

Activating archives for accountability

the TRC records and the duty to remember

By Catherine Kennedy

I *t is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future...¹*

Twenty years ago the Promotion of National Unity and Reconciliation Act was passed, setting in motion what was to become South Africa's most ambitious memory initiative, the Truth and Reconciliation Commission (TRC). Committed to the principles of transparency and public participation, the aim of the TRC was to begin the long, difficult journey towards a post-apartheid reconciliation by investigating the harsh realities of the country's past.

Though not without its critics, the South African TRC has been lauded internationally as an exemplary effort in striking the balance between acknowledging the past, pursuing justice and effecting reconciliation. Yet today South Africa is a country in the grips of apartheid fatigue, in danger of forgetting the work of the TRC. All too often, there are calls to stop unearthing the past, and look towards the future instead but the reality is that most South Africans have not even seen the findings of the Commission and little has been done to build on the ideals that underpinned the TRC's initial establishment. There remains a persistent lack of political will and resolve to follow up on the groundwork laid by the TRC, as articulated in their recommendations to Parliament,

contained with the TRC Final Report².

Only a selection of the TRC recommendations have been engaged with – often controversially so. In recent years, the presidential pardoning of those perpetrators who were either denied amnesty by the TRC or chose to eschew the amnesty process has made a mockery of the TRC's promise of amnesty only in exchange for full and frank disclosure from applicants³. The process for reparations and redress, recommended by the TRC, is also stalled⁴ – the persistent delays in the payment of reparations promised to victims of apartheid-era gross human rights violations means that many are now living in worse conditions than they were under apartheid.

Yet it is becoming clear that many of the fault lines disrupting South Africa today can be traced back to the injustices of the past. Some of the gravest ongoing challenges to the process of reconciliation are the structural inequalities inherited from the past that continue to compound to the ever widening gap between the wealthy and the poor. And there is compelling evidence that large scale corruption took place under apartheid, corruption that not only robbed the country of money that could have made an enormous difference to effecting reparations and redress, but arguably continues to shape and enable cultures of corruption in South Africa today⁵.

At the heart of the TRC was the belief that uncovering as much information about apartheid-era crimes was vital if South Africa was ever to move beyond its dark past and build a democracy built on openness and transparency, rather than secrets and impunity. This idea is not unique

1. The Promotion of National Unity and Reconciliation, Act 34 of 1995. Available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf>
2. In October 1998, the TRC presented the first 5 volumes of the TRC Final report to President Mandela. In 2003, a further 2 volumes were handed to President Mbeki on 21 March 2003. The report can be accessed at <http://sabctr.saha.org.za/reports.htm>
3. For recent media coverage relating to the flawed presidential pardons process, see, for example: <http://mg.co.za/article/2015-03-05-trc-plaint-of-political-prisoners-and-victims-unfinished-business>; <http://pressoffice.mg.co.za/khulumanisupportgroup/PressRelease.php?StoryID=260417>, <http://www.iol.co.za/sundayindependent/political-pardons-would-damage-trc-legacy-1.1832027#.VdMOgPmqpBc>
4. For recent media coverage relating to the flawed presidential pardons process, see, for example: <http://mg.co.za/article/2015-03-05-trc-plaint-of-political-prisoners-and-victims-unfinished-business>; <http://pressoffice.mg.co.za/khulumanisupportgroup/PressRelease.php?StoryID=260417>, <http://www.iol.co.za/sundayindependent/political-pardons-would-damage-trc-legacy-1.1832027#.VdMOgPmqpBc>
5. For recent media coverage relating to the reparations process, see, for example: http://www.dailymaverick.co.za/article/2014-10-14-the-presidents-fund-where-is-the-money-for-apartheid-victims-actually-going/#.VdSU6_mqpBc; <http://groundup.org.za/content/over-r1-billion-fund-yet-apartheid-victims-still-await-compensation>;



Soweto by Jodi Bieber

to South Africa having emerged from early transitional justice initiatives in Central and South America and is now expressed in international law as the right to truth – resolution 2005/66 of the United Nations Commission on Human Rights (UNCHR) “recognises the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights.”⁶ As with all rights, there is an implicit notion of responsibility at the heart of the right to truth – what Louis Joinet, the former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in a 1997 report to the UNCHR, called the “duty to remember” – in what would later become known as the Joinet Principles, the right to truth is framed not simply as the right of individual victims or close relatives to know what happened, but more broadly as a “collective right, drawing upon history to prevent violations from recurring in the future... A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be preserved by appropriate measures in fulfilment of the State’s duty to remember.”⁷

So South Africans have some obligation to acknowledge the past, to better understand and bear witness to the violations, the indignity, the exploitation and disempowerment visited on so many black South Africans under apartheid. And the state has the duty to facilitate this remembering in order to ensure that, to borrow the oft-repeated rallying challenge to impunity, *Nunca Más*⁸, never again shall anything resembling the crime against humanity that was the apartheid system be allowed to recur in South Africa.

Yet to what extent is history repeating itself already? Similarities between the stories told to the TRC and the

Farlam Commission are worryingly apparent – as Dr Fanie du Toit, director of the Institution of Justice and Reconciliation observed in 2013: “The shock of Marikana is that we did go there again... It is clear that there was a military-style operation with overwhelming force where live ammunition was shot at South African citizens and killed them en masse”⁹.

And to what extent is the South African state meeting their obligations to preserve and make accessible those records collected by the TRC in the process of “establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed”¹⁰ during apartheid? Access to the TRC archive remains vital in order to address the unfinished business of the TRC: from the provision of reparations to victims of gross human rights violations, through the prosecution of perpetrators who ignored the TRC’s amnesty process, to ongoing truth recovery efforts to understand more about hidden, unacknowledged aspects of our past.

Tracing the TRC archive

One of the recommendations of the TRC was to protect and make readily accessible to all South Africans the “national asset” that is the TRC archive¹¹. In line with this recommendation, the South African History Archive (SAHA), an independent activist archive based at Constitution Hill in Johannesburg, has demonstrated a longstanding interest in making the work and records of, and surrounding, the South African TRC more widely available, often in the face of little state engagement in continuing the reconciliation agenda begun by the TRC.

One example of the work SAHA has undertaken in making the TRC archive, in its broadest sense, more

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6. See Van Vuuren, Hennie. “Apartheid grand corruption-assessing the scale of crimes of profit in South Africa from 1976 to 1994.” Institute for Security Studies 2 (2006). Available at: <http://opensecrets.org.za/wp/wp-content/uploads/Apartheid-Grand-Corruption-2006.pdf>, as well as the ongoing research project, Open Secrets, “a research project focusing on the legacy of grand corruption, power and profit in South Africa, from the apartheid era to present day (1980s – 2015). More information available at <http://opensecrets.org.za/>
 7. Available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_11.pdf
 8. These principles defined four pillars of transitional justice: the rights to know, to justice and to reparation and guarantees of non-recurrence. The right to know is framed not simply as the right of individual victims or close relatives to know what happened, but more broadly as a “collective right (E/CN.4/Sub.2/1997/20/Rev.1) The report is available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G97/129/12/PDF/G9712912.pdf?OpenElement>. These principles were later updated by Diane Orentlicher in 2004, and become known as the Joinet-Orentlicher Principles, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>
 9. *Nunca Más* (Never Again) was the title of the report of Argentina’s National Commission on the Disappearance of Persons, the first ever truth commission. English version of the report is available at http://www.desaparecidos.org/nuncamas/web/english/library/neveragain/neveragain_001.htm
 10. One of the objectives of the TRC, as described in Section 3 of the Promotion of National Unity and Reconciliation, Act 34 of 1995. Available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf>
 11. “One of the key aspects of the Commission’s work has been its commitment to transparency and public scrutiny. Its records, which are in the form of documents, video and audio tapes, pictures and photographs as well as a computerised database, are a national asset which must be both protected and made accessible.” TRC Final Report, Volume 5, Chapter 8. Available at <http://sabctr.c.saha.org.za/reports/volume5/chapter8/subsection31.htm>

readily accessible was the development of the SAHA / SABC Truth Commission Special Report multimedia player and website¹², an interactive tool built around the 87-part Truth Commission Special Report television series.

Originally broadcast weekly by the South African Broadcasting Corporation (SABC) from 1996 to 1998, these audiovisual records provide a powerful window into the conflicts of the past, particularly those multiple public hearings that had been intended as a mechanism for promoting national healing, the creation of new public histories, and the guarding against amnesia. After the series became largely unavailable after its initial broadcast so in 2007, SAHA began the slow process of locating, digitising, cataloguing, transcribing and indexing this endangered archive.

Episodes from the series were linked to relevant sections of the official TRC Final Report, transcripts from TRC hearings, amnesty decisions, submissions made to the TRC and other related resources, to form a seamless, searchable multimedia player, launched in 2010, intended to support much needed ongoing transitional justice and reconciliation work in South Africa. Based on the success of this multimedia player, SAHA and the SABC then collaborated to put the entire product online in order to make the work of the TRC more widely accessible, to enable users to revisit the work of the TRC, to introduce a new generation of South Africans to this vital period in the making of our democracy, and to prompt consideration of the extent to which conflicts of the past continue to shape the country's ongoing challenges for reconciliation.

This site is now being expanded to include transcripts of the controversial, previously secret TRC 29 "in-camera" enquiries, recently released to SAHA in terms of the Promotion of Access to Information Act (PAIA) after a decade long battle with the Department of Justice¹³, a battle that is worryingly emblematic of the state's failure to fulfil their "duty to remember." In SAHA's experience of having submitted close to 100 PAIA requests for access to TRC records, the state has repeatedly attempted to block access to the TRC archives, which, all too often, has resulted in unnecessarily lengthy, hostile and litigious engagements. SAHA

has secured several favourable settlements, forcing government departments to hand over TRC records they had previously refused to disclose and, in some instances, had denied even existed. However, because of these last minute out-of-court settlements, no legal precedents have been set around access to the TRC archive, enabling government departments to continue using such blocking tactics. Furthermore, going to court is expensive and time-consuming and should not be the primary mechanism to gain access to TRC records.

It is ironic to consider that, as stated in its preamble, PAIA had, in part, been enacted to counteract "the secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations"¹⁴ in the apartheid era. The lack of openness by the state, most notably by the Department of Justice, as it relates to records of apartheid violations the TRC was tasked with uncovering, points to an unacceptable conflation of pre- and post-apartheid realities in the treatment of state records and arguably amounts to a continuation of the old frame, contrary to emerging international principles that call for records relating to violations of international human rights to be treated as having a higher presumption of overriding public interest.¹⁵

In withholding access to the records of the TRC, is the state essentially undermining one of South Africa's greatest right to truth initiative with a will to forget? And in failing to hold the state accountable for the failure to continue the work started by the TRC, are South Africans tacitly condoning and enabling a return to secrecy and impunity? Unless South Africans are willing to become better informed about the secret machinations that enabled apartheid oppression and continue to shape the secret practice of power and corruption today, there is little hope for the guarantee of non-recurrence of human rights violations, of progressing towards the new South Africa imagined by Mandela in a statement made at his inauguration in May 1994:

*Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another and suffer the indignity of being the skunk of the world.*¹⁶



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12. See <http://sabctrc.saha.org.za>

13. For more information on the TRC section 29 enquiries and the records released to SAHA, please see http://www.saha.org.za/news/2015/April/saha_releases_the_list_of_section_29_hearings_obtained_under_paia.htm

14. See <http://www.justice.gov.za/legislation/acts/2000-002.pdf>

15. See, for example, access to information laws in other transitional justice contexts such as Guatemala, Uruguay and Mexico, as well as Principle 10 of the Global Principles on National Security and the Right to Information (Tshwane Principles), available at <https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>

16. See <http://www.anc.org.za/show.php?id=3132>