

Workshop: Truth, Reconciliation and Transparency in South Africa and Kenya

Lessons learned



Johannesburg, 4 April 2009

Goethe-Institut, Nelson Mandela Foundation and Rosa Luxemburg Foundation



About the organisations

The Goethe-Institut



The Goethe-Institut is a cultural organisation that promotes the study of German language abroad and encourages international cultural exchange. It also provides information on Germany's culture, society and politics.

The Goethe-Institut South Africa was key in providing a space for all the interested parties to engage with one another but also brought a German perspective to the workshop proceedings and shared that country's experience of reconciliation. The institute also brought its experience and knowledge to the issue of archiving.

The Nelson Mandela Foundation



The Nelson Mandela Foundation, through the Centre of Memory and Dialogue, contributes to the making of a just society by promoting the values, vision and work of its Founder. The Memory Programme primarily works to ensure that Mr Mandela's legacy of justice is available for future generations to learn from.

The Foundation was fundamental in helping to gather organisations and institutions at the workshop to ensure that the Kenyan TJRC could benefit from the South African experience.

The Rosa Luxemburg Foundation



The Rosa Luxemburg Foundation dedicates itself to the work of political education and encouraging the democratic socialist ideals of Rosa Luxemburg, a founder of the German Communist Party and a representative of the democratic socialist movement in Europe. Following on from this mandate the Foundation is in a unique position to help link the various institutions and organisations involved in the process to ensure that Kenya's TJRC learns from the South African TRC experience.

Moderation was provided by Shadrack Katuu, previously employed by the Nelson Mandela Foundation.

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Introduction

The Goethe-Institut, in association with the Nelson Mandela Foundation and the Rosa Luxemburg Foundation, initiated a workshop in Johannesburg on 4 April 2009 for stakeholders in the Kenyan Truth, Justice and Reconciliation Commission (TJRC) and archivists and historians with experience of South Africa's Truth and Reconciliation Commission (TRC).

The workshop was a space for the organisations and institutions involved in both the South African TRC and the Kenyan TJRC to discuss key topics that are pertinent to the success of a truth commission, especially in the area of access to information and record-keeping.

The workshop gave the institutions the opportunity to engage in debate and dialogue as well as acting as a forum for the South

Africans to give recommendations and advice to the Kenyan institutions about to embark on the complex task of conducting a successful truth commission.

Ulla Wester, Head of Library & Information Services Sub-Saharan Africa, Goethe-Institut, welcomed the participants to the workshop. She said access to the Truth & Reconciliation Commission documents in South Africa was still far from optimum and that the process of Kenya's Truth, Justice & Reconciliation Commission could only be successful if the record of proceedings was made accessible to the public.

Reinforcing the connection between accessible information and dealing with a country's divided past, **Christine Gohsmann, Deputy Director of Archive and Library at the Rosa Luxemburg Foundation in Berlin**, pointed out that Germany got its equivalent of South Africa's Promotion of Access to Information Act (PAIA) only in 2006. This can only mean a long process for everyone.



Session 1a: Recent Developments in Kenya – Overview

Gichira Kibara, Secretary for Justice and Constitutional Affairs in Kenya, sketched the background of the TJRC process.

“The 2007 election resulted in a dispute between the two leading candidates, the current president and prime minister, which led to violence in five of the eight provinces of Kenya. This affected the region too. More than 1 000 people died, 300 000 to 600 000 were displaced and property was destroyed. But violence took place after the 1992 and 1997 elections too. The violence was not worse this time. The repeated violence informs why Kenya needs a TJRC.”

“It is important to understand the nature of the conflict,” he said. “In 1992 and 1997 it was mostly about disputes over land ownership. The settlement of various areas after independence was contested. Violence always takes a clear ethnic line in Kenya and it is instigated by the political elite. It is only when political parties contest elections that there is violence.”

“In the latest election, the nation was divided into two and the election result was close. It was clear that this would be the case even before the votes were counted. Declaring anyone a winner would not resolve the problem. It was not just an issue of having a few more votes – it was about one community winning over another. We were convinced that nothing short of a grand coalition would resolve the crisis. No winner could sustain national unity.”

Kibara said the TJRC being created this time was different from the one envisaged in 2003, which did

not come to fruition. At that time, the idea was to reconcile the state and the citizen, after years of human rights abuses. “This TJRC is now part of the mediation process to reach political settlement, a process that includes judicial and police reforms.”

Kibara outlined some of the challenges facing the TJRC: expectations of what it could achieve, amnesty, compensation, resources, the changing legal framework, and timing.

“Some people think that the crisis is over and that outsiders should not interfere or that we should not have the TJRC now. They want to put it off. But 2012 will be another highly contested election, so we can’t defer the TJRC and we have to work with what we’ve got.”



Session 1b: The TRC Process in South Africa – Overview

Piers Pigou, Director of the South African History Archive (SAHA), outlined the mandate and composition of South Africa’s TRC and how much information it had generated. It had three committees: the human rights, amnesty and reparations committees. The process generated 22 000 statements and 2 000 people testified in victim hearings.

There were also more than 20 thematic hearings (on the role of business, the media, etc) and hearings around the state security council, the armed forces and political parties.

The amnesty committee received 7 000 applications, of which 5 500 were dismissed before the 1 500 public hearings. The process took close to six years – it was originally expected to take two.

All these processes used and generated documents. A national investigative unit did in-depth investigations and regional units mostly carried out the corroboration process.

“In South Africa,” said Pigou, “there was not much debate about reparation before the TRC. Many victims just wanted to know *why* things had happened. The corroboration process verified what had happened but did not explain why. This was a shortcoming.”

“Investigations into amnesty applications also didn’t always look into the broader context; and the quality of the investigation depended on that of legal representation.”

Disclosures made in amnesty applications were not always pursued. “Politically, TRCs are often closed down just when they are starting to get somewhere,” said Pigou.

He added that most South Africans had never seen the final TRC report.





Session 1: Discussion

In the discussion that followed these presentations, the first point was that the TJRC Act was not academic but a matter of bargaining and trade-offs. However, it needed to somehow establish a credible investigation arm that could avoid legal challenges.

The Kenyans were advised to establish a set of issues to investigate and focus on a few “window cases” in detail. Investigations would require considerable resources and skills.

It was suggested that the limited time available meant that Kenya would have to compromise on the scope of the commission.

However, some felt that it was important to find historical records that could settle claims about community matters like land occupation. This would involve primary research.

It was agreed that the TJRC needed to prepare citizens without delay, using the media to explain the process and put it in context. The help of civil society would be needed in this.

The importance of communicating the context of the TJRC to communities and building media capacity was highlighted. It was mentioned that in other countries, such as East Timor, special efforts were made to make the hearings available to communities via radio and video. Also, in South Africa, the TRC engaged media houses at the outset so that they could build the capacity of journalists and assign resources to covering the TRC.

any evidence that it deemed necessary for the discharge of its functions. However, this commission was never established.

Eventually, after another violent election, the Kenya National Dialogue and Reconciliation (KNDR) Committee was formed and negotiations started on 29 January 2008. It was agreed to establish three important commissions:

- the Independent Review Commission on the General Elections 2007 (IREC),
- the Commission of Inquiry into Post-Election Violence (CIPEV), and
- the Truth, Justice and Reconciliation Commission (TJRC).

Specific mention of the role of the National Archives was made for the first time and was made a precondition with a view to archiving and safeguarding the memory of the dialogue and commissions to be established. The director of the archives was appointed as the liaison officer on archival-related matters of the KNDR.

M’reria said the “National Archives are the focal point for national memory and we need to entrench best practice for record-keeping”.

CIPEV recommended setting up a Special Tribunal to seek accountability from those bearing the greatest responsibility for crimes against humanity, but Parliament rejected this. “In the absence of a Special Tribunal to investigate and prosecute those responsible for the post-election violence, efforts to deal with a difficult history, the social conflicts it has raised and the entrenched culture of impunity must begin elsewhere, that is, with the TJRC and the National Ethnic and Race Relations Commission,” said M’reria.

Verne Harris, Head of the Memory Programme at the Nelson Mandela Foundation, outlined the South African TRC documentation process. He began with a controversial statement: “You [Kenya] need to accept that you will fail as we did in South Africa.”

He explained that the Kenyans’ mandate was too wide. On South Africa’s failure, he said: “We tried to establish a platform for continuing work and to create cultures to use that platform. We did establish the platform but we failed to create the cultures. When you start a process and don’t finish it, the damage is profound. The moral underpinning of the process has been completely unravelled.”

He encouraged the Kenyans to use an archiving system from the beginning of the commission process to prevent the loss or destruction of the public records and also to maintain an integrated (paper-based and electronic) filing system for ease of access to the records at a later date.

Harris went on to argue the case for a large budget to be allocated to record-keeping and archives. He said in the South African experience the TRC “should have deployed more resources than it did”.

Session 2: Documentation and Archiving

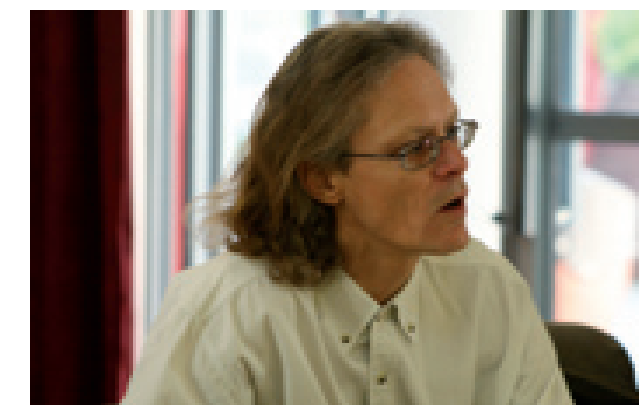


John M’reria, Director of the National Archives of Kenya, briefly outlined for the participants the history and mandate of the National Archives.

In April 2003, the Minister for Justice and Constitutional Affairs appointed a task force on the establishment of a TJRC. According to its report, over 90 percent of the Kenyans who submitted their views wanted the government to establish an effective truth commission which would:

- uncover the truth about the past atrocities,
- name perpetrators,
- provide redress for victims, and
- promote national healing and reconciliation.

The task force recommended that the TJRC should have access to all government records, as well as





Session 3: Right of Access to Information

According to Harris, numerous records were lost when the commission wound down in 1998.

“That was when we should have deployed far more resources, because a lot of material got lost right there when the staff were closing offices and leaving. In many cases, individuals took records with them, especially people who had brought records in. Some people didn’t trust the state to look after them or to provide public access to them.”

Another suggestion he had for the TJRC process was to create a modern electronic archive. “Paper-based records are important but key decision-making processes are very often documented only electronically. In South Africa, the tapes were deposited with the Department of Justice, but if they are not audited and preserved, and migrated to new technology, that record will be lost.”

Eventually the TRC archive went into the National Archives, but the Department of Justice still controls access to the records. “The TRC archive should be in centres of memory all over South Africa, but it is still buried,” said Harris.

He concluded by saying “the continuing imperative is to secure the record and ensure that reasonable public access is effected.”

Session 2: Discussion

One of the issues that came up was the link between secrecy and security, several people making the point that secrecy tends to undermine security rather than supporting it. In South Africa, remarkably, TRC disclosures had not generated more violence.

Harris asked what society hoped to gain from remembering the past. He pointed to the fact that

it does not always help people to learn or to heal. The real reason we remember the past, he suggested, is that we are “looking for stories and voices that inspire us to build a just society”.

The relationship between national archives, government and civil society was mentioned; Kenya’s National Archives would need to operate within government structures and be trusted by all sides. The TJRC’s credibility also depended on Kenyans seeing the process as being run by and for themselves, not by and for foreigners. This in turn depended on Kenyans having information about the TJRC.

It would also be important to clarify the process of archiving and declassifying information without delay, and to record decisions taken in releasing information.

As for judging the success of the TJRC, one view was that this could only be judged in terms of nation-building, which required a long time horizon.



Sello Hatang, Manager of Information and Communication Systems at the Nelson Mandela Foundation, spoke in the final session of the workshop about the right of access to information. The core of his argument was that secrecy and security should not be linked.

He said: “Security is used as an excuse for state agencies not doing their job.” This job, he said, was to declassify records systematically. “Mixing intelligence services with archival services is an unholy union,” he said.

An example was that Nelson Mandela had asked for his prison records so he could see how the state had managed his imprisonment, including control of his contact with the “outside” and surveillance of his every move.

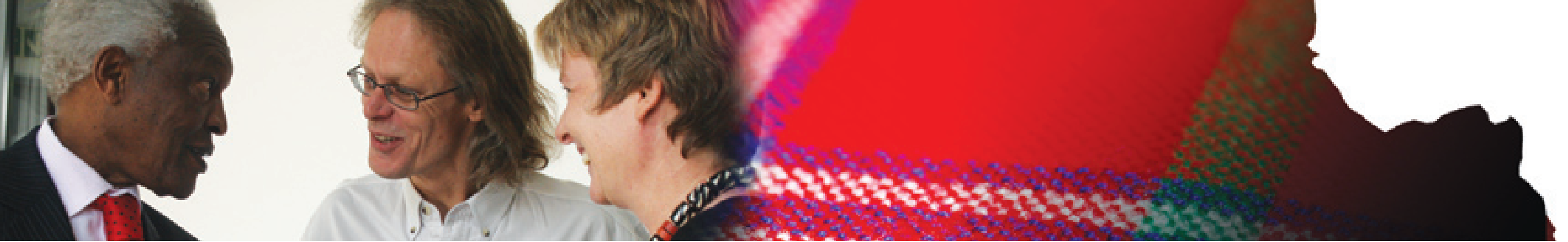
According to the Promotion of Access to Information Act, the holder of the information – not the creator – must be the one that makes the decision about releasing it. This was given as the reason his request was denied. “The

Mandela records have been shut down and Madiba will never know. What harm could it do to the security of the state?” asked Hatang.

He went on to outline five points that he thought the TJRC should consider:

1. Founding principles of openness and transparency – the spirit of the law – should permeate from the preamble throughout the legislation.
2. Accountability vs impunity – The TJRC should avoid “plastering over the cracks” and instead should foster a culture of accountability in government.
3. Timing for setting up the documentation process.
4. A clear action plan for what will happen to the records after the commission is complete. “There is no better time than now to put regulation of access into the Act.”
5. The use of the media is critical to encourage public support for the process.





Session 3: Discussion

The question was raised of privacy being a factor to consider when making sensitive archives available to the public. It was noted that this concept could easily be used as a false excuse by record-keepers. Again, the point was made that there should be a record of the procedures followed when releasing information.

In South Africa, where third-party personal information is concerned, the owner of the information must inform the third party of the intention to make the records public. This can be onerous and often it is easier simply to refuse access. Government has 30 days to respond to requests for information in terms of PAIA, but often takes much longer. Although the legislation is on the side of access, the degree of openness that was expected after apartheid has not been realised.

The Kenyans agreed that in their country too there was a culture of guarding information, for example in the civil service, and the public – including the media – tended not to use their existing rights of access to information.

The discussion went into the responsibility of civil society to demand information, and how this could be done without infringing on the state's legal rights. Care also had to be taken because of the existence of disinformation.

Having a dedicated information commissioner on the TJRC could help avoid delays, costs and legal problems, it was suggested.

One view was that the judiciary was itself a potential obstacle to the TJRC, as it had no history of supporting human rights and was itself a target for reform.

Summary of Workshop Discussions

Throughout the workshop it became clear that there were distinct differences between what had happened in South Africa and what was happening in Kenya.

First, South Africa's commission had already taken place, having recently celebrated a decade since its report was handed over to the then head of state, President Mandela. In contrast, Kenya's enabling legislation had only recently received presidential

assent and the ongoing process was of selecting the commission's key staff.

The second difference relates to why the commissions were set up. While the South African commission looked at the atrocities committed by the apartheid system against individuals, the commission in Kenya would have an expanded mandate, not only looking at state-sponsored atrocities against individuals, but also state-sponsored atrocities against communities such as land dispossession as well as inter-community crimes.

Unlike South Africa, Kenya was setting up the truth commission at a time when three other processes were taking place concurrently. First was the process of the disbandment and setting up of a new electoral commission. Second was the setting up of a special tribunal to prosecute perpetrators of post-election violence and the last was a constitutional review process. This meant that the energies of various sectors of Kenyan society were divided; the political class was carefully observing the special tribunal process, the legislature was heavily engaged in the new electoral commission and the judiciary was occupied in the constitutional review processes. As a consequence, it was feared that the truth commission might not get the nation's full attention and support.

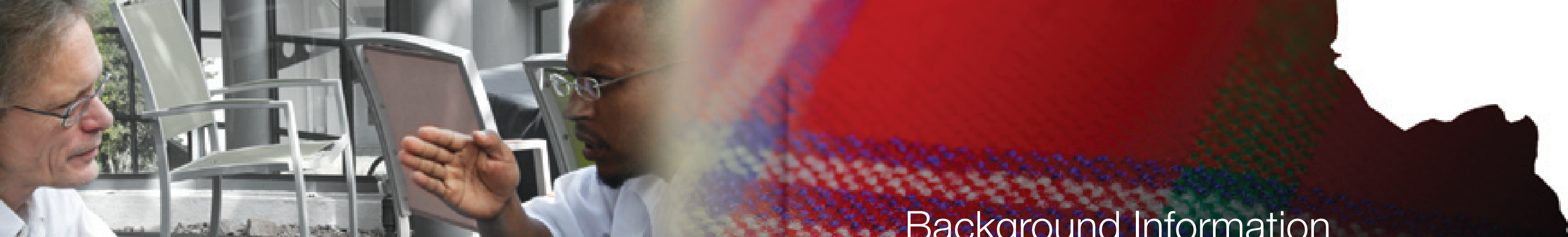
Lastly, other differences related to how the South African commission had been set up and functioned. The TRC had to start working immediately after the commissioners were appointed and, within its Act, the structure of three committees had already been formalised, including a committee that had the power to decide on amnesty applications. In contrast, Kenya's commission would begin work only three months after the appointment of the commissioners, giving them time to prepare. One of the reasons for this delay was that the Act establishing the commission did not prescribe any structures, nor did it give the commission the power to grant any amnesty, restricting it to making recommendations.

During the course of the discussions, a complex tapestry of themes emerged that could be placed into three main categories: those

relating to the setting up of a commission, those relating to the running of a commission and those relating to activities after the life of the commission.

Before the setting up of a commission in both Kenya and South Africa, there was a feeling that there was not enough consultation – in the case of Kenya, with regard to the drafting of the enabling legislation, and in the case of South Africa with the choosing of the commissioners. Additionally the issue of lack of adequate resources was a grave concern. In the case of South Africa, this inadequacy eventually led to overstretched human capacity, particularly in investigation processes. In the case of Kenya, the budget for setting up the commission was much less than desired as the country faced the challenges of an overburdened budget (with a bloated cabinet), empty coffers (as had been reported in the media) and widespread famine, coupled with the ongoing global financial crisis. Lastly, both truth commissions shared the pressure of having to deal with unrealistic public expectations.





Background Information

The Kenya Truth, Justice and Reconciliation Commission

Kenya could probably draw lessons from the work of the truth commission in East Timor, which engaged actively with community and public radio and television stations and used sports and cultural icons to educate the public on realistic goals for the commission.

During the running of the South African commission, one key function that was to have unimagined repercussions even after its work was complete was that of record-keeping. Even though a policy and procedures were formulated and qualified people were given the responsibility of leading the implementation of filing systems for both paper and electronic records, during the course of the commission's work, compliance with the policy and procedures was uneven. However, the fact that there was some compliance was better than if there had been none at all. Additionally, South Africa's commission realised very quickly that they had under-estimated the investigative capacity required, particularly in the work of the amnesty and human rights violations committees. With the all-encompassing ambitions of Kenya's legislation, there was concern that the commission's investigative capacity would be under severe strain from the outset.

At the end of the commission's work, two issues regarding the records it generated were of concern. In South Africa's case, because of the lack of clarity with regard to handover processes, a significant percentage of the staff left with the records in their possession at the end of their tenure. Although this process was being reversed after the fact, with projects such as those being carried out by Wits University and the South African History Archive developing a guide to TRC records in private hands, it was regrettable that it had to happen after the damage had been done. It was hoped that this situation could be avoided in the Kenyan scenario. Secondly, access to commission records in the

custody of the state had been problematic. Even though South Africa boasted a progressive freedom of information regime, there were many contentious issues, such as how to handle copyright of state information, how to deal with privacy and confidentiality concerns with regard to third party information in the records, as well as dealing with records that shared custodial responsibilities (such as between archival institutions and other arms of the state, among them security agencies and government ministries). The issue of shared custodial responsibility was particularly poignant in the example of the "34 boxes" case, where records were initially barred from public access because of security breach concerns but later were found to be largely harmless after a procedural review of the decisions. This was considered a concern for Kenya, where there was a misinformed perception of secrecy being government policy but the reality was very different.



The formation of the TJRC by an Act of Parliament in 2009 was the result of a process that began in 2003, when Kenya appointed a task force to find out whether such a commission was necessary. The task force, chaired by Human Rights Commission chairman Professor Makau Mutua, undertook research, held public hearings and convened an international conference, among other fact-finding activities.

The report of the task force said: "[Kenyan] have overwhelmingly said that the truth about the past must be known, that perpetrators must be identified and punished, that victims must be accorded justice, and that reconciliation is only possible after the truth is known and justice is done."

"Kenyan want an effective and credible truth commission, an institution that will not engage in a witch-hunt or a whitewash." The report also recommended that the TJRC should have access to whatever records it needed.

However, the TJRC was not established by 2004 as recommended.

The 2007 elections revived old divisions in Kenyan society. In January 2008, Kofi Annan, as leader of the Panel of Eminent African Personalities, brought the two political sides (Party of National Unity and Orange Democratic Movement) together and these sides provided panel members to form the Kenya National Dialogue and Reconciliation Committee.

This body proposed various legal and political measures, including the formation of the TJRC.

TJRC Bill

In March 2008, the ruling coalition agreed on the outline of the TJRC:

- It would have seven members, chosen through consultation. (This was amended to nine commissioners, six chosen by a selection panel and three by the Panel of Eminent African Personalities.)
- It would inquire into human rights violations committed by the state, groups or individuals between 12 December 1963 and 28 February 2008.
- No blanket amnesty would be provided.
- The TJRC would submit its report within two years.
- The Bill gives the TJRC broad powers and imposes a duty on others to co-operate. It also guarantees that its recommendations will be implemented. The TJRC Bill was passed by Parliament and signed by the President on 29 November 2008.





South Africa's Truth and Reconciliation Commission

Responses to Bill

There was public concern about aspects of the TJRC proposals, including the extent of consultation, and Amnesty International and the regional Amani Forum contributed to the discussion. Among the criticisms:

- The TJRC can recommend amnesty for gross human rights violations. This is against international law.
- There are obstacles to prosecution of perpetrators.
- The procedure of nominating the commissioners does not guarantee their impartiality, independence or competence.
- The Bill does not provide for the long-term protection of victims and witnesses.
- The Commission cannot recommend a broad range of reparations.
- The Bill concentrates on investigation and prosecution rather than reconciliation.
- The TJRC's mandate should not be too wide in relation to the time and resources available.

Recent developments

Nominees for the TJRC were announced in April 2009. The panel that selected them was chaired by Dr David Ichangi of the Association of Professional Societies of East Africa. Parliament will choose six of the nominees and the Panel of Eminent African Personalities will choose three foreign commissioners.

In March 2009, John M'reria, Director of the National Archives, was appointed the Liaison Officer of the Panel of Eminent African Personalities on the management of the TJRC records.

This chapter is based on material compiled by Shadrack Katuu.



After South Africa's first democratic elections in 1994, a government of national unity was established. The TRC Bill was signed into law in July 1995 after a period of public comment.

The TRC had a narrow mandate, to investigate gross violations of human rights committed between 1960 and 1993, report on the fate of victims, grant amnesty to certain perpetrators, take measures to restore the dignity of victims, report on violations, and recommend what could be done to prevent future violations. It was given two years to do this, which would have to include the time taken to set up the institution.

The TRC had three committees:

- Human Rights Violations – to conduct public hearings and investigations
- Amnesty – to grant amnesty for political acts
- Reparation and Rehabilitation – to recommend how government could compensate victims

The Human Rights Violations Committee took more than 22 000 statements on more than 40 000 violations, and 2 000 deponents testified at over 60 public hearings. Civil society campaigned successfully against holding the amnesty hearings in camera. Amnesty was intended for acts associated with a political objective, and where the applicants made full disclosure. More than 7 000 applications were received.

The TRC's final report was submitted in October 1998. Almost all the political groups took issue with the TRC's findings. The final report and the TRC archives remain inaccessible to the public, limiting its future impact.

The TRC archive

The Promotion of Access to Information Act (PAIA), which came into effect in March 2001, allows anyone to obtain records from government bodies without giving a reason. From 2001 to 2004, TRC material was accessible from the National Archives only through individual PAIA requests. From 2004, records already in the public domain became accessible without a formal request. When the records are 20 years old, they will be available without restriction.

There are gaps in the record: electronic records lost for technical reasons; records removed by staff as the TRC wound down; and documents returned to state bodies. Some records were destroyed by government bodies and some were not but have not been secured.

The TRC report recommended that the National Archives should receive all the Commission's records and make them accessible to the public, with adequate resources from government. The National Archives took custody in 2001/2002. As assets of the Department of Justice, however, the records are subject to the department's control. Also, the archives did not receive the extra resources it needed to process and analyse TRC material or to give effect to legislation aimed at auditing government record-keeping in future.

This chapter is based on material compiled by Shadrack Katuu, which draws on an unpublished document by Piers Pigou.

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