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CAPE ARGUS

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Knife-edge for SA's moment of truth

*Mandela set to receive
TRC's keenly anticipated
Final Report*

INSIDE STORY

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, due to be handed to President Mandela tomorrow, 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 after its marathon two-and-a-half years' work 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.

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 both 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, some 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 1966, preventing it from hearing any testimony against them relating to their alleged involvement in the poisoning of Port Elizabeth student leader Siphiwo Mtimkulu 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, Mr Justice Corbett ruled that people about to be named publicly to their detriment by the TRC did indeed have the right of prior, timeous notification of the allegation/s 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 200 "Section 30" notices to individuals and political organisations during the two months or so prior to 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

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The guilty must come to light but in such a way as not to cast them solely as devils. Otherwise, as in the case of the demonic British and the angelic Boers who emerged in the Afrikaner psyche after the (Anglo-Boer) war, one again has angels on hand who may do as they please because of the sinless legitimacy they got from the devil. –

Antjie Krog, journalist and poet

names in the country:

■ Ronnie Kasrils, former member of the ANC's armed wing Umkhonto weSizwe and currently 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.

■ P W Botha, former state president and National Party leader.

■ F W de Klerk, also a former state

president and National Party leader.

■ Pik Botha, veteran foreign minister in the apartheid government.

■ Mangosuthu Buthelezi, Inkatha Freedom Party leader and Home Affairs Minister.

■ Magnus Malan, former SA Defence Force chief and later defence minister.

■ 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 government.

■ Letlapa Mpahlehle, director of operations of the Azanian People's Liberation Army (Apla), the armed wing of the PAC.

■ Eugene TerreBlanche, leader of the ultra-rightwing Afrikaner Weerstandsbeweging (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 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.

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 perpetra-

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tors in a codicil to the final report, to be published on completion of the amnesty process.

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

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.

But it also recommends that the Government set a fixed time limit on such prosecutions.

Neither of these recommendations were adopted unanimously by the commissioners, and there was intense debate around this issue.

However, the TRC recognised that, in the final analysis, it was the right of the relevant Attorneys-General to decide, after appropriate investigation, whether 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 the 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 both 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 financial benefits should be withheld or reviewed.

The collective name for such sanctions 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 attempting 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 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 in all probability 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 recommend lustration, but it does suggest that when people are considered for

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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 both some TRC commissioners and many people in Government who were decidedly 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 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).

■ 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 executive Stephen Mulholland).

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.

An equally strong recommendation is that, if and when such funding becomes available, it must be used for the upliftment of the poor and cannot be allowed to be siphoned off in dubious "development" or public relations projects – such as the controversial AIDS play *Sarafina*, although this is not mentioned by name in the report.



If I did too little, too late, then I'm guilty. That's it, and I'll have to account to myself and to God. But in all humbleness, I must warn: we mustn't ascribe everything that went wrong in this country to the past. – Former National Party cabinet minister Pik Botha on the September 1992 "Bisho Massacre"

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The TRC tells the Government it has a particular responsibility in this regard.

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.

Recommendations in this regard include the teaching of human rights at school and other educational institutions, and also providing appropriate human rights education within Government structures.

The report states that the Government, the Human Rights Commission and various non-government organisations have a particular responsibility in this regard.

Linked recommendations relate to promoting transparency in government.

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 that the notion of civil society must be strengthened, and that no citizens must feel excluded from the body politic.

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