

Truth and Justice: Unfinished Business in South Africa

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Summary

South Africa's transition to democratic government in 1994 included the creation of the Truth and Reconciliation Commission (TRC), a unique tripartite institution with responsibilities to prepare a record of the apartheid era, make recommendations for reparations, and grant amnesty on the basis of individual applications in limited circumstances. South African governments since 1994, under the leadership of the African National Congress (ANC), have also engaged in significant institutional reform and created new oversight bodies in an effort to ensure that state structures can never again violate human rights norms with such impunity. But Amnesty International and Human Rights Watch are concerned that the recommendations of the TRC are not being seriously and fully implemented: in particular, that reparations have not been paid to victims of past human rights violations; that prosecutions have not been mounted against individuals about whom there is credible evidence of involvement in gross abuses; that there is discussion of legislation providing for a further amnesty; and that as a consequence of a court case the publication of the final two volumes of the TRC's report was delayed by almost one year after their completion, contributing to a further delay in the implementation of reparations. Human Rights Watch and Amnesty International are urging the government to take immediate steps to reverse these disturbing developments, particularly in the wake of the resolution on January 29, 2003 of a court case which had been obstructing the publication of the TRC's final report. On February 14, 2003, President Thabo Mbeki will be addressing the opening of the South African parliament: he should include in his speech commitments to carry out the TRC's recommendations and complete publication of its report.

Amnesty International and Human Rights Watch broadly welcomed the work of the TRC. The commission prepared a ground-breaking history of human rights abuses in South Africa and made important recommendations for reparations to victims. Moreover, while both organizations oppose in principle the granting of amnesty for gross human rights violations, the conditionality and specificity of the TRC's amnesty process allowed the commission to make factual discoveries and the open proceedings allowed the survivors of human rights abuses or their relatives to attend and oppose applications. The implementation of the amnesty provisions was coupled with important steps to achieve accountability, including in some cases extensive investigations and cross-examination of the applicants, public hearings with testimonies from survivors of human rights abuses and the naming of those responsible for the gravest abuses. The option of future criminal proceedings against perpetrators remained possible where suspected perpetrators had failed to co-operate with the TRC or had been denied amnesty. Since the establishment of the TRC the government has shown some willingness to prosecute a number of individuals connected with apartheid-era human rights violations. However there were significant failures in some of these trials.

In its five-volume report published in 1998, the TRC set out a history of human rights abuses committed by all sides in the conflict in South Africa from 1960 to 1994. The commission also

made extensive recommendations to the government for measures to ensure accountability for human rights violations, promote reconciliation, and prevent future abuses. These recommendations included the prosecution of individuals where the TRC had found strong evidence of their responsibility for gross human rights violations, and the granting of monetary and other reparations to approximately 21,500 victims.

A further two volumes containing findings based on the evidence which emerged in the amnesty hearings after 1998 and a final list of victims and recommendations for reparations have not yet been published as a result of an interim court order obtained by the Inkatha Freedom Party (IFP), currently a member of the national government with the ANC and the dominant political party in the KwaZulu-Natal provincial government. The order, issued on August 27, 2002, constrained the TRC from submitting “the final report” to the president and arranging for its printing and publishing, prior to the finalization of a “review application” brought by the IFP requesting that the court strike out certain sections of the TRC’s report relating to the involvement of the IFP in human rights abuses. On January 29, 2003, this court action was settled by the TRC with some alteration of language, but leaving the basic conclusions of the report unchanged.

Human Rights Watch and Amnesty International are concerned that there has been no systematic effort to ensure that the TRC’s recommendations are implemented. In particular, the government has failed to ensure that the modest reparations proposed by the TRC for victims are paid. The participation in the TRC process of victims of human rights abuses was critical for the integrity and credibility of this experiment in addressing past human rights violations. In addition to the moral obligation to victims implicitly arising from the agreement to grant amnesty to perpetrators that arose from the political transition, there are clear international obligations for states to provide reparations, including restitution, compensation and rehabilitation, for victims of gross violations of human rights.¹ Human Rights Watch and Amnesty International urge the South African government to live up to the standards which are embodied in these human rights treaties which it has ratified.

But Amnesty International and Human Rights Watch joint concerns are not limited to the treatment of the TRC’s recommendations. We are also disturbed by several developments in 2002, including the granting of pardon to thirty-three convicted prisoners, mainly from the former liberation movements, at least some of whom had been refused amnesty by the TRC; and the indications that there are ongoing discussions involving members of the national and provincial governments around proposals that a further amnesty may be granted. This amnesty would, apparently, be aimed in particular at members of the former South African army and perpetrators in KwaZulu-Natal—despite the ample opportunity afforded them to co-operate with the TRC’s mechanisms during its life.

¹ See, for example, the International Covenant on Civil and Political Rights (ICCPR), article 2(3) (remedies for rights violations by state parties); the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 14 (right to redress and compensation for torture victims). Article 2(3)(a) of the ICCPR requires that each state party undertake to “ensure that any person whose rights or freedoms as herein recognized as violated shall have an effective remedy.” Failure to provide a remedy constitutes a separate breach of the treaty additional to the original violation. See *Velasquez Rodriguez*, Preliminary Observations, Inter-American Court of Human Rights, Series C No.1(1987), para.91.

Amnesty International and Human Rights Watch urge the South African government both to take urgent steps to pay the reparations recommended by the TRC (or to publish an alternative framework for payment of adequate reparations), and to ensure that the other recommendations are implemented, in particular the prosecution of individuals identified by the TRC as being responsible for gross human rights violations. We also call on President Thabo Mbeki to make a public commitment that his government will not make nor implement any further agreements on amnesties for apartheid-era crimes. With the settlement of the case brought by the IFP, the final two volumes of the TRC's report should be published without delay.

The Truth and Reconciliation Commission

The issue of accountability for past human rights abuses provided one of the most contentious debates during South Africa's turbulent and often violent transition to democracy in the early 1990s. During the negotiations that began in 1990, with the unbanning of the ANC and other liberation movements, and the release of Nelson Mandela and other political prisoners, the National Party, the ruling party from 1948 to 1994, argued strongly for a general amnesty. The ANC resisted this push for a blanket amnesty and insisted that the question of immunity should be left up to the new government and that a truth commission should investigate abuses by all sides. Members of the then government, and possibly members of the armed liberation movements, feared the possibility of criminal prosecutions and civil liability for crimes that had been committed in the name of apartheid or in opposition to it. Ultimately, the ANC conceded that an amnesty of some kind would have to be granted, in order to move forward, and a clause was added to the interim constitution that took effect at the April 1994 elections that, "In order to advance ... reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past." On this basis the new Government of National Unity under President Nelson Mandela—which included members not only of the ANC but also the National Party and the IFP, headed by Chief Mangosuthu Buthelezi—drafted legislation for a wide-ranging commission of inquiry, with power to grant amnesties.

The final outcome of further intensive negotiations within cabinet and parliament was the Promotion of National Unity and Reconciliation Act, which was passed by the new parliament in May 1995 and created the Truth and Reconciliation Commission. The commission was charged with preparing a record of the violation of human rights "through the killing, abduction, torture or severe ill-treatment of any person" committed during "the conflicts of the past" (dating back to 1960), making recommendations including for the granting of reparations to the victims of such abuses, and granting amnesty in respect of "acts associated with political objectives." Three committees were established to carry out these tasks. Notably, the commission's mandate did not include an investigation of the violations caused by the implementation of the policies of apartheid themselves, including, for example, the forced removal of people from their homes, restrictions on movement and residence through pass laws and other legislation, or the denial of the vote to the great majority of South Africa's people.

The new law did not provide for a general amnesty, but a circumscribed process of individual applications in which those seeking immunity from prosecution (or release from prison) had both to show that their crime was political in motive and to make full disclosure of the acts for which

they were seeking amnesty. A successful applicant would be permanently protected from any criminal or civil liability in relation to the offence acknowledged. There was no requirement in the Act that the perpetrator should show remorse or make individual reparations to the survivor or family. However, section 20 of the Act stated that where “gross human rights violations” were acknowledged by a perpetrator in an application for amnesty there had to be an open hearing. The victim or relative had to be informed about the date and location of the hearing and would have the right to “testify, adduce evidence and submit any article to be taken into consideration.” Nevertheless, some survivors and relatives felt aggrieved at the concept of amnesty for perpetrators, particularly where the applicants failed to show remorse or make honest and full disclosures. Relatives of some prominent anti-apartheid victims of police brutality challenged the amnesty provisions in the Constitutional Court. The court, while acknowledging that the provisions had an impact on fundamental rights, ruled that the clause added to the end of the interim constitution effectively limited those rights and that victims would have to look to a broader state program of post-apartheid reparations to obtain compensation.² In sum, the decision to establish a process for granting amnesty was a balancing act between the perceived “national interest” and the claims of victims.

The TRC convened the first of over two years of hearings of testimonies from victims on April 15, 1996. Under the apartheid state victims of human rights violations or their relatives had faced years of denial from officials that the violations had taken place. The public hearings of the TRC’s Human Rights Violations Committee in different parts of the country enabled some 2,000 survivors or their family members to describe what happened to them and to tell the committee what they hoped would come out of its work on their case. The hearings, often highly emotionally charged, and sometimes dogged by legal complexities owing to court rulings constraining the naming of alleged perpetrators without prior notice to them, were broadcast nationally on television and radio and widely reported in the print media. These “victim hearings” included some accounts of abuses inflicted by non-government forces and they were supplemented by “sector” hearings in which representatives of major interest groups in society were invited to put their case regarding their alleged complicity in or response to human rights violations.³

The TRC regarded these hearings as vital to achieve one of its statutory objectives—“restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims.” The hearings “revealed the extent of gross violations of human rights and made it impossible for South Africans ever again to deny that such violations had indeed taken place.”⁴

However, in a severely divided society in which many beneficiaries of the apartheid system had ignored widespread and systematic human rights violations, it was the chilling testimony of the

² In *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC); Catherine Jenkins, *After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa*, South African Journal on Human Rights, vol. 16(3), 2000.

³ Truth and Reconciliation Commission (TRC) of South Africa Report, October 1998, volume 1, chapter 7, pp.179-190; Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity. How Truth Commissions Around the World are Challenging the Past and Shaping the Future* (New York and London: Routledge, 2001), pp.125-127, 227.

⁴ TRC Report, volume 5, chapter 1, pp.7-8.

perpetrators—rather than that of their victims—that breached the wall of denial. The TRC concluded: “[I]n reviewing its efforts to uncover the deeper truth behind the violations of the apartheid era, [it] frankly acknowledges that much of its success is due to the fact that large numbers of security police members grasped at the possibility of amnesty in exchange for full disclosure.” It also acknowledged that what drove these security officials to speak was the extent of the disclosures made by one of them, Eugene de Kock, “who broke the code of silence”⁵ after he was successfully prosecuted for a large number of serious crimes (see below). The lack of successful prosecutions of perpetrators from other sectors, such as the military, meant that they did not feel similarly threatened and were conspicuously absent as applicants for amnesty. The military may also have felt concerned that disclosures relating to crimes committed during the country’s occupation of and attacks on neighboring states would not have been covered by the TRC amnesty process.

On October 29, 1998, the TRC presented a five-volume report to then President Nelson Mandela. The handover was nearly derailed by court challenges to the commission’s findings from both the ANC (unsuccessful) and former President F.W. de Klerk, whose litigation resulted in the removal of a section of the report which had named him as a perpetrator of human rights violations. While finding that apartheid was a crime against humanity—a controversial conclusion among supporters of the former government, given that the TRC had not been charged with examining the policies of apartheid as such, but which the TRC itself felt was essential to its credibility—and that the previous government and its security forces were responsible for most of the human rights violations during the period 1960 to 1994, the commission also found that the ANC and other liberation movements had committed gross human rights abuses during the armed struggle. Its findings against the IFP became the subject of subsequent litigation (see below).

Although the main work of the TRC had been completed with the handing of the report to President Mandela, the semi-autonomous Amnesty Committee continued its work on the applications it had received until mid-2001. The Committee disposed of many of the applications on the basis of papers submitted, though in at least 1,000 cases decisions were reached after public hearings. By June 2001, when the Committee was closing its operations, it had granted amnesty or immunity from prosecution to a total of 1,160 people from 7,094 applicants. A small number of decisions still remained to be reported at that stage. The unpublished final volumes of the TRC may clarify the proportion of amnesties granted to applicants from the former state or opposition organizations.

The work of the TRC was formally ended on December 31, 2001, under the terms of a presidential proclamation issued in May of that year, and the legal responsibility for its remaining business transferred to the Department of Justice.⁶ However, some former TRC commissioners and staff continued to work on two final volumes to complete the account of the TRC’s activities (primarily the work of the Amnesty Committee) and the list of those identified as victims eligible for reparations, which they did by March 2002 when the TRC finally wound

⁵ TRC Report, volume 5, chapter 6, p.202.

⁶ Presidential proclamation R.32, Government Gazette No.22333, May 28, 2001. Most of the activities of the commission ceased on October 28, 1998, with the completion of the first five volumes of its report, but the amnesty committee continued to function in terms of the Act until the end of 2001.

up after six and a half years of work. The handing over to the President and the publication of these volumes has been held up as a result of an interim court order obtained in August 2002 by Chief Mangosuthu Buthelezi and the IFP pending a ruling on a prior application they had made for an order compelling the TRC to amend its findings against them. They had lodged the previous application in the High Court on October 18, 2000, seeking a “review” of certain findings made against them by the TRC in its 1998 report and an order setting aside those findings and directing the TRC to insert a statement to this effect in the final report.⁷ The disputed findings concerned the IFP’s direct or indirect responsibility for numerous human rights abuses, including those committed by an IFP-controlled para-military unit trained by the former South African military in the late 1980s at the request of the then head of the KwaZulu homeland government, Chief Mangosuthu Buthelezi.

On January 29, 2003, the case brought by the IFP against the TRC was settled. According to the settlement, approved by the High Court in Cape Town, the TRC will publish in its final report a “schedule of changes and corrections” to its findings and a “memorandum” formulated by the IFP “setting out its views concerning the findings with which it disagrees”. The contents of both the schedule and the memorandum were confirmed between the two parties in the litigation prior to the agreement of settlement in court. The schedule contained a number of minor changes in wording to the original findings and the insertion of some contextualizing comments relating to those findings. For example in relation to the TRC’s conclusion that the IFP was responsible for 9,000 incidents of gross human rights violations, the schedule notes that the conclusion was based on statements from victims who had identified IFP members as perpetrators and also reflects the fact that the IFP chose to stay away from the TRC process.⁸ However the TRC was not obliged under the terms of the settlement to amend its “core” findings that the IFP, the former KwaZulu homeland government and the KwaZulu Police were responsible for gross human rights violations and that Chief Mangosuthu Buthelezi should be held accountable for these violations, in his representative capacity during the period in question as president of the IFP and as head of the KwaZulu government and its police force.

Reparations

While controversies over the TRC’s report were continuing, the government had delayed the implementation of a program of monetary reparations for the victims of apartheid-era human rights abuses.⁹

⁷ *In the matter between Inkatha Freedom Party, Mangosuthu Gatsha Buthelezi and Desmond Mpilo Tutu NO., Truth & Reconciliation Commission, The President of the Republic of South Africa, in the High Court of South Africa*, Case No. 7467/00. The IFP as a party took a hostile position to the TRC from 1995 and for several years discouraged its supporters from coming forward to make statements to the commission whether as victims or perpetrators of human rights abuses (see comment in TRC Report, volume 3, chapter 3, p. 162).

⁸ The TRC report in fact had noted that the “Commission received many more accounts of the political violence from UDF (United Democratic Front)/ANC supporters, creating the impression that the violations suffered by the UDF/ANC outnumbered those suffered by Inkatha by five to one. The Commission was unable to establish the degree to which this disparity is a reflection of the IFP’s rejection of the Commission or a reflection of the actual experience of violations”. (See volume 3, chapter 3, p. 163.)

⁹ The entitlement of the victims to reparations of course existed from the time of the wrong committed against them. The TRC announced its policy on reparations in October 1997 and formally presented them to the State President as part of the five-volume Report in October 1998 (TRC Report, volume 5, chapter 5).

In its 1998 report, the TRC made extensive recommendations for reparations to victims, including both monetary compensation and various forms of “symbolic” reparations, ranging from the building of monuments and renaming streets and community facilities, to expunging criminal records for acts committed with political motives. The act establishing the TRC recognized that adequate reparation and rehabilitation measures were essential to the process of healing and reconciliation and would counterbalance the consequences of granting amnesties to perpetrators by which victims would be denied the right to institute civil claims, both against the perpetrator and the state. Though there has been progress on many of the non-monetary recommendations, the proposed financial compensation remains largely outstanding.

In July 1998, the President's Fund, established by President Mandela to handle these payments among other matters, made the first disbursements of “urgent interim reparations,” acting on recommendations made by the TRC’s Reparations Committee. Although R300 million (U.S.\$61.7 million at the December 1997 rate) was set aside for this process, only R48.37 million (U.S.\$4.72 million at the November 2001 rate) had been paid out under this scheme by November 2001, in grants of between mostly two and three thousand rands each to 17,100 applicants (from a total of 20,563).

In its October 1998 report the TRC recommended that final reparations to victims involve an amount of money, called an individual reparation grant, to be made available to each victim, or equally divided amongst relatives and/or dependants who have applied for reparation if the victim is dead. Estimating 22,000 victims, the TRC calculated the total cost of this policy to be R2,864,400,000 (U.S.\$588,837,490) over six years.¹⁰

The government announced in February 2001 that it would be setting aside R800 million (U.S.\$103 million at that date) for final reparations (i.e. R500 million in addition to the R300 million already set aside for interim reparations)—substantially less than a third of what the TRC had proposed. But it made no announcement about when this money would be disbursed other than stating that it would be paid in one-off settlements. In May 2001, a Department of Justice spokesperson said that the legislation setting the framework for reparations to the victims could not be introduced to parliament until 2002. In March 2002, the Ministry of Justice informed victim support groups that the reparations policy had been developed and was currently before the Cabinet. Subsequently official spokespersons have stated that nothing can be done until the government has received the final list of victims and report from the TRC. As of January 2003, the reparations policy had not been published or referred to parliament for debate.

Victims’ groups and other civil society organizations have become increasingly impatient at this delay, demanding that the government act on the TRC’s 1998 recommendations. In June 2002 the Khulumani Support Group (Western Cape region), an organization of survivors and relatives of victims of past human rights violations, applied to the High Court in Cape Town for an order, under the terms of the 2000 Promotion of Access to Information Act, compelling the government to make available to the applicants its reparation policy or, if there were no policy, to provide

¹⁰ The amount of the grant was based on a benchmark of R21,700, the median annual household income in South Africa in 1997, worth U.S.\$4,460 at that time. The TRC recommended a three-part formula to calculate each individual award, with components to acknowledge the suffering caused by the gross violation that took place; to enable access to services and facilities; and to subsidize daily living costs, based on socio-economic circumstances.

one as soon as reasonably possible and to pay out urgent interim reparations in the meantime. In the applicants' view the "application had been necessitated by the failure on the part of the Respondents to fulfill their obligations towards the victims of gross human rights abuses who had participated in the TRC process."¹¹ In its submission in response, the Department of Justice declared that the requested document was part of a privileged "deliberation" process and so could not be made available. The case was set down to be heard in August 2003, but may be heard earlier.¹²

Amnesty International and Human Rights Watch urge the South African government to take immediate steps to inform parliament and the public at large about its proposed reparations policy and to implement the TRC's recommendations. Now that the court case between the IFP and the TRC delaying the publication of the final two volumes of the TRC's report has been resolved, the government should not delay any further in fulfilling its responsibilities.

Trials Related to Apartheid-Era Human Rights Crimes

Even before the TRC delivered its 1998 report, there were a number of prosecutions of perpetrators responsible for human rights abuses in the pre-May 1994 period. These trial proceedings constituted a critical part of the context in which the TRC was working, and continue to have important consequences today. In particular, the failure of several trials has meant that some sectors of the former security forces have virtually escaped accountability for serious human rights abuses.

In the most important successful trial of a member of the apartheid-era security forces, Eugene de Kock, commander under the previous government of the notorious and secret Vlakplaas unit of the security police, was found guilty in August 1996 of six murders and eighty-three other crimes, following a trial that lasted eighteen months. In his plea in mitigation before sentencing, de Kock implicated senior members of the former regime in "dirty tricks" activities against anti-apartheid activists and in the promotion of political violence by covert supply of weapons and other means. Among those named were former Presidents P.W. Botha and F.W. de Klerk, and a number of generals in the army and senior police officers. Availing himself of the provisions of the 1995 act, he launched an application for amnesty from maximum security prison in Pretoria where he was serving multiple life sentences. The hearings on his lengthy application threatened to expose the role of others in his crimes. It was the fear of likely prosecution that partly drove other members of the security police to apply for amnesty. The TRC was therefore able to compile a relatively thorough account of the activities of this branch of the former government's security forces.

Other trials relating to apartheid-era crimes have been less successful. In October 1996, the trial of former defense minister Magnus Malan, former head of military intelligence Gen. Tienie

¹¹ Affidavit of first Applicant, *In the matter between the Khulumani Support Group Western Cape Region, Shirley Renee Gunn, Brian Mkululi Mpahlele, Maureen Thandi Mazibuko, Johannes Petrus Hendry Titus and Desmond Mpilo Tutu N.O., The Truth and Reconciliation Commission, The Minister of Justice, The President of the Republic of South Africa, in the High Court of South Africa.*

¹² Possibly from frustration with the government's failure to implement a reparations program, some support groups and civil society organizations have welcomed or joined the legal suits for damages lodged in courts in the United States and Switzerland in 2002 against foreign banks and companies involved in apartheid South Africa.

Groenewald, and eighteen others, in connection with a 1987 massacre of fourteen family members of an ANC leader in KwaMakhutha in the former homeland of KwaZulu, now KwaZulu-Natal, ended in acquittal or discharge for all defendants. The trial centered on allegations that the National Party government had, at the request of Chief Mangosuthu Buthelezi, trained IFP cadres, many of whom were later integrated into the KwaZulu Police, to carry out political assassinations or promote political violence against the IFP's opponents. The acquittal led to accusations that the prosecution had been deliberately badly handled by the then Natal provincial Attorney-General, Advocate Tim McNally, whose failure to call certain witnesses critical to the prosecution case was remarked upon by the presiding judge.¹³ The collapse of this trial was one of the main reasons why few members of the former army applied to the TRC for amnesty or co-operated seriously with other aspects of the TRC's work, including by handing over documents vital to its investigations.

Another important trial linked to the activities of the former Defence Force ended in acquittal in 2002. On April 11, the Pretoria High Court acquitted Dr. Wouter Basson, head of the military's covert biological and chemical warfare program in the apartheid era, of forty-six murder, embezzlement and other charges against him. Among other findings the Court ruled that the state had not proved beyond reasonable doubt that Dr. Basson had been part of a conspiracy to supply deadly drugs to military agents to murder enemies of the government. In 2001 another fifteen charges had been struck out at the close of the prosecution case. During the thirty-month trial the prosecution had led evidence from nearly 200 witnesses and produced thousands of pages of evidence. The accused was the sole witness for the defense. The trial had been marked by allegations of judicial bias and a number of controversial decisions by the presiding judge. After the judge delivered his verdict in 2002 the prosecution applied for leave to appeal certain of his decisions, including the judge's ruling at the start of the trial that the accused did not have to face a number of charges, on the ground that the alleged crimes had been committed in Namibia and were covered by an amnesty for the security forces authorized by the then Administrator-General on the eve of Namibia's independence in 1990. The prosecution also sought to appeal the judge's rejection during the course of the trial of a prosecution motion for his recusal on the ground of bias. These and other points of law which the prosecution wished to appeal were still under consideration either by the Chief Justice or the Supreme Court of Appeal in early 2003.

Two former members of the army of the former "independent" homeland of Ciskei, the Ciskei Defence Force (CDF), charged with the 1992 "Bisho massacre," in which twenty-eight ANC demonstrators were killed, were also acquitted in March 2002. Both of the accused, who were low-level officers in the CDF, had previously been denied amnesties by the TRC. The case was prosecuted by the office of the Director of Public Prosecutions in the Eastern Cape and seemed to have been poorly prepared. Senior political and military figures who were in command of the CDF on the day in question were not prosecuted.

The TRC in its 1998 report made recommendations that information it collected in the course of its investigations should be used as the basis for the further investigation and prosecution of

¹³ For an analysis of the conduct of the trial and related cases, see Howard Varney and Jeremy Sarkin, "Failing to Pierce the Hit Squad Veil: A Critique of the Malan Trial," *South African Journal of Criminal Justice* (1997) 2; and Amnesty International, *South Africa: The criminal justice system and the protection of human rights: the role of the prosecution service* (AI Index: AFR 53/01/98).

individuals responsible for gross human rights violations who had not been granted amnesty. In particular, the TRC urged the justice system to “pay rigorous attention to the prosecution of members of the South African Police Service (SAPS) who are found to have assaulted, tortured and/or killed persons in their care.” The persistence of incidents of torture, assault with intent to inflict grievous bodily harm and execution-style killings of arrested suspects in police investigations highlight the urgency of this recommendation by the TRC.

Since 1998 progress in acting on this recommendation has been slow, although the government has established a unit in the office of the National Director for Public Prosecutions (NDPP) to pursue these cases. This “special national projects” unit also deals with organized crime cases. Its small staff, under an experienced advocate and prosecutor, is still involved in identifying and preparing cases for possible prosecution. Limited resources and obstacles to recovering evidence will restrict its ability to prosecute many cases. In addition national political priorities have become more focused in the last few years on the effective combating of high levels of criminal violence in the country.

Amnesty International and Human Rights Watch urge that this unit be given the human and financial resources to enable it to carry out effective prosecutions of the cases recommended for such action by the TRC.

Pardons

In May 2002, President Mbeki used his constitutional powers to grant pardon to thirty-three convicted prisoners, mostly members of the ANC and Pan-Africanist Congress (PAC), the other main liberation movement. President Mbeki stated that those pardoned were in prison as a result of their activities in the anti-apartheid struggle; Justice Minister Penuell Maduna, however, asserted that their pardons were not on political grounds. Pardoning these prisoners brought calls from those on the right of South African politics for the release of others, including those convicted of the 1993 murder of senior ANC leader Chris Hani.

Amnesty International and Human Rights Watch do not oppose the granting of pardon in all cases; it may appropriately be granted, for example, on humanitarian grounds. But it is difficult to draw any principled line between those pardoned and others who seek pardon, if political criteria are used to select the beneficiaries. In addition, the organizations are dismayed because many of those pardoned had already had applications for amnesty considered and rejected by the TRC. To our knowledge none of them had taken up the option to seek judicial review of the TRC decisions. The TRC process provided a fair hearing with clear criteria to all those who considered that they had committed an offence with a political motive. To pardon individuals who were unsuccessful before the TRC undermines the entire work of the commission, with potentially serious consequences for the future of justice and reconciliation in South Africa.

While it may not be possible to rescind the pardons already granted, Amnesty International and Human Rights Watch strongly urge that no similar pardons be granted in future.

Further Amnesties?

One of the key recommendations of the TRC was that: “In order to avoid a culture of impunity and to entrench the rule of law, the granting of general amnesty in whatever guise should be

resisted.” Human Rights Watch and Amnesty International share this view. In addition to the international law requirements for perpetrators of human rights abuses to be brought to justice, there would not be a constitutional basis for any such amnesties. We believe that the TRC process exhausted the scope for limitation of constitutional rights provided by the clause added to the end of the interim constitution.

On May 15, 2002, however, government spokesperson Joel Netshitenzhe, reporting on a cabinet meeting, stated that the issue of a general amnesty would be discussed when the final volumes of the TRC report are released. Although the justice ministry issued a statement on May 19 that “there will be no blanket amnesty,” and Minister Maduna acknowledged in a written reply to a parliamentary question that legislation would be required for any further amnesty for those who have not been convicted, both of these statements leave open the possibility of further amnesties that, while not “blanket,” allow individuals who have committed serious crimes to escape any possibility of prosecution.

Indeed, the former head of the South African Defence Force (SADF), Gen. Jannie Geldenhuys, has indicated that an agreement has been reached with the ANC on a form of extended amnesty for members of the previous government’s armed forces. Such a deal has been publicly mooted since at least 1999, when President Mbeki stated to parliament that the issue of SADF members who had not applied to the TRC had to be dealt with, and that a further amnesty should be extended to cover political violence in KwaZulu-Natal that took place after the “cut-off date” for acts which the TRC could consider (originally December 6, 1993; later extended to May 10, 1994).

Amnesty International and Human Rights Watch oppose any further amnesty in South Africa. We do not believe that the arguments apply any longer that were used in obtaining concessions from the principle of accountability during the negotiation of the terms of the Promotion of National Unity and Reconciliation Act that established the TRC, and that convinced the Constitutional Court to approve the amnesty process. We believe, on the basis of our work in South Africa and other countries, that impunity for past abuses increases the likelihood that those abuses will be repeated in the future. Repeated extension of amnesties encourages abusers to believe that they can continue to avoid responsibility for their acts indefinitely, and thus have no need to change their behavior.

SADF members had ample opportunity to take advantage of the TRC process, and largely failed to do so. The TRC also had great difficulty in accessing the archives of the SADF: in 2002, it was discovered that the army had failed to turn over thousands of documents to the commission.¹⁴ As a consequence, the TRC concluded that “its research and investigation into the activities of the former SADF were insufficient and constrained.” Senior members of the SADF should not now profit from that failure to cooperate with the TRC, by being granted any form of legal immunity from prosecution. Furthermore, we oppose any suggestions that the “cut-off date” should be extended beyond May 10, 1994. This was the date a democratic government was inaugurated and the last date on which it could be claimed that an act was, in the words of the interim constitution, “committed in the course of the conflicts of the past.”

¹⁴ There has also been concern that TRC documents relating to the previous government’s chemical and biological weapons program have disappeared after having been handed to the National Intelligence Agency.

Conclusion

Human Rights Watch and Amnesty International urge the government of South Africa to publish the final two volumes of the TRC's report as soon as possible after receiving them from the TRC and to implement the recommendations the TRC has already made—in particular to end the impunity enjoyed by too many of those who have committed gross human rights abuses. To this end the government should strengthen the capacity and resources of the special prosecution unit in the NDPP's office. Failure to do so will not only allow those who were responsible for past human rights abuses and refused to co-operate with the TRC process to escape punishment, but will also harm the prospects of preventing a repetition of the kinds of human rights abuses the TRC had helped to expose. In KwaZulu-Natal in particular, political violence continues; among those implicated are individuals associated with human rights abuses during the apartheid era.¹⁵ There must be no further pardons and no further amnesties; where there is credible evidence that individuals have committed crimes, they must be prosecuted without fear or favor. Finally, the government should move swiftly to redress the injustice to the thousands of victims and their families who co-operated with the TRC process and implement a program of reparations.

¹⁵ Rupert Taylor, "Justice Denied: Political violence in KwaZulu-Natal after 1994," *African Affairs*, Vol.101, No. 405, October 2002.