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Final

report likely to have profound effect on us all

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*With the arguable exception of the writing of the new democratic constitution, no document in recent South African history has attracted as much critical attention and speculation as the final report of the Truth and Reconciliation Commission. The report, due to be handed to President Mandela by TRC chairman Archbishop Desmond Tutu in Pretoria tomorrow, is likely to have a profound effect on the lives of all South Africans. Senior writers **ROBERT BRAND** and **JOHN YELD** consider its expected findings and recommendations.*

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THE TRC's final report has been one of the most keenly anticipated documents in South Africa's recent history. The reasons for such anticipation are sharply contradictory.

One is a genuine desire on the part of deeply committed South Africans to see what recommendations the TRC has come up with, to promote much-needed reconciliation in a society still sharply divided on racial and socio-economic lines.

Another is the more cynical hope that, in the run-up to the 1999 elections, the final report will provide a useful "stick" with which to beat (metaphorically speaking) political opponents named by the TRC as perpetrators of gross human rights violations.

Yet another motivation is an unabashed desire by some opponents of the TRC to see in its final report confirmation of their deep-rooted prejudices that the truth body has been a hopelessly flawed mechanism, developed and manipulated by the former liberation movements to deal with South Africa's political "old guard" from the apartheid era.

Those who have been anticipating a register in which perpetrators of gross human rights abuses in South Africa between March 1 1960 and May 20 1994 are named, their ugly



deeds catalogued and appropriate action against them recommended, are only partly rewarded by the TRC's final report.

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The report does name perpetrators on the basis of findings of "reasonable probability" that they were involved in gross human rights abuses, either by commission or omission, during the period under review by the TRC.

The test used by the commission to name perpetrators was similar to that applied in civil legal proceedings, as opposed to the much more stringent test of "proof beyond reasonable doubt" required in criminal cases.

But the final report contains significantly fewer names of perpetrators than was anticipated by the TRC itself and by observers.

The reason for this is an eloquent

appeal judgment delivered by South Africa's then Chief Justice, Judge Michael Corbett, about two years ago. A high court application was brought by two retired policemen for an interdict against the TRC before its first scheduled public hearing in East London in April 1996, preventing it from hearing any testimony against them relating to their alleged involvement in the poisoning of Port Elizabeth student leader Siphiso Mtshkulu until they had been given adequate notice and access to all relevant documentation.

A temporary interdict was granted, and the issue then went all the way to the appeal court. In his definitive judgment, Judge Corbett ruled that people about to be named publicly to their detriment by the TRC did indeed have the right of prior, timely notification of the allegations against them, and also had to be given reasonable opportunity to respond to, or make representations about, such allegations before these were made public by the TRC.

It is a ruling the TRC has taken very seriously, but the overall effect has been to emasculate the final report.

Acting in terms of the Corbett judgment, the TRC sent out more than 20 "section 30" notices to individuals and political organisations during the two months or so before



the publication of the final report, informing them that it was contemplating making detrimental findings against them in the report and asking for their responses.

Such notices were sent to leaders across the political spectrum, and included some of the top political names in the country: Ronnie Kasrils, former commander of the African National Congress's armed wing Umkhonto weSizwe and cur-

rently Deputy Minister of Defence; Winnie Madikizela-Mandela, former deputy cabinet minister, and still an ANC MP and a member of the ANC's national executive committee; PW Botha, former state president and National Party leader; FW de Klerk, also a former state president and NP leader; Pik Botha, veteran foreign minister in the apartheid-era government; Mangosuthu Buthelezi, Inkatha Freedom Party leader and Home Affairs Minister; Magnus Malan, former SA Defence

Force chief and later defence minister in the apartheid-era government; Tienie Groenewald, former SADF general and Freedom Front leader; Constand Viljoen, former head of the SADF and a Freedom Front leader; Craig Williamson, spy and intelligence operative for the apartheid-era government; Letlapa Mphahlele, director of operations of the Azanian People's Liberation Army (Apla), the armed wing of the Pan Africanist Congress; and Eugene Terre-Blanche, leader of the ultra right-wing Afrikaner Weer-

standsbeweging (AWB).

Lawyers representing some of those who received section 30 notices immediately challenged the TRC, arguing that their clients had not been given sufficient details about the contemplated negative

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finding to allow them to respond meaningfully, and/or that they had not been given sufficient time to respond before the final report was due to be handed to President Mandela on October 29.

These lawyers threatened legal action in the form of applications for high court interdicts against the TRC to stop the publication and hand-over of the final report, if their demands were not met.

The TRC, having taken high-level legal advice, was determined not to be caught out on "due process" in its final days. So, because of the overwhelming need to get the report handed over and to wind up the TRC's already over-extended lifespan, the commissioners opted for a prudent, if conservative, route.

The result is that the names of a number of prominent perpetrators have been omitted from the final report - some being erased literally at the 11th hour on the floor of the printing room. However, the TRC has resolved to include a full list of named perpetrators in a codicil to the final report, to be published on completion of the amnesty process (probably in the later half of next year).



One of the names it did not remove entirely, despite representations from lawyers, was that of Mr de Klerk, and he brought an 11th-hour application for an interdict in the Cape High Court.

The hearing was set down for this afternoon.

The final report also contains recommendations that some of those named perpetrators be investigated by the statutory legal authorities - such as the relevant attorneys-general - with a view to prosecution. However, it also recommends that the Government set a fixed time-limit on such prosecutions.

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Neither of these recommendations was adopted unanimously by the commissioners, and there was intense debate around this issue. However, the TRC recognised that it was the right of the relevant attorneys-general to decide whether, after appropriate investigation, to prosecute named perpetrators.

The recommendation relating to a fixed time limit on such investigations/prosecutions was in response to criticism from those who reminded the TRC that its mandate was specifically to bring the whole issue of past human rights abuses in South Africa to a close. If it were to recommend a series of criminal investigations, these would probably result in major, time-consuming trials and possible appeals which could drag on for years, and the whole issue would be prolonged interminably, they argued.

Certain people are named in the final report as having been responsible for gross human rights abuses committed by South Africans outside the borders of the country. However, the TRC has not made any



particular recommendations in terms of what action should be taken in this regard.

This thorny issue - which includes the question of possible extradition and/or arrest when named perpetrators travel outside South Africa - has been left to the politicians and diplomats to find an appropriate solution. During the TRC's lifespan, it asked for, and was offered unsolicited, possible recommendations for inclusion in its final report and many responses contained tough proposals on how to deal with perpetrators.

These included that those found to have committed gross human rights violations be barred from holding public office and/or serving in the civil service and the armed forces, and that, if any of them were state employees, their pensions and other benefits should be reviewed.

The collective name for such sanc-

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tions is lustration, and this model was adopted in parts of Eastern Europe after the fall of communism. Several individual commissioners considered lustration an attractive option for South Africa, but after intense debate the TRC finally decided against making such a recommendation. This was partly because the TRC had become increasingly aware of the dangers of isolating individuals accused of gross human rights violations, rather than trying to rehabilitate them into society.

The fear was that, if shunned, such perpetrators would simply find opportunities in undesirable activities such as chemical and biological warfare programmes elsewhere in

unhappy with the recommendations, and who believed the TRC should have recommended only symbolic and community reparations – such as monuments, statues, tombstones, community centres, playing fields, clinics, schools and hospitals – and excluded any individual reparations in the form of monetary payments.

However, the final report confirms the existing reparations policy. In addition, it stresses that such reparations will not bridge the yawning gap between the “haves” and “have nots”, and that reconciliation in South Africa is dependent on a major injection of capital into reducing this gap. It does not make a formal recommendation in favour of

the world or in mercenary groups and dubious “security” companies.

Secondly, the TRC was aware that if it recommended lustration, it would be punishing people who had come forward to assist it (whatever their motivation for doing so had been), and that, because of South Africa's lack of investigative capacity, those who had chosen to remain silent would probably escape censure.

Also, because there were many more amnesty applicants from the liberation movements than from the apartheid security forces, one side of the conflict would bear the brunt of possible lustration, which would be unfair.

So the final report does not recom-

mend lustration, but it does suggest that when people are considered for appointment to public office in future, any past involvement in gross human rights violations should be taken into account.

Among the TRC's most significant recommendations are those relating to the issue of reparations and restitution. The TRC's reparation and rehabilitation policy, which recommended that R3 billion be paid over six years to declared victims of gross human rights violations, proved highly controversial when announced last year.

There were some TRC commissioners and many people in the Government who were decidedly

one particular mechanism for raising such funds, saying the TRC lacked the necessary economic expertise to make such a choice.

However, it points to various suggestions made during its business sector hearings and elsewhere, and states that these must be investigated seriously by the Government, in conjunction with labour and employers.

Such suggestions include: A “wealth tax” of 0.5% on assets for 10 or 20 years for South Africans whose assets exceed R2 million (suggested by Stellenbosch University economics professor Sampie Terreblanche); using some of the assets of the R9-billion Sasria insurance fund, established during the apartheid era to compensate victims of political violence (a recommendation by the Afrikaanse Handelsinstituut); and a donation by all the listed companies on the Johannesburg Stock Exchange of 1% of their capital – estimated at R14 billion in July of this year – to a trust fund tasked with the upliftment of the poor (suggested by former editor and media execu-



tive Stephen Mulholland).

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The TRC's final report states categorically that reconciliation and peace will not be achieved in South Africa until the gap between rich and poor is bridged and restitution (over and above the recommended reparations for victims of gross human rights violations) has been made.

Another major recommendation in the final report is that the culture of human rights in South Africa must be entrenched over the full gambit of such rights (first, second and third generation rights), as spelled out in the Constitution.

The final report emphasises that freedom of speech and freedom of the press must be protected at all costs, and it warns about the dangers posed by some of the Government's recent veiled threats against the media. It also emphasises the notion of civil society must be strengthened, and no citizens must feel excluded from the body politic.

Appalling horror of necklacing

THE origins of the infamous "necklace" murder method – placing a tyre around the neck of a victim and setting it alight, usually with petrol – may be disputed; what is indisputable is the appalling cruelty and inhumanity involved.

Some of the most harrowing testimony to the TRC were accounts of necklace murders. Nonkuzola Fulani of Uitenhage described how, six months pregnant and wearing only a nightdress, she had been forced to watch her policeman husband Aubrey being made to drink petrol before he was necklaced.

Ms Fulani testified she and her husband had been abducted by a group of young "comrades" in April 1985 and taken to a place where he had been interrogated and accused of not allowing tobacco to be given to a prisoner being held at the police cells where he was on guard duty. "I was made to look at him one last time," she recalled. "I was told to stand outside and watch 'while the dog burns' ... They made him drink petrol; they burned him right in front of me until he died."

She pleaded with the attackers to burn her as well, "because I couldn't bear to listen to his cries". But they refused, saying they didn't have enough petrol – they only had five litres – and that they would necklace her later. Her captors had then driven around with her in an unsuccessful search for more petrol, Ms Fulani said.

"A vote was taken as to whether I should be burned or not, but most of the youngsters said I must not be burned because I was pregnant – that's why I survived."

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