

# Will unfinished business of TRC amount to a blanket amnesty?

BY CHRISTELLE TERREBLANCHE

Almost 10 years after the Truth and Reconciliation Commission (TRC) opened its doors, a large pool of apartheid perpetrators are yet to account for their deeds – which could amount to an effective blanket amnesty.

This is one of the pertinent questions raised in an assessment of how the South African government has responded to the TRC's recommendations.

The 50-page assessment, "Provoking Questions", was compiled by the Institute for Justice and Reconciliation (IJR) and is due to be released in the coming week.

It provides a first measured analysis of the government's lack of response to the TRC's "unfinished business" and homes in on the fact that few who spurned or failed the commission's amnesty process have been charged. The IJR asks whether the "stick" used to compel apartheid-era perpetrators to make full disclosures of atrocities was really a "bluff", as many remain all but "untouchable".

The institute stresses that the TRC was never meant to bring about reconciliation and justice of its own accord and that "significant gaps" remained in the state's responsibility to take the process forward, which "may grievously affect individual and community attitudes about justice and reconciliation".

Professor Charles Villa-Vicencio, the IJR executive director, said the publication was the outcome of continuing monitoring of the post-TRC processes. "What emerges from this is that the matter of prosecutions remains unresolved and, very clearly, it is in the interests of all that this matter now be brought to a head," he said.

"When the TRC report was first handed to president Nelson Mandela in 1998, I remember him saying that accountability needed to be established and that where there was evidence of a serious crime, prosecutions must follow."

President Thabo Mbeki has since ruled out a general amnesty but the National Prosecuting Authority last year stopped its apartheid-era prosecutions in lieu of clearer guidelines, which are expected to be tabled in parliament soon.

The only real prosecution undertaken was that of apartheid's chemical and biological warfare expert, Dr Wouter Basson, who was acquitted, while Gideon Nieuwoudt, who was indicted with others for the Pebco Three murders, recently died. Only one other indictment has been issued – that of a minor liberation-force cadre, Buyile Ronnie Blani.

The IJR instead makes a case for prioritising the masterminds of apartheid-state atrocities and giving special attention to "unresolved forceable disappearances" but does not rule out prosecution of liberation-force violations in a targeted manner.

Without further prosecutions, however, the IJR concludes that the basis for the TRC's amnesty process may be rendered meaningless and "would reward those who spurned and showed contempt for the TRC".

"Just as the violations they committed were deliberate and a mark of their power, the decision not to apply for amnesty was intentional," the IJR said.

In a foreword, Villa-Vicencio said the aim of the publication was to promote debate on the "unfinished business" of the TRC and ensuring that "the demands captured in the recommendations do not fall by the wayside".

"In some instances, these recommendations await an adequate response," he said, adding that the success of the TRC's work was never meant to be entirely dependent on its own endeavours, but it was then up to the government and people of South Africa to take forward.

The introduction notes that the essays were not simply an indication of "unfinished business". "Rather, they underscore what the TRC claimed from beginning to end – reconciliation is an ongoing process, one that will take years, and possibly generations, to complete."

"In this sense, the assessment of how and how well the commission's recommendations have been implemented is an occasion to enter into sustained debate and dialogue about the meaning of reconciliation and the ways in which it can evolve to meet the challenges of the present moment."

While the IJR acknowledges a number of limitations to a post-TRC prosecutions process, it said that the government's policy on such trials "remains ambiguous and has led some to worry that continued inaction may result in a de facto general amnesty".

"Progress has been made, while much remains still to be accomplished," it says.

Villa-Vicencio said that many of the survivors and victims "continued to experience great anxiety and want closure on the matter", while one perpetrator told him recently that he "continued to drift between the devil and the deep blue sea".

Making a case for additional prosecutions, the IJR said there were "substantial costs associated with the refusal to undertake additional prosecutions".

"The TRC found that while the state and the Inkatha Freedom Party were responsible for the overwhelming majority of human rights abuses, only 293 applications were received from the former security forces and 109 from the IFP," the document states. "There is now a large pool of individuals that are alleged to have committed gross violations and are eligible for prosecution."

Very few applications came from the masterminds of apartheid atrocities.

It said that this did not necessarily imply, as perhaps the government feared, that the country must undertake decades of numerous and expensive prosecutions, but that "a far more strategic approach needs to be developed, especially given present resource constraints".

"Priority should be given to cases involving the most egregious violations and should factor in the perpetrator's role in its planning and overall responsibility."

"Prosecutions would thus be directed at those who bore greater responsibility, who planned or participated in especially serious incidents, and who deliberately spurned the amnesty process or were refused amnesty for their actions," it said.

This would not rule out targeted prosecutions of liberation-movement personnel or even civilians, "but would place the bulk of those who were mere foot-soldiers or those swept up in the moment of violence in a low-priority ranking".

It concludes that the book on prosecutions was not closed. "Cases in Chile and Argentina suggest that, if not resolved, these issues linger on," said the authors. "In Chile, the prosecution of aged [former leader] General [Augusto] Pinochet is currently under way. In Argentina, nearly two decades after their truth commission concluded its work, the courts have finally set aside earlier amnesty laws that granted perpetrators blanket amnesty. The experience of these countries points to the folly of believing that the demand for accountability will fade with time."

The assessment also probes the memorialisation of apartheid-era experiences as well as the state's keeping of records and access to information.



National

# Unfinished business

Victims and perpetrators of apartheid violence were left stranded by the truth commission, writes  
**Gretchen Wilson**

**A** decade after the Truth and Reconciliation Commission (TRC) started its work, many South African communities are still recovering from the brutal conflicts it tried to cauterise.

Victim advocates insist real reconciliation will not happen while the practical concerns of survivors and perpetrators remain unaddressed.

"This is quite close to the surface of the national psyche and is present in communities up and down the country," says Piers Pigou, a former TRC investigator.

The victim support group Khulumani estimates that 120 000 people suffered gross human rights violations — more than five times the testimonies recorded by the TRC. Nationwide, 14 000 people were killed in political violence between 1990 and 1994; many more "disappeared".

Interviews with victims on the East Rand, torn by years of conflict after 1990, highlighted the profound effect that the violence continues to have on residents' daily lives.

Take 37-year-old Lindelwa Ngxamngxa, paralysed from the waist down after being shot, she says, by a known Inkatha Freedom Party supporter.

She lives in Thokoza, south-east of Johannesburg, where communities were plagued by clashes between African National Congress-supporting residents and IFP hostel-dwellers allegedly in cahoots with the security forces.

Ngxamngxa says she was not political herself, but that the ANC was popular in her neighbourhood. In 1993, her assailant forced his way into her home and shot her in the chest, arms and head before he, and others, robbed her.

Thirteen years later she has some manoeuvrability through her wheelchair, but needs help from her teen-



Sarah Sithole: 'The pain is still in my heart, and the money too little for the work I had to take on after my daughter died.' Photograph: Gretchen Wilson

age daughter, who shares her rented one-room shack.

They survive on her disability grant of R1 000 a month. Of this, she spends nearly R300 on catheters and the rubber gloves she uses to empty colostomy bags.

"My life is so terrible," Ngxamngxa says. "And it is so painful the minute I think about the fact that I'm in this situation because of somebody else."

But she says that the psychological suffering of seeing her assailant living freely in her neighbourhood is worse

than the physical harm. Though she reported him to police, charges were dropped almost immediately — arranged, she says, by police who supported the IFP.

Now she stays home alone for fear of what he may do if he sees her. "When he comes, I have to hide because he knows I've identified him," Ngxamngxa says. "I'm still alive, and that is a problem for him."

Most survivors called to give evidence at the TRC's human rights violations committee received a single reparations payment of R30 000. But many remain mired in poverty.

"Although I got the compensation, even today that reconciliation has not happened," says 76-year-old Sarah Sithole of Kaitleng.

Sithole still knows very little about the murder of her daughter, one of five commuters gunned down in a taxi. She was the family's sole bread-

winner, and after her death, Sithole raised her two children on a pensioner's grant of R720 a month.

She says "not a cent" is left of her reparations grant; the money went to pay for school fees, food or to pay off debt. "The pain is still in my heart, and the money too little for the work I had to take on after my daughter died," she says. "I struggled to raise those children."

"When the government gave us the grant they were just wiping away our tears, but we need something more."

The men of violence were offered conditional amnesty in exchange for TRC testimony. One East Rand man whose slate was wiped clean was ANC member Michael Pama, who claims responsibility for 20 deaths.

Now 63, Pama became a commander in the armed militia of Phola Park. He says he and others returned fire to protect homes and allow women and chil-

dren a chance to flee the shooting.

"As I was protecting the community, I knew some people on the other side were dying," he says.

Arrested in 1993, Pama served a seven-year jail sentence. Despite receiving amnesty, he says he thinks about what happened "each and every day". He still lives on the fringes of his former community and fears revenge.

"Even when I am just going about the neighbourhood, I need protection because I can still be killed," he says.

Pama, who was shot during the violence and considers himself a survivor, says he feels slighted by the TRC process and the new government. "I fought for democracy and to get rid of apartheid, but the fix didn't even look at that side," he says bitterly.

Oupa Makhalemele, researcher at the Centre for the Study of Violence and Reconciliation, suggested the government should have targeted programmes to cater for survivors and perpetrators.

"This is the unfinished business of the TRC. What is the government doing in areas where resources are very limited, where people have real physical and psychological effects of the breadwinner who was killed?"

Khulumani's acting director, Marjorie Jobson, says a recent conference in Cape Town commemorating the TRC suggested a fresh commitment to victims of violence. "The next decade has to be about survivors," Jobson says.

Like thousands of others, Ngxamngxa says she didn't hear about the TRC until after public testimony ended in 1998.

She still wants her attacker prosecuted, but in the meantime wants the means to move to another neighbourhood. She also dreams of enough money to see a medical specialist and to cover her medical bills. She hopes the government will help.

"I would tell President Thabo Mbeki, 'You didn't finish with the TRC,'" she says. "Even the president himself benefited from the time of violence and by those fighting. Even today, the leaders of the country are enjoying the fruit of the victims' blood."

# A decade on, TRC has 'unfinished business'

## Reparations incomplete as scholars salute SA

By **SIVUYILE MANGXAMBA**  
Staff Writer

South Africa's Truth and Reconciliation Commission (TRC), 10 years on, is a global icon among international peace scholars. This emerged at an event to mark the TRC's 10th anniversary yesterday.

"I am amazed at how much interest the world had in our process. It addressed the victims and perpetrators, and people are eager to see how it worked here," said Nomfundo Walaza, former director of Cape Town's trauma centre.

Peace scholars from more than 20 countries are in Cape Town to mark the 10th anniversary of the TRC.

Archbishop Desmond Tutu, who has travelled extensively



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in a bid to forge peace around the world, took part in public conversations about the TRC's journey through trauma in which victims shared their experiences.

In a BBC documentary shown at the conference, highlighting his efforts in Northern Ireland, Tutu said: "Reconciliation is not about forgiveness but an opportunity for the victim and the perpetrator to acknowledge each other as human beings. It may open you to being hurt again."

In South Africa, victims and

perpetrators faced each other in town and community halls where they shared their experiences, and the world was still paying attention to this.

"There is a profound need among humans to talk about what happened," said Harvard University scholar Donna Hicks, who is involved in conflict resolution processes around the world.

"The point about the TRC process is that there is a need for some acknowledgement and a public ritual about the suffering that took place," said Hicks.

"Human suffering has more need for healing than any physical break in the body.

"The significance of reconciliation has no words to describe. When someone has a spirit wound, there is no emer-

gency room but some healing has to be initiated."

However, some international peace scholars say the TRC has unfinished business.

"It's unfinished business that we still need to take forward," said Walaza.

"Reparations and making sure that victims got what they wanted is important in taking the country forward."

The Department of Justice was still finalising payments to the victims for compensation as the TRC recommended, said spokesman Lazarus Mothupi.

"Most of the victims have been paid, but we are still looking for others," said Mothupi in reference to the R30 000 being paid to victims of apartheid human rights violations.

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# Pardons – still many unanswered questions

**P**RESIDENT Thabo Mbeki recently addressed a joint sitting of Parliament to announce a new policy on politically motivated crimes of the past.

The president invited all relevant political parties to form a reference group to review applications for pardons and advise on those cases where presidential pardons should be granted.

The policy announcement was welcomed by most political parties. It seemed to be a direct response to pressure from the Inkatha Freedom Party.

The party had recently launched a high court challenge against the justice minister and the president for failing, after four years, to respond to a request for pardons for 384 of its members it considered political prisoners.

The Pan Africanist Congress has similarly pushed for the release of many of its members since the end of the Truth and Reconciliation Commission (TRC) process.

In total, the presidency has received 1 064 requests for political crime pardons thus far. This number is likely to increase significantly before the close of the new window period. Many ordinary criminals are likely to make an effort to



**NAHLA  
VALJI**

*Government  
seems to pay  
little regard to  
needs of victims*

"spin" their past crimes as having a political motivation.

In addition, there'll most likely be applications from those who did not apply for TRC amnesty – possibly because they were not willing to disclose the truth or gambled there wouldn't be political will for future prosecutions.

There were, however, a number of individuals who did not come before the TRC for legitimate reasons. They were either instructed by their political parties not to or the vio-

lations perpetrated were done in the context of the then ongoing conflict in KwaZulu-Natal – a time period that fell outside of the commission's mandate.

The need to deal with such cases is therefore necessary and should be cautiously welcomed. But the challenge will be in how the group conducts its work. There's a risk that a group made up solely of political parties may allow the process to degenerate into a forum for political horse trading.

Moreover, and most importantly, there has been no mention thus far of the needs of victims or the role that they will play in the new pardons process. Victims' groups should be invited to have representatives on the reference group to ensure that the recommendations of the group reflect more than just political expediency, but also the voices of those most centrally affected.

The issue of political crime pardons is only one element of the "unfinished business" of the TRC that needs to be addressed. Other key elements include following through on the threat of prosecutions for those who did not apply for the TRC's amnesty or were denied amnesty, comprehensive reparations programmes for victims and larger processes of in-

stitutional transformation and redistributive justice.

Each of these elements need to be addressed in order for South Africa to establish sustainable reconciliation based on justice and accountability.

However, to date, the government's willingness to engage with the past seems to have focused almost exclusively on ensuring benefits for the perpetrators, with little regard for the needs of victims.

This has been aggravated by the government's continued opposition to an international reparations case launched by former victims against multinational companies complicit in supporting and financing the human rights atrocities of the apartheid regime.

This sends a disturbing message about who it is that "counts" in the new South Africa. Urgent attention should be turned to the creation and implementation of policies designed to benefit victims through ongoing investigations, truth recovery, psychosocial support, follow through on prosecutions and comprehensive reparations, both symbolic and monetary.

■ Valji is senior project manager at the Transitional Justice Programme for the Centre for the Study of Violence



# Truth commissioners call for debate on pardons

BY CHRISTELLE TERREBLANCHE

Former truth commissioners have made the strongest appeal yet for a public debate on the process to resolve the issue of how to deal with those who did not appear before the truth commission and did not disclose their part in crimes committed during the apartheid era.

The appeal was made in the same week that the government and multinational corporations said they would continue to oppose reparations claims by victims of apartheid in a New York court. This week the United States 2nd circuit court of appeals ruled that the claims against the corporations – estimated at \$400 billion (about R2 700 billion) – could be heard by the lower court that had dismissed three apartheid lawsuits in 2004.

Some of the companies, which the claimants allege aided and abetted apartheid, said on Friday that they would seek a rehearing by the court of appeals.

Brigitte Mabandla, the minister of justice, said the South African government would continue to oppose the lawsuits.

Her department is also opposing constitutional challenges by victims of apartheid to its post-truth commission prosecution guidelines and its apparent lack of guidelines for the granting of presidential pardons to political prisoners of opposition parties jailed for apartheid-era atrocities.

Five years after the final report of the truth commission, the government still has no comprehensive plan for making community reparations, which was promised by President Thabo Mbeki. The government paid limited compensation to about 15 000 individual victims of gross human rights violations. The President's Fund, established for apartheid-era reparations, contains an estimated R600 million, which victims claim they cannot access.

This week, Alex Boraine, the former deputy chairman of the truth commission, accused the government of falling "far short" of the commission's recommendations on both

prosecutions and reparations, and said this "hangover" should be dealt with.

"Clearly we cannot let this thing hang in the air," he said. "I think that a debate has to be opened up because there is so much confusion. And so many different stakeholders – the perpetrators, the legal community, the victims, the media – all have an interest in gaining clarity as to the way forward."

Earlier this week, Boraine denounced the recent conviction of Adriaan Vlok. He said the secretly negotiated plea bargain was a farce, which allowed the apartheid-era minister of law and order minister to walk away scot-free without even providing detailed information.

Boraine's appeal for public participation was endorsed by two other former commissioners, Mary Burton and Dumisa Ntsebeza, and Boraine believes most of the other 14 would support it.

The government is believed to have had a comprehensive rethink on the

post-truth commission processes. This was revealed in court papers in a constitutional challenge brought by convicted Inkatha Freedom Front members in a bid to be considered for presidential pardons. In opposing papers, Menzi Simelane, the director-general of justice, said there was "a sense developing that the processes under the auspices of the TRC may not have covered and brought the closure which is necessary to help the country to achieve the necessary peace and stability", and that the state "would like to have a relook at a fresh mechanism or tool or process that can enjoy broad public legitimacy resulting in some form of closure on the so-called politically inspired offences".

In October 29 2003, the 55 000-member Khulumani Support Group for apartheid victims formally requested the government to provide it with details of its promised community reparations. But last month, it was told by the justice department that no such policy existed.

Marjorie Jobson, the Khulumani director, said it would now submit an access-to-information application to establish what happened to the reparations policy promised by Mbeki and Penuell Maduna, the then justice minister, in April 2003. At the time, Maduna said big business had promised to help the government to make community reparations in return for the state's assistance to quash the reparations claims filed in New York. Jobson endorsed the call for a public debate.

"Part of what we aspire to as a democracy is a responsive and open government with proper participation by citizens, but we haven't actually reached that stage of constitutional development," she said.

"And I think all these challenges are related to the presidency and the justice department... who are always treating us like this and are really defensive, whereas we aspire to make it work."

"For Khulumani, it is about creating the space for people to realise they have won the right to have their voices heard."

Burton said any new process should be debated by parliament, not by the executive or the national prosecuting authority (NPA), and only after wide consultation with civil society.

Boraine added: "Nobody seems to know what is happening... Nobody seems to be consulted. We are not sure whether the executive is making decisions, or the NPA, or the minister of justice... and I think it cries out loud for clarity concerning a wide range of issues. Otherwise rumour, fear and uncertainty will continue."

John Ngcebetsha, the South African lawyer for one of the lawsuits, has appealed to the government to stay neutral in the rehearing of the case in the 2nd circuit court of appeals, as it was not obliged to reciprocate.

"Our view is that this case is perfect to establish a trust fund to help rehabilitate communities that were affected [by apartheid-era atrocities]," he said. "One is talking in terms of \$400 billion, which could be the single largest capital injection in South Africa [yet]."



# TAKING CARE OF 'UNFINISHED BUSINESS'

**F**OUR suspected African National Congress guerrillas were abducted in July 1987 by the then Northern Transvaal security branch. The security police first took two of the suspects, Andrew Makupe and Jackson Maake, to a farm in Pienaars River. After beating them for hours, the apartheid police unit made Makupe phone his friend, Harold Sefolo, pretending that he wanted to see him.

They picked up Sefolo and, finding it difficult to extract information from him, wired Makupe to a portable generator and electrocuted him in front of Sefolo. They did the same to Maake and told Sefolo he was also going to be electrocuted. He asked to make a final request and his torturers agreed. He then gave a short speech and sang *Nkosi Sikelel' iAfrica*. When he finished, he was electrocuted to death.

A presidential pardon is in the interests of nation-building, says **PRESIDENT THABO MBEKI**. It will also enhance national cohesion and make a further break from the conflicts of the past

The fourth victim, Justice Mbizana, was arrested and taken to a farm in Hammanskraal where he was tortured and bludgeoned to death. The police tried to destroy the bodies of the deceased with explosives to ensure that the stories, the fate and identities of those who had been murdered, would never be known.

However, the critical work that the Truth and Reconciliation Commission (TRC) did ensured that the nation got to know what happened to these and many others who died so we can enjoy the freedom for which we pride ourselves today.

Further, the sterling work of the Missing Persons Task Team of the National Prosecuting Authority found the remains of the patriots in a grave in Winterveldt outside Tshwane and through deoxyribonucleic acid analysis (DNA) tests, was able to identify the deceased.

As far as we know, their families – and the families of the many who died in similarly horrible circumstances – have not asked for vengeance, but have insisted on a process of healing.

# No reconciliation without reparations

By RAFFAELLA DELLE DONNE

It did not come as too much of a surprise that the events at Polokwane would overshadow the meaning behind the Day of Reconciliation.

While the country geared (or rather braced) itself for the stand-off between Jacob Zuma and Thabo Mbeki this week, the kultural upstarts kollektive, a Cape Town-based group of cultural activists, erected a 3.5m x 2.5m crucifix outside St George's Cathedral and nailed Steve Biko to it.

But even a public crucifixion of the father of Black Consciousness couldn't divert media attention away from the Zulu on our stoep.

Our latest public art installation was motivated by a strong belief that there cannot be adequate reconciliation without accountability and compensation for the suffering inflicted on South Africans under apartheid.

We chose the Day of Reconciliation to highlight that the government – of both Mbeki and Zuma – opposes legal action against 23 multinational corporations for complying and benefiting from apartheid. A few weeks ago, in response to the news that the US courts of appeal had overturned the dismissal of the apartheid lawsuits, Mbeki issued a statement that it would harm both foreign investment and reconciliation, as well as

undermine the state's sovereignty.

For the most part, Mbeki's response attracted little media attention in the face of corruption scandals, crime statistics and dirty politicking. In opposition to the government's position, 17 Truth and Reconciliation commissioners, including Archbishop Emeritus Desmond Tutu, have backed the Khulumani plaintiffs, who are taking the legal action.

The kultural upstarts kollektive feels it dishonours all those who fought and died to overthrow an oppressive regime for the government to believe reconciliation has occurred simply because we now have a democracy.

Mbeki said freedom and

democracy were the "most fitting and profound reparation". Tell that to South Africans who do not have running water. Tell that to South Africans living with HIV/Aids. Tell that to South Africans who are being evicted from their homes.

For us, as young South Africans, the struggle was not about "lip service" ideals; it was about addressing the socio-economic disparities that continue to cripple the majority of this nation's peoples.

We believe it is the obligation of the government to act as a conduit for the prosperity of all South Africans, and to condemn injustices past and present, in order for true reconciliation to be achieved.

The ANC's ideological meander

from a centre-left movement to an institution which endorses macro-economic policies such as Growth, Employment and Redistribution (Gear), are doused in neo-liberalism, on which multinationals, such as those being sued, thrive.

In the context of the bigger, global picture where multinationals continue to exploit developing countries, it is disgraceful the government is merely banking on reconciliation instead of using this case to highlight the unethical business practices that continue to pervade and contribute to the oppression of all African peoples.

● *Raffaella Delle Donne is a writer and co-founder of the kultural upstarts kollektive*



# Victims denied any say in political pardons

Unlike the truth commission hearings, the amnesty debates will be held in private, writes **Hugo van der Merwe**

**P**olitical parties are helping to review applications for pardon from individuals who have committed politically motivated crimes. In this de facto re-enactment of the Truth and Reconciliation Commission's (TRC) amnesty process, the president has created a "reference group" to assess applications for pardon, a group that includes representatives of our 15 national political parties.

This group has already started making recommendations to the president as to which wrongdoers may be regarded as political offenders. The group's recommendations could lead to the early release of the perpetrators and the erasure of their criminal records. But, this time, the victims have no say in the process. And this is a huge step backwards after the efforts made by the TRC to assert victims' rights.

In a bizarre twist, those convicted of committing human rights abuses during apartheid and who thumbed their noses at the TRC are now having their cases reviewed by a political party panel. These cases are not being subjected to public exposure or formal legal hearings.

Worst of all, victims are prohibited from participating. The victims, or relatives of those murdered are not given access to the information disclosed by the perpetrator. Victims are not given an opportunity to challenge the facts presented by the perpetrator, nor are victims permitted to state how such a pardon might affect them. A pardon process is not itself a problem, but the potential political manipulation sets a dangerous precedent for our new democracy.

Pardons are a part of our constitution and are designed to give the president final say in deciding the fate of those convicted in the courts. Generally, such powers are used to relieve prison congestion or to grant mercy to those who might have been harshly treated by the courts.

In the case of politically motivated offences, it is an understandable response to those cases where individuals were not able to apply for amnesty through the TRC

for various reasons. Both the Inkatha Freedom Party and the Pan Africanist Congress have argued that many of their members involved in the political struggle are still behind bars.

Recognising this dilemma, President

Thabo Mbeki announced the political pardons process to deal with this "unfinished business" of the TRC.

While the pardons reference group employs similar criteria to that used by the TRC's amnesty committee (full disclosure

and political motivation), it has discarded what is arguably the most important and constitutionally entrenched requirements: the right of victims to be heard and to be given an opportunity to challenge the stories of perpetrators.

In contrast to the public hearings of the TRC, the reference group is meeting behind closed doors using undisclosed standards and principles.

Requests for information about the names of pardon applicants and the

group's rules and procedures have gone unanswered. As a result, no one outside of the group is in a position to challenge the alleged political motivation of the perpetrators. The reference group is under heavy pressure to deal with a huge caseload. It has reportedly received more than 2 300 applications and only has until September 30 to forward recommendations to the president.

While the president is not obligated to act on these recommendations, the fact that they have been considered by all 15 political parties is likely to lend serious weight to the recommendations.



# City Press

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## Mbeki's pardons should target historical injustices

THOSE who thought President Thabo Mbeki would address the limitations of the Truth and Reconciliation Commission (TRC) to fix outstanding issues regarding perpetrators of political violence may have been disappointed by his speech to Parliament this week.

It is tempting to congratulate Mbeki for announcing that all political prisoners whose crimes fall within the prescribed period ending in 1999 would be considered for presidential pardon and release from jail.

However, it is a scandal that somebody who was convicted and jailed for fighting against apartheid should still be in jail 13 years after the African National Congress (ANC) took power.

After all, those convicted of political violence include members of the ANC, the Pan Africanist Congress (PAC) and the Inkatha Freedom Party.

The pardon was good news – many political prisoners would benefit.

Even those who were already released would benefit because their cases would be expunged and they would no longer have criminal records.

To that extent, the announcement by Mbeki was a gesture of goodwill as we approach the festive season.

However, we should raise concern about the thousands of freedom fighters who shunned the TRC on principle and refused to apply for amnesty such as PAC president Letlapa Mphahlele.

He rightly argued that apartheid had been declared a crime against humanity by the United Nations and those who fought against it were on the side of justice while those who fought for its preservation should face criminal charges.

The equation of freedom fighters with those fighting to retain apartheid was a product of a political compromise.

The deal made political sense but it was morally bankrupt.

We had thought Mbeki would use the opportunity to correct this historical injustice – putting freedom fighters and apartheid warlords in the same dock. He did not.

There is no doubt that the struggle against apartheid was just. There is also no doubt that the struggle for apartheid was wrong.

However, Mbeki could have been limited by the law.

As president, he could only grant pardons to people who had been convicted in a court of law.

This means that even if he had wanted to grant pardons to all the freedom fighters who did not follow the TRC route, he could not.

It is unfortunate that there are people who cannot return to South Africa because there is a possibility that they could be arrested for crimes committed in the fight against apartheid, a system condemned by the World Council of Churches as a heresy.

Mbeki would do well to think about his legacy and that of his party on this vexed issue.

## NATIONAL NEWS

Calls for legal action against Motlanthe if he grants presidential pardons for apartheid-era crimes

# Rights body wary of political pardons

Franny Rabkin

Staff Writer

**T**HE South African Human Rights Commission (SAHRC) has added its voice to a coalition of civil society organisations calling for a revision of a presidential pardon process to address politically motivated crimes.

On the list of people who applied for presidential pardons are Ferdi Barnard (who murdered anti-apartheid activist David Webster), former apartheid police chief Johann van der Merwe and former law and order minister Adriaan Vlok.

The process was initiated by former President Thabo Mbeki to deal with the "unfinished business of the Truth and Reconciliation Commission" (TRC).

Mbeki established a parliamentary reference group, comprising representatives of all the political parties in Parliament, to consider and make recommendations for pardons in relation to "politically motivated offences before June 16 1999".

Tertius Delpoit, Democratic Alliance (DA) MP who chairs the reference group says that out of 2 300 applications, about 105 pardons for politically motivated crimes have already been recommended to President Kgalema Motlanthe.

The vast majority were rejected. He says there are about 250 applications that the committee must still consider.

Delpoit does not want to disclose who the reference group had recommended. He says he cannot even say which political parties they came from, because "that issue is so irrelevant".

The coalition, which includes the Centre For the Study of Violence and Reconciliation, the International Centre for Transitional Justice, the Khulumani Support Group and the Freedom of Expression Institute, has threatened legal action against Motlanthe should he grant presidential pardons for apartheid-era crimes.

It says the process is problematic because it does not allow for victims to make representations or require that applicants fully disclose all the facts regarding the offences related



The names of Adriaan Vlok, right, and Johann van der Merwe are on the list of those who seeking pardons.

Picture: ALON SKUY

to their applications for pardon.

SAHRC chairman Jody Kollapen says that if a special mechanism is set up to complete the unfinished business of the TRC, "it should follow the philosophy and architecture of the TRC".

Kollapen says one of the big differences between the TRC and the pardons process is that "central to the TRC process was victim participation".

"It would have been inconceivable for the TRC to have happened without the participation of victims or their families. So, at the very least, victims should have been informed and given the opportunity to make representations."

Another big difference is that the TRC required that applicants for amnesty made "full disclosure" of all the facts related to their actions.

Delpoit has confirmed to Business Day that there was no such requirement for recommendation by the reference group

In Vlok's case, National Director of Public Prosecutions (NDPP) Vusi Pikoli refused Vlok's request not to charge him for the attempted murder of Rev Frank Chikane because Vlok had not made full disclosure. Full disclosure was one of the requirements of the National Prosecuting Authority's prosecution policy.

In particular, Vlok did not disclose the contents of a list of high-profile anti-apartheid activists — of which Chikane was just one — also meant to be "acted against".

Vlok then entered into a plea bargain agreement. He pleaded guilty to the attempted murder of Chikane in return for the charges being dropped on conspiracy to commit murder of the "unknown persons" on the list.

Since there is no requirement for full disclosure, Vlok and others may be recommended for pardon without having to disclose anything, and the list may never be revealed.

The coalition is also concerned that the process happened behind closed doors. The TRC process was a public one and the prosecutions policy at least requires that the NDPP give reasons if it refused to prosecute.

But Delpoit says there is no requirement in Mbeki's terms of reference for full disclosure or victim participation.

Delpoit says that presidential pardons are entirely within the discretion of the president and had been found to be constitutional by the Constitutional Court.

Delpoit also says the process "was not the unfinished business of the TRC" because his group was "mandated to look at people who committed political crimes right up until 1999".

He says representations from victims were never taken into account in the pardon process and to do so would have been embarking on a "semi-judicial process".

Delpoit says that the committee is merely an advisory one — ultimately the president decides. But the coalition is convinced that the pardons process violates the rights of victims to just and fair administrative process, dignity, life and equality. They also say that there is a conflict of interest because the reference group is comprised entirely of representatives of political parties.

Delpoit was a deputy minister of provincial affairs in the apartheid government.

The coalition wrote to Motlanthe last month asking him not to give pardons until victims had been consulted. Motlanthe has replied that he was taking legal advice from Justice Minister Enver Surty and, until Surty makes a recommendation, nothing will be done.

The group now wants to meet urgently with Surty. But it says if the pardons go ahead, it will seek to interdict the president in court.



# Sanction of secret pardons 'is bizarre'

'MPs should have stood up for victims' rights'

JOHN YELD  
Staff writer

IT'S "astounding" and "bizarre" that all 15 political parties represented in the past Parliament were prepared to sanction a secret pardon process for supposedly politically motivated crimes committed after the cut-off date for amnesty granted by the Truth and Reconciliation Commission (TRC).

"This is the verdict of the Observatory-based Centre for the Study of Violence and Reconciliation, articulated by its director, Hugo van der Merwe.

Speaking yesterday during a media conference that was called in response to a judgment by the Pretoria High Court last week about the pardon process, Van der Merwe was also critical of the parties for not speaking out publicly in support of the right of victims to make representations.

The centre, one of a coalition of civil society and victim organisations, was the first applicant in the urgent application for an interdict to stop President Kgama Mantshe granting pardons in terms of the Special Dispensation on Political Pardon - a process that had been set in motion in early 2007 by then president

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Thabo Mbeki.

In terms of this process, a Pardon Reference Group, comprising representatives of all political parties in the previous Parliament, considered applications for pardons for political offences, to deal with the "unfinished business" of the TRC.

The group then made recommendations to the president.

One of those seeking a pardon, and who joined the court action as an intervening party, was Afrikaans Weerstandsbeweging leader Jan "Voetbaai" van der Westhuizen, who was sentenced to 40 years in jail for a 1996 Christmas Eve bomb attack in Worcester in which four people died and more than 40 others were seriously wounded.

The urgent court application was prompted by Mbeki's decision on March 12 not to permit victims to make representations and not to lift the blanket of secrecy under which the pardon process had taken place.

The president had report-

edly been on the verge of pardoning about 130 perpetrators, on the recommendation of the reference group, just before the April 22 elections when the coalition launched its court action.

Judge Willie Switz issued an interim order to the effect that, before releasing any prisoner on pardon, Mbeki had to consider all relevant information relating to the prisoner.

"The judge said information should include the input of victims and/or families of the victims of that particular crime, and any other relevant information which might come from any interested party," the judge said.

Yesterday's media conference was called by the coalition to comment on the judgment, and to provide an opportunity for 15 victims and the families of victims of the Worcester bombing to comment publicly.

Asked why the political parties would have agreed to a secret process - the names of about 130 applicants for pardon are known, but not those of the 120-odd recommended by the reference group or any other details - Hugo said they feared a process of "horse-trading" in which the parties had supported each other's candidates.

"They all stayed together and didn't break ranks - it's bizarre," he said.

Linda Sibeko, deputy mayor of Worcester at the time of the bombing, who acted as translator yesterday, said the victims still needed counselling.

"This is the first time they've had a platform to speak out about these things. We will never forget that day."

"We said in Zwelwiniwe it was like a Black Christmas. It was one everybody."

Sibeko agreed with the victims' sentiment that Van der Westhuizen should not be pardoned.

"The begging the president not to allow that man to come out (the AWB members) knew exactly what they were doing."

Shirley Green, of the Human Rights Media Centre, another member of the coalition and an applicant, pointed out that victims of crimes by those now being considered for pardon had not had access to any reparations - unlike victims identified by the TRC process.

They should get compensation from the President's Fund, which stood at R100 million, she said.

"That's definitely something we should lobby for."

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STILL SUFFERING: Lalai Mathobha, right, tells how her 3-year-old son Xolani died in the 1996 bomb blast.

Picture: Sam Clark

## Victims can't forgive bomber for destroying lives

JOHN YELD  
Staff writer

THE PAIN is still palpable, more than 13 years after the incident that blew their lives apart - literally and figuratively.

Nonnyala Banaawe is sitting in the Observatory offices of the Centre for the Study of Violence and Reconciliation, wiping her eyes as she recalls how her daughter Sweetsie was severely injured by a bomb blast on Christmas Eve 1996 and died four years later after never recovering properly.

Next to her, fellow victim Lalai Mathobha and Paulina Mathobha, who both lost young children to the bomb that was planted by AWB member Jan "Voetbaai" van der Westhuizen,

sob quietly as they listen to their fellow residents of Zwelwiniwe township in Worcester explain why she believes a pardon for the right-winger is out of the question.

Banaawe recalls how Sweetsie, then 26, was severely wounded in the stomach and foot when the first of two bombs exploded outside Shoprite Checkers in Worcester, where she was a casual worker.

When she got to the hospital, she found her daughter with her flesh "shattered, just blood", and she passed out with shock. When her daughter was discharged, she was a cripple.

"And now this man says we must forgive him, he wants to get out of jail. Today I have no one to support me. I suffer from hunger. I have to live just

from my pension. I will never be able to forgive that man as long as I live ... and the Lord must forgive me," says Banaawe.

Lalai Mathobha tells how her 3-year-old son Xolani was killed instantly. Banaawe is pained so badly that she won't allow to see his remains.

The family didn't have money for a coffin and had to rely on the victims' relief fund established by the town's mayor, the late Rynold Williams.

"He (Jan der Westhuizen) wanted to kill black people. He must stay where he is - I totally don't forgive him," she says.

Paulina Mathobha tells how her only son, Andile, 13, was severely injured in the head and suffered for seven days before dying in Tygerberg Hospital.

"I can't forgive him (Van der Westhuizen)," she says. Leroy Dwahe, who was 21, tells how he had gone to the supermarket to earn money by helping elderly people carry their groceries.

"I just smelled something on the ground ... when I looked at my leg I could see blood and see my foot just hanging there."

Building up his trouser leg to show the scars, he says: "The cause of that injury, I'm not like other children, I can't play football since that day."

Audrey Papias, 12 in 1996, pulls up his shirt to reveal several scars.

Like the women, neither will sanction Van der Westhuizen's pardon bid.

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# Right time to tackle the TRC's unfinished business

THERE has been a recent spate of letters from right-wing elements who seem to feel safe in spouting a mixture of ignorance and vitriol about the conduct of the anti-apartheid struggle in the 1980s.

To many of those who fought against the neo-fascism of apartheid, made great sacrifices and lost loved ones, some of the letters have bordered on hate speech and kindle exactly the kind of resentment that Rodney Warwick ("Is ANC rekindling past resentments?" Cape Points, August 10) tries to attribute to those who commemorated the deaths of Coline Williams and Robbie Waterwich.

Many foot soldiers of the apartheid regime who paid the ultimate price lie in their graves and are accorded respect as war dead, without denigration from the ANC.

Romantic monuments, in unbelievably great numbers, dot the landscape of our country extolling the virtues of colonial and apartheid-era notables, and the ANC has not assailed these.

It is thus rather rich that we are now subjected to accusations of "romanticisation" because of a handful of modest memorials around the country.

I took Warwick's letter and replaced the names of Robbie and Coline in the text with that of Nelson Mandela, as everything said could be equally applied to our great elder statesman, who was, after all, the commander-in-chief of MK.

When you do this you see these commentators for who they really are and it makes you think that reconcili-

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ation is a very thin veneer in our post-apartheid society.

The memory of Robbie and Coline has become a soft target for the resurgent right-wing in the Cape.

If Warwick has the guts, let him tell us openly that apartheid was not a crime against humanity and that Mandela and the organisation he led were misguided people who intimidated a population which was really quite happy under Verwoerd, Vorster and Botha's regime. This would be a fair summary of his letter.

Many of us believe we need a round two of the Truth and Reconciliation Commission to clear up unfinished business, where more emphasis is placed on bringing out the full truth than giving pardons and exemptions in the name of reconciliation.

South Africa has yet to hear of the full horrors perpetrated by the apartheid regime, which carried on right up to 1994.

Too many have gotten away with gross violations and continue to stir up anti-ANC feelings from positions of respectability as they try to rewrite history.

I would welcome giving the stand to the Willem Steenkamps and Warwicks of this world, to come and put their arguments denigrating the ANC's struggle in front of apartheid-era victims and the world's media. Of course they would need to allow cross-examination of their spin.

I would also like to see the broad range of activist veterans, young and old, testify to our experiences. Too many still don't know the real stories of resistance and the price paid. This would be most educational for the nation. Then let the world truly judge.

As in any war, there certainly were failures in the resistance movement, but there was much sacrifice and heroism that has gone unsung while yesterday's violators walk around freely, talking about their 'respectable' military and policing careers and denigrating the validity and conduct of the ANC in the years of struggle.

And perhaps while we are taking a new look at the past, we could, like Germany, open up the security police archives for public scrutiny.

Fifteen years after 1994 I still cannot read my own security police file. We would all learn a little bit more about what really happened in the 1980s and take the ignorant wind out of the sails of Warwick et al.

Patric Tariq Mellét  
Rondebosch East

RODNEY Warwick's letter reeks of prejudice and racist bigotry.

Exactly what point he is trying to make escapes me.

His attempt to trivialise the deaths of Robert Waterwich and Coline Williams by suggesting that they were two misguided youngsters flies in the face of the truth that they gave their lives in an attempt to free this country from the sickness that was destroying it.

That a cleaner may have died during the attempted bombing, as Warwick points out, was not the issue.

Tens of thousands of young black cadres died during those dark times at the hands of those in power.

They were thrown off the tops of buildings, out of windows, blown to pieces, fed to crocodiles, shot, tortured and murdered.

We will never know how many died or where their bodies lie.

Suffice to say that the deaths of Williams and Waterwich and the tireless work of MK and the underground movement of that time entrenches Warwick's rights today via the best constitution in the world and allows him to write drivel without fear of prosecution or intimidation.

Warwick treads on thin ice when he attempts to besmirch and undervalue the role of two young people who gave their lives so that people like him are able to live in a country where all are equal.

Colin Bosman  
Newlands



# Justice for victims of crime

Court endorses their right to a say in consideration of pardons, writes **Piers Pigou**

**‘W**HO pardons easily invites offence.” So warned French poet and dramatist Pierre Corneille, and fortunately our highest court is alive to this concern.

The Constitutional Court’s dismissal of AWB member Ryan Albutt’s efforts to prevent victims from making representations in the pardon process set up by former president Thabo Mbeki to deal with cases from the pre-1996 political conflicts has been rightly lauded as a victory for victims’ rights.

This is in a context in which their right to remedy from apartheid-era violations has been slowly whittled away. The crux of the matter was whether victims should be afforded the right to participate in any decisions relating to pardon applications by their perpetrators.

It is something the presidency had ignored in its terms of reference, and which the reference group refused to accommodate. The court’s decision was therefore a victory for common sense.

**Ruling has significant implications in law for other cases being considered**

As Chief Justice Sandile Ngcobo pointed out, once we accept that “the twin objectives of the special dispensation process are nation building and national reconciliation, and that the participation of victims is crucial to the achievement of these objectives, it can hardly be suggested that the exclusion of the victims from the special dispensation process is rationally related to the achievement of the objectives of the special dispensation process”.

Though the court’s reasoning related to the specifics of this particular process, many believe that the judgment has significant legal implication for other cases under consideration for presidential pardon — with the hope that victims would be consulted in these matters too.

This explains the cacophony of media noise about the unrelated pardon applications of Eugene de Kock and Schabir Shaik. Even if it is unclear whether either of these convicts is claiming political motivation in his application, the judgment is, however, likely to have a bearing on other pardon applications relating to past political conflicts. These include the cases of the several hundred IFP supporters who have been waiting for many years for their applications for a pardon to be finalised.

In a country in which perpetrators applying for pardons have used the courts and the media to present themselves as victims of discrimination, it’s worth

reminding ourselves of the types of crime for which pardons are sought.

Over 2 100 applied in the special dispensation process, of which 121 were recommended for pardon. These included members of the ANC, PAC, IFP, UDM and AWB, and relate to hundreds of violent

crimes, over 350 murders and attempted murders, unlawful possession of unlicensed firearms and ammunition, high treason, sabotage, robbery and theft.

Some relate to notorious massacres such as the 1995 Christmas Day Shobashobane killings on the south coast of KwaZulu-

Natal, and the multiple murders relating to the bloody reign and demise of former ANC and UDM warlord Sifiso Nkabinde. They include mass murderers and contract killers.

It remains unclear how pardoning these and other criminals would contribute to nation building and national reconciliation.

There was never any real chance that this or any other pardon process could be the vehicle for completing “the unfinished business of the TRC”. For one thing, the pardons process could not address the hundreds of cases that were transferred from the TRC to the National Prosecuting Authority for investigation.

These and other criminal matters that should be under investigation have not received adequate attention. The NPA unit responsible for these inquiries has been starved of resources, and efforts by the NPA to introduce a special policy for investigating and prosecuting pre-1994 conflict cases was exposed as another back door *in camera* amnesty process, and was successfully challenged in the courts by a similar coalition of human rights organisations.

So, just how serious is South Africa’s political leadership about making some progress, maybe even closure around the multiple aspects of this unfinished business?

Legal accountability and related processes are likely to remain a contested and fraught terrain, but there are also a range of other issues relating to past conflicts that still require attention, but not necessarily through a legal lens.

These relate to multiple opportunities for further truth recovery, reparations and memorialisation, as well as access to the TRC’s archive, a national treasure that remains under lock and key.

These issues have, for the most part, been airbrushed from our collective consciousness. It remains a national shame that most South Africans have not seen what the TRC found or recommended.

With respect to the pardons issues, the NGO coalition will now seek to advise the presidency on what it thinks would be a suitable process for victim consultation and will draw on best international practices to do so.

Victims and survivors are not necessarily opposed to the notion of pardons but, as the Constitutional Court has confirmed, the legitimacy and durability of the process dictates that they must be part of it.

The presidency and civil society must ensure that victim constituencies and broader South African society are meaningfully engaged throughout.

*Pigou is a senior associate of the International Centre for Transitional Justice*