹ Ensalaco (2000). *Chile Under Pinochet: Recovering the Truth*. 201.

failing to stand up for human rights. Though it did not name the names of perpetrators, the commission reported that the vast majority of crimes were traceable to official forces: a combination of military and police intelligence units in the first year of military rule, and after that the security police composed of military and civilian agents.³² Furthermore, a substantial portion of the report was devoted to describing the suffering and anguish of those Chileans who lost their loved ones to atrocities carried out during Pinochet's regime.

The commission in concluding the report put forward a significant number of institutional, legal, and reparative recommendations, including the establishment of a follow-up body to administer reparations and continue investigations into the 642 unresolved cases. However, the report disappointingly stopped short of recommending that the 1978 Amnesty Law be annulled. In the coming decade, this law would be utilized to close human rights cases in the courts and would come under fire by numerous international human rights agencies as being instrumental to permitting widespread impunity for past human rights violations.

Perhaps the greatest disappointment of the truth commission's report was its lack of new information regarding the whereabouts and fates of thousands of other victims. Because of legal obstacles in obtaining information, its limited time of operation, its limited mandate, and its overall cautionary approach to investigating the responsible parties for these crimes, the report reflects the

³² Human Rights Watch Annual Report, Chile, 1991.

Chilean truth commission's failure to fulfill its mandated goal of gathering evidence in a way that would allow the identification, whereabouts, and fates of victims. This process would have to be left up to the courts, which now possessed the evidence gathered by the commission.³³

4. Acknowledgment stage

The Rettig Commission's report was presented to President Patricio Aylwin in March 1991, when he addressed the Chilean public on national television discussing the report's findings, its recommendations, and his own reflections with tears in his eyes. He also personally gave the report to representatives of victims' organizations.³⁴ In his address, Aylwin communicated his hopes that the crimes would be pursued in the courts with "justice to the extent possible" and said that the Amnesty Law of 1978 should not be an obstacle to investigating these cases³⁵. He additionally apologized on behalf of the government for the trauma and pain of all victims and pleaded that "the Armed Forces and forces of order, and all who have had participation in the excesses committed, (make) gestures of recognition of the pain caused and cooperate in diminishing it."³⁶

While the emotion and sentiment of his speech strived for renewed reconciliation in Chilean society, the responses of both the former regime and the public were discouraging.

³³ Ensalaco (2000). *Chile Under Pinochet: Recovering the Truth*. 212.

³⁴ Ensalaco (2000). *Chile Under Pinochet: Recovering the Truth*. 212.

³⁵ Ensalaco (2000). *Chile Under Pinochet: Recovering the Truth*. 212.

³⁶ Human Rights Watch Annual Report, Chile, 1991.

The Supreme Court, all of whom were appointed personally by Pinochet during his presidency, called the report “impassioned, reckless, biased” in its May 13 response to the report.³⁷ Both the National Security Council and the armed forces criticized the report as inaccurate and unjust. On March 28, 1991 Pinochet stated the armed forces’ “fundamental disagreement” with the report, calling its findings “personal and precarious convictions which have been transformed into condemnatory sentences against many persons, outside due process.”³⁸ The armed forces’ lack of recognition of the report was disappointing and infuriating to many and reiterated the continued lack of accountability under the transitional government.

Human rights organizations and the public’s response to the truth commission’s report was divided at best.³⁹ Human Rights Watch and Amnesty International in their 1991 annual reports on Chile both communicated reservations about the limitations of the commission’s work. Additionally, several polls taken after the release of the commission’s report reveal an ambivalent and dissatisfied public.⁴⁰ One poll revealed that 70% of respondents did not consider the report to be a definitive solution to the problem of human rights

³⁷ Ensalaco (2000). *Chile Under Pinochet: Recovering the Truth*. 221.

³⁸ Kirtz, ed. (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume II: Country Studies. 476.

³⁹ Hayner inaccurately characterized the reception of the report as “wide reclaim” among both the public and the human rights community. Priscilla Hayner (1994). “Fifteen Truth Commissions—1974 to 1994: A Comparative Study.” *Human Rights Quarterly*. 622.

⁴⁰ Kirtz, ed. (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume II: Country Studies. 474-475.

violations.⁴¹ Another poll asking whether the Rettig Report contributed to reconciliation revealed an even split: 42.5% answered yes, 39.5% answered no.⁴²

Only a month after the release of the report, rightwing senator Jaime Guzmán was assassinated by the armed Left, in an event that Human Rights Watch said “effectively ended public discussion of the Rettig Report.”⁴³ The legacy of Chile’s National Commission for Truth and Reconciliation would ultimately be left up to a legislature and court system deeply embedded with officials, practices, and obstacles left in place by the former regime.

C. Key Recommendations of the Chilean Truth Commission

1. Reparations: *A follow-up state body should be created to continue the search for the remains of those killed and disappeared.* Fully implemented.

In one of its final recommendations in its report, the Chilean truth commission suggested the establishment of a public law foundation as a follow-up body to investigate the remaining unresolved cases, to collect further evidence, to administer financial reparations to families, to elaborate on education proposals, and to centralize information gathered by the commission.⁴⁴ This public law foundation, known as the National Corporation for

⁴¹ Kirtz, ed. (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume II: Country Studies. 474-475.

⁴² Kirtz, ed. (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume II: Country Studies. 474-475.

⁴³ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 259.

⁴⁴ The Report of the Chilean National Commission for Truth and Reconciliation. Part 4, chapter 3.

Reparation and Reconciliation, was created by Congress with the passage of Law No.19.123 on January 31, 1991. It was established as a temporary state organ with a mandate lasting until 1997. Chile's was the first truth commission to successfully establish a follow-up body to carry out implementation of any of its recommendations. Although the general goal of the body would be to carry out the recommendations of the National Commission for Truth Commission and Reconciliation, the Corporation would address three specific areas: to discover the whereabouts of those victims who disappeared; to investigate those 642 cases that the commission did not resolve; and to administer financial reparations to the families of victims.

By 1997, the year the mandate of the Corporation expired, progress had been made in all three areas, though the body was expectedly overwhelmed with new cases and limited in time and resources. As a result of its investigative efforts, the Corporation presented a report that confirmed another 899 cases in which human rights violations had occurred.⁴⁵ Additionally, the Corporation's work aided in exhuming and identifying bodies buried in mass graves, such as the clandestine graves in which remains of officials from Allende's government were discovered in the Santiago Cemetery in 1995.⁴⁶

The bulk of the Corporation's work addressed the immediate need to administer financial aid to the families of victims as a necessary path to reconciliation in Chilean society. By 1997, 4,886 Chileans received a check in

⁴⁵ Amnesty International Annual Report, Chile, 1997.

⁴⁶ Amnesty International Annual Report, Chile, 1995.

the mail each month from the government as part of the government's lifetime pension plan for family members killed or disappeared under the military dictatorship.⁴⁷ Immediate family members would be distributed a check each of month of \$481; families with only one surviving member received a \$345 check per month. Family members were also entitled to educational and healthcare benefits as well as a waiver of military service. While these benefits covered only a fraction of the thousands of Chileans who suffered under the military dictatorship and excluded those victims and family members whose human rights violations did not fit into the commission's mandate, the progress was nevertheless a positive step in the direction of implementing concrete measures to help relieve the pain and suffering of those most deeply impacted by the brutal regime.

2. The Rule of Law: *Military courts should be used in limited circumstances and under the supervision of the Supreme Court.* Not implemented.

As noted previously, the Chilean truth commission was emphatically critical of the judiciary's lack of independence, particularly its failure to provide oversight of military tribunals during Pinochet's regime. One of the key judicial reform recommendations put forth by the commission called for military courts to restrict their jurisdiction to cases solely involving crimes committed by the

⁴⁷ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 172.

military against other individuals in the military, and for the Supreme Court to more rigorously supervise the actions of these courts.⁴⁸

However, this recommendation, though pushed as a part of a comprehensive package of reforms by the government in 1991, failed to come to fruition. As a result, the Supreme Court almost always upheld military courts' jurisdiction over human rights cases during the military dictatorship involving civilians, and most of the investigations into these critical cases were closed by the military courts either indiscriminately or on the basis of the 1978 Amnesty Law. In addition, the military courts throughout the 1990s prosecuted and sentenced a multitude of journalists, human rights lawyers, and other civilians for "offending" the armed forces.⁴⁹

Not until 1997 did the Supreme Court begin asserting its authority over the military courts, when it rejected the Military Prosecutor General's petition to instruct all appeal courts and judges to close hundreds of cases of human rights violations that occurred during the 1973 to 1978 military government. It was the first time the Supreme Court had re-established its authority to decide on cases within their jurisdiction.⁵⁰ In October 1998, the same month that Pinochet was arrested in London at the request of a Spanish judge on charges of gross human rights violations, the Supreme Court again rejected the Military Prosecutor General's request and recommended that courts and judges speed up all

⁴⁸ The Report of the Chilean National Commission for Truth and Reconciliation. Chapter 2, part 4.

⁴⁹ Amnesty International Annual Report, Chile, 1991, 1994, 1995, 1996, 1999.

⁵⁰ Amnesty International Annual Report, Chile, 1997.

pending human rights violations cases.⁵¹ The Supreme Court, in perhaps its most courageous gesture of independence since the transition of the early 1990s, finally re-interpreted the 1978 Amnesty Law in July 1999, proclaiming that cases in which victims disappeared did not fall under the Amnesty Law unless their deaths had been established by evidence.⁵² However, to this day, the Supreme Court has not annulled the 1978 Amnesty Law.

The failure of the Supreme Court in allowing military courts to control the jurisdiction of thousands of cases of human rights violations undoubtedly corroded the rule of law and victims' perceptions of justice in the country during the political transition. Unfortunately, as late as 2004, military courts in the country still held jurisdiction over some cases of human rights violations that had still not been transferred back to civilian courts.

3. Human Rights: *There should be limitations in the use of solitary confinement, with access to an independent doctor and safeguards for the prisoner's physical and mental health.* Not implemented.

The commission's report placed noticeable importance on the use of solitary confinement in threatening the development of a strong human rights culture, noting that statistics provided by international organizations revealed that torture usually takes place during periods of solitary confinement. The commission's recommendation regarding solitary confinement suggested that

⁵¹ Amnesty International Annual Report, Chile, 1998.

⁵² Amnesty International Annual Report, Chile, 2000.

this practice be used only for limited time periods and under certain circumstances, such as preventing “suspects from engaging in collusion in order to impede investigation into the facts of the crime.” The recommendation also advised that those under solitary confinement should have access to an independent doctor at all times for physical and mental healthcare.⁵³

Tracing the path of this recommendation’s fate leads to a discouraging record of the use of solitary confinement by the government throughout the 1990s. Although legal reforms limiting incommunicado detention and providing for medical examination of detainees were enacted in February 1992, the same year, at least 20 complaints of torture related to solitary confinement were presented to the courts, and none of those responsible for torture were brought to justice.⁵⁴ A particularly egregious case was recorded in 1993, when Chilean citizen Mirentchu Vivanco Figueroa was arrested without warrant, held incommunicado for three days, deprived of sleep, threatened with death, and forced to remain standing for long periods of time.⁵⁵

Such cases were rarely questioned by the courts, with the exception of an unusual ruling by the Santiago Appeals Court in 1994, in which it found that eleven alleged armed opposition group members had been tortured, held incommunicado for twenty days during questioning, and forced to incriminate

⁵³ The Report of the Chilean National Commission for Truth and Reconciliation. Part 4, chapter 2.

⁵⁴ Amnesty International Annual Report, Chile, 1992.

⁵⁵ Amnesty International Annual Report, Chile, 1993.

themselves in order to secure the release of their illegally detained relatives.⁵⁶ As late as 1997, the UN Special Rapporteur on torture issued a report and urged the government to bring provisions for incommunicado detention into line with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁵⁷ The issue of ill-treatment and torture in prisons was not fully and comprehensively addressed until 2005, when then-President Lagos organized the National Commission on Political Imprisonment and Torture, Chile's second truth commission whose mandate included the thousands of victims of torture and ill-treatment under the military government and throughout the political transition. By the end of 2005, this commission collected almost 28,000 testimonies from victims of torture, though no measures were proposed for obtaining justice.⁵⁸

V. SOUTH AFRICA

A. Context of the Formation of the South African Truth Commission

South Africa was a nondemocratic nation for the majority of the 20th century. The roots of apartheid (the Dutch word for "separateness") can be traced back to 1910, when the first South African constitution promulgated a

⁵⁶ Human Rights Watch Annual Report, Chile, 1995.

⁵⁷ Amnesty International Annual Report, Chile, 1997.

⁵⁸ Amnesty International Annual Report, Chile, 2005.

structurally racist and undemocratic society. This system was further solidified when the National Party (NP) came into power in 1948. Under apartheid, a system that classified and discriminated people on the basis of skin color, those classified as “non-whites”—well over the majority of the population—were denied basic political rights; they could not vote, run for office, or were not granted citizenship. Furthermore, they were excluded in virtually all facets of everyday life, including housing, health services, education, and transportation. Apartheid, as defined by TRC commissioner Alex Boraine, was “a system of minority domination of statutorily defined color groups on a territorial, residential, political, social, and economic basis.”⁵⁹

In response to the rigid apartheid system, the political party the African National Congress (ANC) launched a defiance campaign in 1952 in South Africa’s first mass civil disobedience campaign.⁶⁰ In particular, the ANC was focused on how to combat the forced removals of blacks from Sophiatown, which the government had decided should be reserved for whites.⁶¹ In 1960, a breakaway group of the ANC, the militant Pan-Africanist Congress (PAC) was banned after it organized a campaign against identity passes, in which unarmed protesters left their identity passes at home and gathered at police stations in order to be arrested for contravening the pass laws. In this tragedy, known later as the Sharpeville Massacre, police opened fire, killing 69 people

⁵⁹ Boraine (2000). “Truth and Reconciliation in South Africa: the Third Way.” *Truth v. Justice: the Morality of Truth Commissions*. 141.

⁶⁰ Eades (1999). *The End of Apartheid in South Africa*. 54.

⁶¹ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 14.

and wounding 186 more. The following year, the government banned both the ANC and the PAC,⁶² and the leaders of the campaign (including Nelson Mandela) were sentenced to life imprisonment for inciting people to strike and for leaving the country without a passport.⁶³ The TRC's mandated period of investigation began its coverage at this point in South African history.

By the early 1990s, the country had suffered from massacres, killings, torture, lengthy imprisonment of activists, and severe economic and social discrimination against its majority non-white population.⁶⁴ The negotiation process began in earnest in 1990, when Nelson Mandela was released from prison after National Party President F.W. de Klerk announced the unbanning a range of organizations and parties, including the ANC, the South African Communist Party, and the PAC.⁶⁵ The same year, Nelson Mandela was freed from prison. Within the next two years, Mandela was elected president in the country's first free, all-race elections, and an interim government and constitution were established.

After almost a century of deep racial and ideological divisions, violence, and social unrest, discussion of a truth commission to address the country's history of human rights abuses began in 1994. By 1995, the South African Parliament passed the Promotion of National Unity and Reconciliation Act, which established the Truth and Reconciliation Commission (TRC), and the same

⁶² Deegan (2001). *The Politics of the New South Africa: Apartheid and After*. 31.

⁶³ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 16.

⁶⁴ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 41.

⁶⁵ Deegan (2001). *The Politics of the New South Africa: Apartheid and After*. 77.

year, Archbishop Desmond Tutu was named head commissioner. The commission's mandate would demand an investigation of almost thirty-five years of human rights violations under apartheid.

B. Assessment of the South African Truth Commission

1. Formation stage

The establishment of South Africa's Truth and Reconciliation Commission (TRC) in 1995 emerged out of almost two years of negotiations between the African National Congress (ANC), the National Party (NP), and over twenty-six other political parties in the country. The formation of the truth commission was just one of many sweeping reforms and legislation that characterized South Africa's revolutionary democratic transition. The creation of the commission itself was a unique process; it was the first to be established by congressional legislation, distinguishing it from past truth commissions that were generally established by presidential decree. The process began with two conferences, sponsored by the Institute for Democracy in South Africa and its Justice in Transition Project, held in Cape Town in 1994. At the conferences, delegates from Chile, Argentina, and Eastern Europe discussed their own experiences dealing with past abusive regimes.⁶⁶ For nearly an entire year, the bill which proposed the commission, the Promotion of National Unity and Reconciliation

⁶⁶ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 2.

Act, was debated by multiple political parties in the Lower House and the Senate until it was finally signed into law on July 19, 1995 by South African president Nelson Mandela.

The mandate of the Truth and Reconciliation Commission addressed three tasks:

- (1) To compile as complete a record as possible of gross human rights violations during the period of March 21, 1960 to May 10, 1994;
- (2) To restore victims' human and civil dignity by letting them tell their stories and to recommend how they could be assisted;
- (3) To consider granting amnesty to those perpetrators who carried out their abuses for political reasons and who gave full accountings of their actions to the commission.⁶⁷

The legislation defined human rights violations as the "killing, abduction, torture, or severe ill treatment of any person...which emanated from conflicts of the past...and the commission of which was advised, planned, directed, commanded or ordered by any person acting with a political motive."⁶⁸ On the one hand, the TRC's mandate covered a substantial time period and its definition of human rights violations was notably broad. However, it failed to address core practices of apartheid that created deep racial divisions in South African society for almost a century, including the forced removal and displacement of millions of people based on race and everyday policies and practices of apartheid.⁶⁹

⁶⁷ Promotion of National Unity and Reconciliation Act No. 34 of 1995.

⁶⁸ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 6.

⁶⁹ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 304.

The TRC was unusual in the rigorous legal powers it was granted. The commission had the power to subpoena witnesses and institutions, the power of search and seizure, and the power to grant amnesty to those perpetrators who provided full disclosure of their crimes and could establish that their actions were politically motivated. Furthermore, the TRC had the power to make public the names of those it found to be perpetrators. Together, these powers gave the TRC much broader access to documents and testimony that could more fully illustrate the events of the nearly thirty-five year period it was mandated to investigate. As a result, agreements were made by political parties as well as by the military and security institutions to make public submissions to the commission.⁷⁰

To achieve its mandated goals, the TRC was structured into three separate committees: the Human Rights Committee, which conducted public hearings for victims and survivors; the Reparation and Rehabilitation Committee, which was to develop policy for long-term reparations as well as interim relief; and the Amnesty Committee, which heard applications of amnesty through 2000.⁷¹

The commissioners were chosen by a similarly deliberative process. Nominees were suggested by NGOs, churches, and political parties and were interviewed in public by a selection panel, with the president and cabinet

⁷⁰ Boraine (2000). "Truth and Reconciliation in South Africa: the Third Way." *Truth v. Justice: the Morality of Truth Commissions*. 146.

⁷¹ Boraine (2000). "Truth and Reconciliation in South Africa: the Third Way." *Truth v. Justice: the Morality of Truth Commissions*. 145-146.

choosing from a short list.⁷² In the end, Christian Archbishop Desmond Tutu was selected as head commissioner. The remaining fourteen commissioners spanned the political spectrum and were racially diverse, with seven blacks, two Indians, and six whites. Notably, while the majority of the commissioners came from the legal profession, four (including Tutu) were ordained ministers.⁷³

The staff and budget of the South African truth commission were also far and above past commissions in Africa and Latin America, with a staff of three hundred, a budget of some \$18 million each year for two and a half years, and four large offices around the country.⁷⁴ Additionally, its time of operation was lengthier than most: it worked 2.5 years at its peak, with an additional 3.5 years for the Amnesty Committee to complete its work (1995-2000).⁷⁵

2. Investigation stage

The TRC began its first hearings and investigations in April 1996. The commission's work was widely publicized in South African and international media because of its unique use of public hearings for victims and witnesses. The commission collected over 21,000 victim statements, 2,000 of which were public hearings.⁷⁶ Their work covered an impressive but overwhelming 37,000

⁷² Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 3.

⁷³ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 4.

⁷⁴ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 41.

⁷⁵ Quinn and Freeman (2003). "Lessons Learned: Practical Lessons Gleaned from the Inside the Truth Commissions of Guatemala and South Africa." *Human Rights Quarterly*. 1124.

⁷⁶ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 42.

human rights violations under the commission's mandate.⁷⁷ The use of public hearings has been lauded by some and criticized by others. On one hand, the public hearings offered a powerful and cathartic platform for victims and witnesses to publicly tell their stories about the trauma of the past, some for the first time. The environment of reconciliation and forgiveness brought to the public hearings by Archbishop Tutu encouraged the healing of deep societal wounds and a new resolve to forgive and move the country forward. On the other hand, public hearings were hard to administer, organize, and focus.⁷⁸ Additionally, there was a conspicuous absence of whites at any of the commission's public hearings, a cause of concern to the commissioners and a valid reason to question the public hearings' true potential to promote societal reconciliation.⁷⁹ In addition to public hearings for individual victims and witnesses, a series of special hearings were held for institutions in society to account for their role in helping to legitimize or execute policies that furthered human rights violations during apartheid. Testimonies were recorded from the business sector, the media, the health sector, and religious institutions.⁸⁰

To complement witness and victim testimony, the Human Rights Committee did investigative research to corroborate its findings, and it utilized a wealth of expert information, forensic reports, and official documents to follow

⁷⁷ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 3.

⁷⁸ Quinn and Freeman (2003). "Lessons Learned: Practical Lessons Gleaned from the Inside the Truth Commissions of Guatemala and South Africa." *Human Rights Quarterly*. 1141.

⁷⁹ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 92.

⁸⁰ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 7.

up on details that were testified and to establish the nature and extent of violations.⁸¹ Certainly, the TRC's subpoena and search and seizure powers aided it in its investigatory process. However, it did not guarantee that all sources of information were available: one difficulty the commission experienced on this front were claims by the government upon request of information that critical official documents had either disappeared or were destroyed.⁸² Nevertheless, where the commission did gain access to official documents, the information would help the commission to more accurately understand and account for the causes and modus operandi of past human rights violations.

Special hearings for political parties were held, and testimony of key former officials, including former president F.W. de Klerk, were recorded during these hearings. The ANC testified in general about the abuses committed by the National Party but less about its own abuses, and incredulously, the National Party and de Klerk denied authorizing planned murders, tortures, and assassinations.⁸³ The Inkatha Freedom Party (IFP) additionally did not take responsibility for any acts of violence. Neither former National Party presidents de Klerk and P.W. Botha nor IFP leader Mongosuthu Buthelezi applied for amnesty and remained unrepentant for the events of apartheid. Tutu was

⁸¹ Quinn and Freeman (2003). "Lessons Learned: Practical Lessons Gleaned from the Inside the Truth Commissions of Guatemala and South Africa." *Human Rights Quarterly*. 1136-1137.

⁸² Quinn and Freeman (2003). "Lessons Learned: Practical Lessons Gleaned from the Inside the Truth Commissions of Guatemala and South Africa." *Human Rights Quarterly*. 1137.

⁸³ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 86.

deeply disappointed that the perpetrators of these parties did not express remorse, regret, or apology to victims and their families.⁸⁴ Botha was the only person to ignore his subpoena to testify at the commission's hearings; he said he would refuse to be humiliated publicly and would not apologize for apartheid. In August 1998, Botha was found guilty of contempt for court, given a suspended jail sentence of one year, and fined \$1,500.⁸⁵

The Committee on Reparation and Rehabilitation's work involved collecting information that would help the government to design a system of reparations for victims. It held regional hearings across the country in 1996 and 1997 to find out what victims were seeking in terms of redress. Its findings and recommendations for reparations were recorded in the commission's final report.⁸⁶

Perhaps the most controversial dimension of the TRC's investigation was the work of the Amnesty Committee. Its work began in earnest in late 1996 and continued until 2000. The committee received over 7,000 applications for amnesty. The conditions for gaining amnesty were fourfold: (1) the crime must have occurred between 1960 and 1994; (2) the applicant must demonstrate the crime was politically motivated; (3) the applicant must provide full disclosure of the facts; and (4) the proportionality rule: the offence must have been carried

⁸⁴ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 53.

⁸⁵ Eades (1999). *The End of Apartheid in South Africa*. 113.

⁸⁶ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 7.

out in a manner in which it was proportionate to its objective.⁸⁷ Ostensibly, the last criterion was the most ambiguous and controversial, and some of the most notorious and contested cases granted amnesty involved controversy over the “proportionality” rule.⁸⁸

The amnesty provision in general presented a dilemma for South Africans. The TRC was the first truth commission ever to utilize such a stipulation, and feelings were mixed about its value. There is no doubt the work of the Amnesty Committee brought to light new information to the public about the abuses of the former regime. However, the inherent moral question seems to be, “At what cost?” Those who favored the amnesty power of the TRC believe it was a necessary political concession in order to bring the National Party on board with the truth-seeking process. Those against it viewed it as a perpetrator-friendly body, indemnifying the guilty, completely surrendering justice in order to mollify whites, and ultimately damaging the commission’s goals of attaining improved reconciliation between members of society.⁸⁹

3. Report stage

⁸⁷ Truth and Reconciliation Commission of South Africa Report (2003). Volume 6, chapter 1, section 1.

⁸⁸ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 70.

⁸⁹ Truth and Reconciliation Commission of South Africa Report (2003). Volume 6, chapter 5, section 1. See also Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 58.

The final, five-volume report of the TRC was presented to President Mandela in October 1998.⁹⁰ Its findings implicated over 400 individuals for committing human rights violations, and it recognized the responsibility of both the former state as well as the resistance. The final report emphasized three major findings: (1) apartheid was a crime against humanity; (2) the previous government was responsible for most of the human rights violations between 1960 and 1994; and (3) some resistance movements that fought to destroy apartheid were also guilty of gross human rights violations.⁹¹

The report itself was a comprehensive work of great breadth that examined all facets of South African society and the roles each of them played in assisting or ignoring heinous human rights violations, including torture, abduction, severe ill-treatment, deliberate manipulation of social divisions to mobilize one group against another, unjustified use of deadly force, arming and training foreign nationals, incursions across South Africa's borders, judicial killings, extrajudicial killings, and covert training of hit squads.⁹² The first two volumes of the report explained in detail the structure of the commission, its investigative procedures, and a comprehensive historical context from 1960 to 1994. The third volume illustrated profiles of regions in South Africa most directly affected by past abuses; the fourth contained the findings of the institutional hearings.

⁹⁰ A sixth volume with the Amnesty Committee's final report, and a seventh volume summarizing victim findings, were released in 2001.

⁹¹ Human Rights Watch Annual Report, South Africa, 1999. See also Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 145.

⁹² Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 145.

Finally, the fifth volume reported the commission's findings and recommendations.

In this final section, the commission stressed that those recommendations listed should serve the grander, ultimate goal of societal reconciliation. In order to ensure the prevention of human rights in the future, the report laid out a series of "simultaneous actions" that needed to take place in South Africa that would establish a culture of human rights; this list included a wide dissemination of the commission's findings, transforming the educational system, closing the gap between rich and poor through increased availability of social services, combating racism, and the complete elimination of human rights violations by the police and security forces in the country.⁹³ It also recommended that a follow-up body be set up to administer financial reparations to victims and oversee the implementation of its recommendations, quite similar to Chile.

The addition of the Amnesty Committee's report as volume six in 2001 contributed new, previously unknown information about the past as well as a detailed explanation of the committee's procedures. This particular section of the overall report helped further the commission's mandated goal to develop as complete a picture as possible of human rights violations between 1960 and 1994. A seventh volume added the same year gave a summary of victims' findings.

⁹³ Truth and Reconciliation Commission of South Africa Report (1998). Volume 5, chapter 8, 309.

Perhaps what was most notable about the TRC's final report was the impartiality with which the commission approached assigning guilt to various parties of apartheid-era South Africa.⁹⁴ Although the National Party was burdened with the most blame by the commission as well as the Inkatha Freedom Party, which collaborated with the former government in hit-squad activity, it equally accused the African National Congress, the main resistance movement, of gross human rights violations. The report found that the ANC was guilty of committing civilian casualties during its own acts of resistance. Similarly, the Pan-Africanist Congress was reproached for engaging in acts of war by killing white farmers.⁹⁵ As a result of its special hearings for various sectors of society, the TRC's report even placed blame on institutions like the United Dutch Reformed Church, finding that the Church promoted the ideology of apartheid.⁹⁶ As Desmond Tutu said, "A gross violation is a gross violation, whoever commits it and for whatever reason."⁹⁷ However, the fact that all sides of the conflict were incriminated inflamed actors across the political spectrum and would make it more difficult to achieve reconciliation.

4. Acknowledgment stage

⁹⁴ However, some have considered the report's impartiality as proof that the commission was confined by the chains of political compromise.

⁹⁵ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 145-148.

⁹⁶ Deegan (2001). *The Politics of the New South Africa: Apartheid and After.* 152.

⁹⁷ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 147.

The TRC's final report was released in October 1998 with a flurry of controversy arising in the days prior to the release. As expected, the report was boycotted by the National Party and the Inkatha Freedom Party, the two parties most criticized in the report. Even the African National Congress, the party responsible for creating the commission, condemned the report's findings as criminalizing the anti-apartheid movement.⁹⁸ Both former NP president F.W. de Klerk and the ANC challenged the report in court; de Klerk was successful in removing a short section which named him as a perpetrator of abuses.⁹⁹

President Mandela, however, made an effort to distance himself from those opposing the report and at the ceremony in which the commission presented to the report to him, he expressed his approval of the commission's activities.¹⁰⁰ Additionally, Tutu acknowledged that while many were unhappy with the content of the report, it shed light on crucial events of the past that would help South Africa move forward and learn from apartheid.¹⁰¹ However, the government made no commitment to implement the commission's many recommendations in the day immediately following the release of the report.¹⁰² While some recommendations would be pursued in the coming years, not until the Amnesty Committee completed its work in 2000 did the commission's legacy

⁹⁸ Graybill (2002). *Truth and Reconciliation in South Africa: Miracle or Model?* 148.

⁹⁹ Human Rights Watch Annual Report, South Africa, 2000.

¹⁰⁰ Deegan (2001). *The Politics of the New South Africa: Apartheid and After.* 158.

¹⁰¹ Deegan (2001). *The Politics of the New South Africa: Apartheid and After.* 158.

¹⁰² Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity.* 45.

come under increased scrutiny, especially in the delayed execution of its recommended reparations to victims.

Public reaction to the commission's report was not overly enthusiastic. A national poll released by Market Research Africa just as the report was about to be released revealed that nearly two-thirds of the public believed that revelations resulting from the truth commission process had made South Africans angrier and led to a deterioration in relations between races.¹⁰³ While the TRC's report came under fire, Quinn and Freeman suggest that this was because the public felt other aspects of the truth commission's process, such as its public hearings, were more effective than the release of the report.¹⁰⁴

Response to the report was also divided along racial lines. A national poll in 1998 addressing the future consequences of the TRC asked "Having the Commission means that all people in South Africa will be able to live together more easily in the future. Do you agree or disagree?" 54.2% of black respondents agreed, compared to only 20% of white respondents; 69.3% white respondents disagreed, compared to 20.6% of black respondents.¹⁰⁵ Additionally, in a July 2000 survey, only half of white South African respondents felt that it was their "responsibility as a citizen to contribute to the process of national reconciliation."¹⁰⁶

¹⁰³ Hayner (2001). *Unspeakable Truths: Confronting State Terror and Atrocity*. 156.

¹⁰⁴ Quinn and Freeman (2003). "Lessons Learned: Practical Lessons Gleaned from the Inside the Truth Commissions of Guatemala and South Africa." *Human Rights Quarterly*. 1146.

¹⁰⁵ Lodge (2002). *Politics in South Africa: From Mandela to Mbeki*. 198.

¹⁰⁶ Lodge (2002). *Politics in South Africa: From Mandela to Mbeki*. 200.

Those who criticized the commission felt that it did not fully capture the motives and perspectives of those who perpetrated gross human rights violations. The commission defended itself by claiming that its primary function was not to write the political history of South Africa, but to expose violations of all parties as a means of laying the basis for a human rights culture in the country.¹⁰⁷ Others were angered by the commission's ongoing amnesty process and viewed it as a concession to placate perpetrators; in addition, the amnesty process brought to light new information that was released in the official report that quite simply disturbed and upset many people in South African society.¹⁰⁸ Those who supported the commission's work lauded it as an excellent example of an "even-handed" search for truth that was impressively comprehensive in scope for the amount of time it operated.¹⁰⁹ Others see the vigorous debate and heated emotions from all sides after the release of the report as a testimony to the commission's credibility.¹¹⁰ It is fair to say that South Africa's Truth and Reconciliation Commission was a courageous and unorthodox experiment in addressing past human rights violations. Yet, in order to fully realize whether the commission's work furthered justice or reconciliation, it is necessary to engage in an in-depth assessment of how fully its major recommended reforms were advocated and implemented by the government.

¹⁰⁷ Lodge (2002). *Politics in South Africa: From Mandela to Mbeki*. 194. See also Deegan (2001). *The Politics of the New South Africa: Apartheid and After*. 162.

¹⁰⁸ Deegan (2001). *The Politics of the New South Africa: Apartheid and After*. 162.

¹⁰⁹ Deegan (2001). *The Politics of the New South Africa: Apartheid and After*. 162.

¹¹⁰ Deegan (2001). *The Politics of the New South Africa: Apartheid and After*. 161.

C. Key Recommendations of the South African Truth Commission

1. Reparations: *Individual reparation grants paid over a period of six years should be given to each victim of a human rights violation. Partially implemented.*

In its official report released in 1998, the TRC made firm suggestions that reparation and rehabilitation policies should immediately and comprehensively address the psychological, physical, and spiritual needs of victims of human rights violations. Specifically, it outlined a an individual reparations grant program in which an amount of money be made available to a victim or his or her families for three purposes: (1) to acknowledge the suffering of the victim, (2) to enable access to facilities and services, and (3) to subsidize daily living costs.¹¹¹ The grant would be administered by a President's Fund and would cost approximately 3 billion rand (\$420 million).¹¹²

By June 2000, \$4.2 million had been paid out to 10,000 victims, but thousands more had still not received reparations two years after the commission's final report. The delayed of deliverance these individual grants to thousands of victims as well as their total absence for thousands more continues today to taint the perception of the TRC's work in South Africa. While Mbeki government promised in 2002 that it would introduce legislation to outline a

¹¹¹ Truth and Reconciliation Commission of South Africa Report (1998). Volume 5, chapter 5, 184.

¹¹² Human Rights Watch Annual Report, South Africa, 2001.

comprehensive reparations policy, in 2003, Human Rights Watch wrote President Mbeki expressing concern that 22,000 victims and/or family members still had not received reparation payments.¹¹³ On April 15, 2003, Mbeki authorized a one-time payment of \$74 million to victims in “urgent” need—almost \$300 million less than the recommended amount by the commission. He also spoke against numerous U.S. class action lawsuits against South African corporations whose practices contributed to apartheid.¹¹⁴

While the TRC’s recommendations for reparations have still not been fully administered to this day, Tom Lodge notes that this is hardly the fault of the TRC, but rather that of the government. He puts forth several explanations for why reparations have not been delivered. First, logistical difficulties prevented a quick and efficient distribution of money from the President’s Fund to victims; for example, although in 1998 the government authorized urgent interim payments, by 2000, much of the money in the Fund remained there because of uncertainties of which government department was responsible for distributing the money. Additionally, the government seemed to delay action on reparations simply because government officials viewed reparations as a low-priority concern. Lodge believes both the lack of official enthusiasm was unlikely fiscal austerity but rather a result of political hostility to the commission’s work. Lodge explains that a fundamental difference existed between the government

¹¹³ Human Rights Watch Annual Report, South Africa, 2003.

¹¹⁴ Michael (2003). “Moment of Truth.” Worldpress.org.
<http://www.worldpress.org/Africa/1077.cfm>.

ANC officials (such as Mandela) and those ANC members who applied for amnesty through the commission: the former were in favor of a more general amnesty and a fresh start, while the latter argued that white South Africans should finance reparations.¹¹⁵ The government's unspoken disagreement with the commission's proposal to have reparations paid out as a means of attaining justice and reconciliation resulted in sluggish, disorganized implementation. Regardless of the political conflict over the issue of reparations, the lack of fulfillment of the TRC's recommendation in this area left huge sectors of society deeply frustrated that their suffering had not been acknowledged through individual grants and incredulous of the actual reconciliatory value of the commission.

2. The Rule of Law: *Where amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation.* Not implemented.

The TRC prioritized in its recommendations the need to bring to justice those perpetrators it found to be guilty of human rights abuses. In its recommendation section addressing accountability, the first recommendation listed suggested prosecution of those who were denied amnesty or did not seek it but were found to have committed gross human rights violations. The commission articulated that it would aid this process by making "available to

¹¹⁵ Lodge (2002). *Politics in South Africa: From Mandela to Mbeki*. 190-191.

the appropriate authorities information in its possession concerning serious allegations against individuals.”¹¹⁶ It makes note afterwards that no general amnesty should be granted, at the risk of establishing a culture of impunity.

This recommendation was glaringly disregarded by President Mbeki in May 2002, when he pardoned thirty-three convicted prisoners, primarily from the ANC and Pan-Africanist Congress, even though some of them had been denied amnesty by the Truth and Reconciliation Commission. Other parties protested the pardons or demanded similar treatment for their own members. Human Rights Watch wrote Mbeki the same year to condemn the pardons as well as Mbeki’s proposal that a further amnesty for apartheid-era politically motivated crimes be granted.¹¹⁷ The government continued to largely ignore the TRC’s recommendations for prosecution as it did the recommendations for reparation.¹¹⁸

Mbeki’s pardoning of the prisoners, a manifestly biased act as well as an act of politically expediency, undermined the even-handed findings of commission. Here again, responsibility for this recommendation’s failure may not be fully placed on the commission but rather on how the government responded to and implemented truth commission recommendations. In selectively pardoning prisoners of his own party, Mbeki not only acted in a way that eroded the rule of law of the new South Africa, but he also effectively

¹¹⁶ Truth and Reconciliation Commission of South Africa Report (1998). Volume 5, chapter 8, 309.

¹¹⁷ Human Rights Watch Annual Report, South Africa, 2003.

¹¹⁸ Lodge (2002). *Politics in South Africa: From Mandela to Mbeki*. 204.

undermined the comprehensive work and legal powers of the TRC. It had been one of the first with the power to both publicly name the names of perpetrators and to recommend prosecutions after it completed its findings. The failure of the government to capitalize and contribute to justice with the resources and information provided by the TRC again reflected a fundamental difference and division between the TRC and the government's respective conceptions on how to achieve post-conflict justice.

3. Human Rights: *Prison officers should receive human rights training as a basic guide for treatment of prisoners and the management of the prison systems.* Implemented.

The TRC placed special emphasis on transforming the South African prison system in its recommendations. It found that the existing institutional prison structure and the practices of prison officials were derived from the entrenched legacy of human rights violations rather than from the norms of prison law, human rights law, and the Constitution.¹¹⁹ In one of its key recommendations in this area, the TRC proposed that prison officers receive human rights training as a basic guide for treatment of prisoners and the management of prison systems.¹²⁰

¹¹⁹ Truth and Reconciliation Commission of South Africa Report (1998). Volume 5, chapter 8, 313-314.

¹²⁰ Truth and Reconciliation Commission of South Africa Report (1998). Volume 5, chapter 8, 314.

Even after South Africa democratized, conditions in South African prisons remained dismal. In addition to overcrowding, numerous instances of disturbance, unrest, and prison violence were reported.¹²¹ In 1995, there were also reports of violence between prisoners as well as by guards assaulting prisoners.¹²² Although in 1995 the Correctional Services Transformation Forum was held to discuss prison reform and the prison service was officially demilitarized in 1997, little progress was made in addressing human rights violations that continued in prisons.¹²³

It was not until 1998 that major prison reform legislation and programs to train prison guards emerged, the same year that the recommendations of the TRC were made public. A pilot project for training prisoners and prison staff in human rights norms was launched in 1998 by the Department of Correctional Services together with two nongovernmental organizations. In addition, that fall the government introduced important legislation designed to restructure the prison service.¹²⁴ Similar progress was made in 2000, when President Mbeki appointed Judge Johannes Fagan to head a judicial inspectorate to provide independent oversight of prison conditions in the country.¹²⁵

Perhaps the most notable implementation of the commission's recommendation was the passing into law of the Correctional Services Act 111

¹²¹ Human Rights Watch Annual Report, South Africa, 1995.

¹²² Human Rights Watch Annual Report, South Africa, 1996.

¹²³ Human Rights Watch Annual Report, South Africa, 1997.

¹²⁴ Human Rights Watch Annual Report, South Africa, 1999.

¹²⁵ Human Rights Watch Annual Report, South Africa, 2001.

of 1998. This comprehensive bill, which established the Judicial Inspectorate among other codes of conduct for prisons, addressed “the custody of all prisoners under conditions of human dignity.” The bill outlined codes of conduct for safe custody of prisoners, access to healthcare and services, and the training of prison officials in creating an environment that respects the human dignity of the imprisoned.¹²⁶ The sections of the bill began to be actively enforced in 2004. Though overcrowding continued in South African prisons into 2005, the passing of the Correctional Services Act 111 enabled noticeable progress to be made in the area of human rights of prisoners.¹²⁷

VII. CONCLUSION

This research project originally assumed Chile’s National Commission for Truth and Reconciliation was a categorically failed truth commission, while South Africa’s TRC was a model of success. In engaging in a four-stage assessment of each commission’s work, as well as examining whether key recommendations in the areas of reparations, the rule of law, and human rights were implemented in both countries, we were surprised to discover mixed results.

Indeed, Chile did face tough obstacles in its search for truth: the outgoing military regime still controlled most facets of the government after the transition; the commission did not possess the necessary legal powers to compel witnesses

¹²⁶ Correctional Services Act 111 of 1998.

¹²⁷ Human Rights Watch Annual Report, South Africa, 2006.

and perpetrators to testify; and cases of human rights violations did not move forward in the courts until almost a decade after the commission's work completed. In addition (and perhaps because of) these limitations, the commission did not have the courage to recommend the annulment of the 1978 Amnesty Law or to more boldly demand acknowledgement of human rights abuses from the military and secret police. However, in Chile, we found successes that need to be credited. For example, Chile's truth commission was the first to recommend and then successfully implement a follow-up body to continue investigations as well as deliver reparations to victims it established in its report. Furthermore, as one of the first major truth commissions in Latin America, the Chilean truth commission's final report was impressively comprehensive in the detail it afforded to each victim's story and in the depth it devoted to understanding the context of Pinochet's oppressive regime.

Likewise, in studying South Africa, our initial preconceptions about the commission were soon qualified by the evidence gathered in our research. Both in popular media and a substantial amount of scholarship on the subject, South Africa is portrayed as the model of success for truth commissions. This portrayal is not entirely false. The TRC was unprecedented on many levels. It was the first truth commission in the world with the power to grant amnesty to perpetrators for their full disclosure in the truth-seeking process, a radically new approach to post-conflict justice. Its introduction of public hearings in its investigations also allowed victims' stories to be shared with a large national

audience and attracted wide interest from the international community. In addition, the TRC was the largest, most funded, and longest operating truth commission, with a broad scope of violations as well as over thirty-four years of apartheid to investigate. However, the South African TRC was by no means perfect in either performing its duties or achieving its goals. It failed to investigate the basic discriminatory practices of apartheid that divided and oppressed black South Africans for almost a century. Furthermore, the conspicuous absence of white South Africans in the commission's search for truth undermined the TRC's grander goal of reconciliation. And the government's blatant disregard for the commission's recommendations to administer reparations to victims as well as the pardoning of its own speaks poorly for the TRC's power in South African politics and even worse for victims' needs.

Numerous questions remaining as a result of comparing Chile and South Africa can fuel future research. For example, what factors can help a truth commission more fully investigate its mandate? Decisions made in the formation stage are critical in determining the answer to this questions; for example, in Chile, legal powers of subpoena and search and seizure could only have been granted to the commission if it was vested with authority by congressional legislation. Furthermore, how can the existing political climate predict and affect the quality and breadth of the commission's search for truth? In South Africa, the TRC emerged in a period directly following political negotiations

between a number of parties on the political spectrum, and this most likely set the stage for the TRC's comprehensive investigations, which assigned blame on both the former state and opposition parties. Finally, how can a truth commission ensure that its recommendations are fully implemented after it completes its work? Chile was successful at creating a follow-up body, while a similar recommendation in South Africa was disregarded by the government.

In the end, neither Chile's National Commission for Truth and Reconciliation nor South Africa's Truth and Reconciliation Commission can be categorically defined as a "success" or a "failure." As a relatively recent phenomenon, truth commissions as transitional justice mechanisms are continually evolving, and the optimal and most effective way for them to perform in the context of political transitions is still being discovered. The strengths and weaknesses of both Chile and South Africa's experiences with truth commissions can guide and teach critical lessons to nations considering the truth-seeking process as an aid in their democratic transitions. It is with hope that comparative research of these country experiences highlights those conditions, factors, and decisions that do the most to further justice and reconciliation in the aftermath of abusive regimes.

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