

Volume **SIX** • Section **FIVE** • Chapter **ONE**

Findings and Recommendations
THE LEGAL FRAMEWORK WITHIN WHICH
THE COMMISSION MADE FINDINGS IN
THE CONTEXT OF INTERNATIONAL LAW

Legal Framework

THE LEGAL FRAMEWORK WITHIN WHICH THE COMMISSION MADE FINDINGS WITHIN THE CONTEXT OF CURRENT INTERNATIONAL LAW

■ INVESTIGATING GROSS HUMAN RIGHTS VIOLATIONS

1. The Truth and Reconciliation Commission (the Commission) was charged with the task of investigating and documenting gross violations of human rights committed during the period March 1960 to May 1994. In the course of doing so, it was required to compile as complete a picture as possible of the conflicts of the past.

DEFINING GROSS HUMAN RIGHTS VIOLATIONS

2. The Promotion of National Unity and Reconciliation Act No. 34 of 1995, (the Act) defined a gross human rights violation as:

the violation of human rights through (a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date [10 May 1994] within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive;¹

3. The language used in the Act to describe gross human rights violations deliberately avoided the use of terms associated with the legal definitions of crimes in South African law. Thus 'killing' was used rather than 'murder' in order to allow the Commission to examine these violations without having to consider legal justifications or defences used by perpetrators for such conduct. The Commission could therefore make findings that those who had suffered these violations were victims. Chapter Four of Volume One sets this out more elaborately.

¹ Section 1(1)(ix).

Interpreting the definitions

Killing

4. 'Killing' was interpreted to include the following:
 - a the killing of civilians, irrespective of whether they were deliberately targeted or innocent bystanders caught in the crossfire, and
 - b those who were executed for *politically motivated* crimes, irrespective of whether the killing had the sanction of the state, tribunals set up by the liberation movements or 'people's courts' established by communities.²

5. The only exception that the Commission took into account was that of combatants who had died in the course of the armed conflict and were clearly identified as such. The Commission's position in this regard is further elaborated in Volume One, Chapter Four of the Final Report. In this the Commission was guided by the Geneva Conventions' distinction between 'combatants'³ and 'protected persons'⁴.

Torture

6. The Commission accepted the international definition of torture: that is, the intentional infliction of severe pain and suffering, whether physical or mental, on a person for any of the following purposes:
 - a obtaining from that or another person information or a confession;
 - b punishing a person for an act that s/he or a third party committed or is suspected of having committed;
 - c intimidating her, him or a third person; or
 - d any reason based on discrimination of any kind.

7. Pain or suffering that arises from, is inherent in, or is incidental to a lawful sanction does not qualify as torture.⁵

² These interpretations reflect the Commission's position on the death penalty and political killings, which is in line with international human rights law.

³ Geneva Conventions, Article 43 (Paragraphs 1 and 2) of Additional Protocol I of 1977.

⁴ Geneva Conventions, Common Article 3 of all four conventions of 1949. See Appendix 1.

⁵ Article 1(1), Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

Abductions

8. This term was defined as the ‘forcible and illegal removal or capturing of a person’. It was applied to those cases where people had ‘disappeared’ after having last been seen in the custody of the police or of other persons who were using force. It does not include those who were arrested or detained in terms of accepted human rights standards.

Severe ill-treatment

9. This term was defined by the Commission as:
acts or omissions that deliberately and directly inflict severe mental or physical suffering on a victim, taking into account the context and nature of the victim.
10. The Commission took a number of factors into account when determining on a case-by-case basis whether an act qualified as severe ill-treatment. These included the duration of the suffering or hardship, its physical or mental effects and the age, strength and state of health of the victim. Violations included rape, sexual abuse, severe assault, harassment, solitary confinement, detention without trial, arson and displacement. A fuller list of acts that constituted violations is included in the Commission’s Final Report.⁶

ESTABLISHING ACCOUNTABILITY

11. One of the main objectives of the Commission was to establish the identity of the individuals, authorities, institutions and organisations involved in the commission of gross violations of human rights. The Commission was also tasked with establishing accountability for the violations, and determining the role played by those who were involved in the conflicts of the past. In dealing with these complex issues, the Commission was guided by the provisions of section 4 of its enabling Act.
12. The Commission made findings of accountability in respect of the various role players in the conflict on the basis of the evidence it received. It should be noted that it did this in its capacity as a commission of inquiry and not as a court of law. The Commission’s findings are, therefore, made on the basis of probabilities and should not be interpreted as judicial findings of guilt, but rather as findings of accountability within the context of the Act.

⁶ Volume One.

13. The Commission based its conclusions on the evidence and submissions placed before it. It did not focus only on legal and political accountability, but also on establishing moral responsibility.

Moral responsibility

14. In its Final Report, the Commission stated:⁷

A responsible society is committed to the affirmation of human rights and, to addressing the consequences of past violations) which presupposes the acceptance of individual responsibility by all those who supported the system of apartheid or simply allowed it to continue to function and those who did not oppose violations during the political conflicts of the past.

15. In the Final Report, the Commission defines not only legal and political accountability, but also boldly asserts the notion of moral responsibility. The Commission finds that all South Africans are required to examine their own conduct in upholding and supporting the apartheid system. The abdication of responsibility, the unquestioning obeying of commands, submitting to fear of punishment, moral indifference, the closing of one's eyes to events or permitting oneself to be intoxicated, seduced or bought with personal advantages are all part of the multi-layered spiral of responsibility that lays the path for the large-scale and systematic human rights violations committed in modern states.
16. There were those who were responsible for creating and maintaining the brutal system of apartheid; those who supported this brutal system and benefited from it, and those who benefited from the system simply by being born white and enjoying the privileges that flowed from that. Others occupied positions of power and status and enjoyed great influence in the apartheid system, even though they had no direct control over the security establishment and were not directly responsible for the commission of gross human rights violations. It is only by acknowledging this benefit and accepting this moral responsibility that a new South African society can be built. What is required is a moral and spiritual renaissance capable of transforming moral indifference, denial, paralysing guilt and unacknowledged shame into personal and social responsibility. This acceptance of moral responsibility will allow all those who benefited from apartheid – including the business community and ordinary South Africans – to share in the commitment of ensuring that it never happens again.

⁷ Volume One, Chapter Five, para 101.

17. Those who must come under special scrutiny are those who held high office, those who occupied positions of executive authority and those cabinet ministers whose portfolios did not place them in a direct supervisory capacity over the security forces. While the Commission's findings are not judicial findings, the Commission finds them to be morally and politically responsible for the gross human rights violations committed under the apartheid system, given:
 - a the specific responsibilities of cabinet ministers who oversaw aspects of the apartheid structure in areas that formed key aspects of apartheid's inhumane social fabric (education, land removals, job reservation, the creation of the Bantustans, for example);
 - b the knowledge they had (given the extensive information regarding apartheid crimes in the public domain), or the knowledge that they are presumed to have had, given their access to classified information – at the highest level – about gross violations of human rights, and
 - c their power to act, given their official leadership positions.

LEGAL ACCOUNTABILITY

18. In deliberating on its findings, the Commission was guided by international humanitarian law and the Geneva Conventions.

Apartheid as a crime against humanity

19. The International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the United Nations (UN) General Assembly in 1973, states in Article 1 that apartheid is a crime against humanity. The Convention is one of a series of General Assembly and Security Council resolutions condemning apartheid as a crime against humanity. This legal categorisation has been echoed in the jurisprudence of the International Court of Justice and the International Law Commission's Draft Articles on State Responsibility and Crimes against the Peace and Security of Mankind. The classification of apartheid as a crime against humanity has been confirmed, and apartheid has been treated as similar to other egregious crimes such as genocide, slavery and colonialism in international sources as wide-ranging as the African Charter on Human and People's Rights and the International Criminal Tribunal for the former Yugoslavia.

20. The International Law Commission's description of a crime against humanity⁸ has been interpreted to suggest that such a charge can be brought against a single individual for a single act if that act is on a large scale, and/or if that act can be situated in a systemic pattern of violations⁹

Implications of this classification for the prosecution of human rights crimes under apartheid

21. While executing its mandate, the Commission gained a deep understanding of the apartheid system as a whole and its systematic discrimination and de-humanisation of those who were not white. Moreover, the Commission received a number of submissions from various institutions and structures, requesting that it interpret its mandate more broadly than was defined in the founding Act. Whilst taking these submissions very seriously, the Commission was bound by its legislative mandate to give attention to human rights violations committed as specific acts, resulting in killing, abduction and severe physical and/or mental injury, in the course of the past conflict. Although the Commission endorsed the internationally accepted position that apartheid was a crime against humanity, the focus of its work was not on the effects of the laws and policies passed by the apartheid government. The Commission has been criticised in some quarters for this approach.
22. It could be argued that the new government has an obligation, in terms of international law, to deal with those who were responsible for crimes committed under apartheid, even though their acts were considered legitimate by the South African government at the time. On the other hand, the international community declared apartheid to be a crime against humanity and saw the apartheid government as illegitimate. It can therefore be argued that crimes under apartheid have international implications and demand an appropriate response from the new state.
23. However, the Commission acknowledged in its Final Report that the urgent need to promote reconciliation in South Africa demanded a different response, and that large-scale prosecution of apartheid criminals was not the route the country had chosen. This does not mean, however, that those who were in power during the apartheid years should not acknowledge that the crimes committed in the name of apartheid were grave and heinous. Had there been no such

⁸ ILC, 1886 Draft Code of Crimes against the Peace and Security of Mankind.

⁹ Judgment of Tadic case, 7 May 1997, para 649.

settlement, had the negotiating parties not decided to put reconciliation first, there would have been serious consequences for members of the former Cabinet and Tricameral Parliament, for those who held high office in the security forces, intelligence and the judiciary, and for others who were responsible by virtue of their positions of authority and responsibility.

24. The liberation movements were cognisant of this at the time of negotiations. They were, however, also sharply aware of the fact that prosecutions could endanger the peace process; hence the need for an accountable amnesty provision which did not encourage impunity, while at the same time taking account of the rights of victims. Furthermore, it has always been understood that, where amnesty has not been applied for, it is incumbent on the present state to have a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law.

Importance of this classification for reparation

25. The recognition and finding by the international community that apartheid was a crime against humanity has important consequences for the victims of apartheid. Their right to reparation is acknowledged and can be enforced in terms of international law.
26. The classification of apartheid as a crime against humanity emphasises the scale and depth of victimisation under apartheid and, to that extent, adds further weight and urgency to the need to provide adequate and timely responses to the recommendations of the Commission. It also enhances the legitimacy of the Commission's recommendations in respect of reparations, which now require urgent implementation. The classification also gives greater legal legitimacy to the Commission's recommendations for the institutional reform of apartheid institutions (including the security forces, public administration, the judiciary and business).
27. The Constitutional court in the Azanian People's Organisation (AZAPO) case took the issue further. Not only did it recognise the rights of victims, but it also confirmed the statutory duty of the state to provide an appropriate reparation policy for victims emanating from the Commission process.

Importance of this classification for the struggle of the liberation movements against the apartheid state

28. As elaborated more fully in the section on African National Congress (ANC) violations (see below), the legal designation of apartheid as a crime against humanity has important consequences for the struggle conducted by the liberation movements. In terms of international law, the designation of apartheid as a crime against humanity has ensured that the legal status accorded to the war waged against the former apartheid state is that of a 'just war' or '*ius ad bellum*'.¹⁰
29. The effect of this designation is to render as just the moral, political and legal status of the struggle against apartheid.
30. The criteria for determining whether a struggle can be regarded as a just war are: (i) that those who waged it turned to armed conflict to fight an unjust system, and (ii) that they did this in a context where alternative routes for legal and political action had not only failed, but were likely to trigger further repression.
31. Thus those who waged war against the illegitimate apartheid state had legitimacy conferred upon them in terms of international law.
32. However, a distinction needs to be drawn between the means and the cause. The fact that the cause is just does not automatically confer legitimacy on all conduct carried out in the pursuit of that war (*ius in bello*). International law imposes a continued obligation on the liberation struggle to employ just means, even in the conduct of a just war.
33. The laws that apply to the conduct of a just war rest on two broad principles: the principle of necessity and the principle of humanity. Simply interpreted, this means that 'that which is necessary to vanquish the enemy may be done', but that 'that which causes unnecessary suffering is forbidden'.
34. The balancing of these two principles has been the subject of much debate and writing in international law.
35. In essence, these principles have meant that combatants in a conflict or war situation enjoy certain rights. If they are captured and disarmed, they are considered to be prisoners of war and must be treated accordingly. This

¹⁰ Volume One, Chapter Four.

requires of the party in command of the situation that prisoners of war be safeguarded against execution or deliberate injury. In the event that they are *hors de combat*¹¹ because they have surrendered or have been wounded or captured and disarmed, they must be protected. Warfare cannot be continued against them. These principles also apply to non-combatants or civilians (as they are now known). The laws of war require that civilians or non-combatants may not be subjected to deliberate or indiscriminate attacks, reprisal killings, seizures, hostage taking, starvation or deportation, nor may they have their cultural objects and places of worship destroyed.

36. Both civilians and combatants in conflict circumstances are protected against criminal sanctions unless they have been accorded due process of law.

INTERNATIONAL HUMANITARIAN LAW

The Geneva Conventions

37. The Geneva Conventions were adopted in 1949 and additional Protocols I and II in 1977. The Conventions are considered to be binding in international law. Virtually every government in the world has accepted their tenets by ratifying them. However, even where states have not ratified the treaty, they have the force of 'customary international law' – that is, they bind governments irrespective of whether those governments have formally ratified the treaty accepting their obligations. The apartheid state acceded to the Geneva Conventions in 1952. It did not, however, ratify or accept the additional protocols, and sought to argue that it could not be bound by their provisions. However, because the international community does not regard ratification as a criterion for holding a state to be bound, it is generally accepted that, even though the previous government did not ratify these conventions, it was formally bound by the principles enunciated by these bodies during the relevant period, as they are expressions of customary international law on state responsibility for the commission of gross human rights violations.
38. In the case of the ANC, President Oliver Tambo signed a declaration at the headquarters of the International Committee of the Red Cross, Geneva, on 28 November 1980, committing the ANC to be bound by bound by the Geneva Conventions and Protocol I.¹²

11 Out of the fight.

12 See the Appendix to Chapter Three of this section for a full text of the statement and declaration.

Applicability of the Geneva Conventions to the South African conflict

39. The Commission's mandate encompassed the period March 1960 to 10 May 1994, the date of President Mandela's inauguration. Given that Protocols I and II were adopted in 1977, it is appropriate to consider what law was applicable to the conflict raging in South Africa. Of particular note are those sections of the Protocol dealing with grave breaches.
40. The Geneva Conventions and Protocol I draw a distinction between acts that constitute a 'grave breach' and acts that constitute a 'regular breach'.¹³
41. These definitions become important when dealing with those acts or means used during conflict which the Commission found to constitute gross human rights violations. Furthermore, the provisions of the relevant Conventions and Protocol I become particularly important when dealing with the bombing incidents (Khotso House, the Magoo and Why Not Bars, the London ANC office and so on).

The period March 1960 to 1977

42. During the period March 1960 to 1977, the principal treaties that applied to the conflict were the Geneva Conventions, and in particular Common Article 3. Protocols I and II had not yet been drafted.
43. Common Article 2 of the Geneva Conventions states explicitly that, with the exception of Common Article 3 and the Martens Clause, the Conventions exclusively address armed conflicts between states.
44. Whilst on the face of it this may be interpreted to mean that the Geneva Conventions had no application during that period, this is not the case, as a number of bodies within the UN passed resolutions relating to the armed conflict in South Africa. The resolutions covered subjects ranging from apartheid to colonialism and the right to self-determination. In this regard, Resolution 31029(XXXVIII) of the UN General Assembly adopted in 1973 provided as follows:

¹³ Appendix 2 to this chapter sets out those acts that constitute a grave breach.

The armed conflict involving the struggle of people against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to persons engaged in armed struggle against colonial and alien domination and racist regimes.

45. It can, therefore, be argued that the conflict in South Africa was regarded not as an internal conflict but as an international armed conflict.
46. One should also have regard to the provisions of Common Article 3, which expressly provide that this Article applies 'in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. Given that South Africa had acceded to the Geneva Conventions in 1952 and has remained a party ever since, there can be no doubt that it was bound by these provisions.
47. The ANC at this time was a non-state actor and lacked the authority or legal capacity to ratify or accede to the Geneva Conventions. However, the ICRC commentary to Common Article 3 makes it clear that non-state parties to non-international armed conflicts become bound to apply the provisions of Common Article 3 upon ratification or accession by the state party to the conflict. Moreover, the ANC itself, in terms of public statements made during this period, considered itself bound by the core principles enshrined in international humanitarian law. The provisions of Common Article 3, therefore, applied to the military and political activities of the ANC during this period.
48. Violations in terms of Common Article 3 fall under the following four sections:
 - a violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b taking of hostages;
 - c outrages upon personal dignity, in particular humiliating and degrading treatment, and
 - d the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognised as indispensable by civilised peoples.

49. These provisions apply to ‘persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds detention, or any other cause’.

The period March 1977 to 1980

50. It is during this period that Protocol I of the Geneva Conventions was drafted specifically to cover the conflict situations in South Africa and Israel.
51. It is important to note that Protocol I was intended to supplement the existing Geneva Conventions and to ensure that national liberation movements were protected in the conflicts that were taking place.
52. In this regard, Article 1(4) of Protocol I sought to confer prisoner of war status on national liberation movement combatants involved in the conflicts in South Africa and Israel. The article provides that ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’ are to be treated as international armed conflicts and not as internal conflicts.
53. The effect of this was to bring the conflicts in South Africa and Israel under the ambit of the Geneva Conventions, and specifically of Protocol I.
54. As discussed above, the apartheid government did not accede to the additional protocols, particularly Protocol I. This was in the main due to the fact that it was of the view that Article 1(4) of Protocol I was intended to legitimise the struggle of the liberation movements and provide additional protection for their members.
55. As a liberation movement, the ANC did not apply to the ICRC to ratify or accede to this protocol, thus one can conclude that common Article 3 and not Protocol I continued to apply to the ANC.

The ANC and international humanitarian law: The period 1980 to 1994

56. In 1980, the ANC declared itself to be bound by the general principles of international humanitarian law applicable to the conduct of armed conflicts. The then ANC President Oliver Tambo deposited a declaration¹⁴ with the ICRC

¹⁴ See Appendix 3.

declaring the ANC bound by the Geneva Conventions and Protocol I. In fact, the declaration ought to have been deposited with the Swiss Government; but it is the intention of the party making the declaration that is important. By submitting the declaration, the ANC intended to hold itself bound by the Geneva Conventions and Protocol I.

57. As a result of this declaration, the ANC bound itself to apply Protocol I and the Geneva Conventions. In terms of Article 96(3) of Protocol I, the protocol and the Geneva Conventions came into effect immediately in respect of the conflict, despite the fact that the apartheid state had not acceded to the additional protocol.
58. The importance of the declaration is that the ANC became bound to uphold the same obligations and burdens as other parties to the Conventions and Protocols. It also enjoyed the same rights and benefits. The preamble to Protocol I provides that the provisions of the Geneva Conventions and Protocol I:

must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction, based on the nature or origin of the armed conflict or on causes espoused by or attributed to the Parties to the conflict.

59. As discussed above, while the ANC had bound itself unilaterally by way of the declaration to the provisions of Protocol I, the apartheid government did not consider itself so bound. It treated members of the liberation movements as criminals rather than as prisoners of war. The ANC regularly sought to challenge the jurisdiction of the courts on the basis that they were entitled to prisoner-of-war status and invoked the protection of these treaties in an attempt to commute the death sentences of numerous political prisoners. In this they were unsuccessful. Professor John Dugard commented in a book that he wrote on the status of an ANC prisoner of war:¹⁵

The issue that most starkly illustrates the conflict between perceptions of international law in South Africa is the dispute over the status of captured ANC combatants. From the perspective of most Whites, ANC combatants cannot be accorded prisoner-of-war status as this would confer legitimacy on the ANC and condone the acts of its members. On the other hand, many Blacks view them as 'freedom fighters' engaged in a just struggle entitled to be treated as POW's and not ordinary criminals.

¹⁵ Article by John Dugard: *Denationalization of Black South Africans in pursuance of Apartheid*

Furthermore, the General Assembly has recognized the legitimacy of the struggle of the national liberation movements and demanded that the ANC combatants be treated as prisoners-of-war in accordance with the provisions of the Geneva Conventions of 1949 to include 'armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination'.

The doctrine of state responsibility

60. The doctrine of state responsibility has emerged through the development of customary international law. In summary, it states that the state is accountable for the commission of gross human rights violations as follows:
 - a It is strictly responsible for the acts of its organs or agents or persons acting under its control.
 - b It is responsible for its own failure to prevent or adequately respond to the commission of gross human rights violations.

61. It is important to note that South Africa did not until recently become a state party to the principal international human rights instruments. In 1998, the newly democratically elected government ratified the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide convention) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

62. This does not mean that South Africa was not bound by these principles of customary international law at the relevant times. They are regarded as expressions of customary international law on state responsibility for human rights violations and have emerged from the broad rubric of human rights law, which includes the Conventions referred to above, the Universal Declaration of Human Rights, regional human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention for Human Rights, the African Charter on Human and People's Rights, and the judgments of the various human rights bodies such as the decisions of the European Court of Human Rights, the Inter-American Court and Commission of Human Rights and the Human Rights Committee.

63. The decisions of the tribunals for the former Yugoslavia and Rwanda have also had an impact on how the law has developed.

64. The basic principles that have emerged from international customary law can be summarised as follows:

Interpretation of these principles by international human rights bodies, which have application to the question of state accountability

65. In the Velasquez-Rodriguez case¹⁶, the Inter-American Commission on Human rights held that states are strictly responsible for the conduct of their organs or agents who violate human rights norms, whether or not such actors have overstepped the limits of their authority.
66. Thus a state will be held responsible for the actions of an official where excessive force is used that is contrary to law and policy. In South Africa, the practice of the former state was to indemnify the security forces in those incidents where they had used excessive force.
67. It is important to note that, in terms of international law, the state will be held accountable for the act of an agent. The motive or intent of the agent is considered to be irrelevant to the analysis of the crime. In addition, if an agent of the state uses his or her official status to facilitate or cover up a murder s/he commits for personal reasons, the state may still be held responsible for such a gross violation.
68. Another important principle that has evolved from the Velasquez-Rodriguez case is the fact that a state is held responsible for violations perpetrated by any of the organs or structures under its control. In these instances, state responsibility may be invoked independently of any individual responsibility for the crime. All that is required is for the claimant to establish that an agent of the state committed the violation. The fact that the identity of the individual agent who perpetrated the violation is not established does not matter.
69. A difficulty that has been identified in matters of this nature is that the state is the repository of information and is also the party most interested in suppressing the truth. Circumstantial evidence is often all that exists. International human rights law is cognizant of this and thus places the burden on the state to justify its actions in the face of credible allegations of abuses by state agents.

¹⁶ The Inter-American Court of Human Rights, 29 July 1988 (Series C, No. 4)

70. In the case of Kurt v Turkey¹⁷, the European Court of Human Rights held that, once the applicant had shown that the victim was in the custody of the security forces, the responsibility to account for the victim's subsequent fate shifted to the authorities.
71. In the case of Ireland v UK, the European Court of Human Rights applied a strict liability test when dealing with the government of the United Kingdom. In this case, the European Court considered allegations by the Irish¹⁸ that the United Kingdom authorities operating in Northern Ireland were engaged in practices that violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, the Irish alleged that these practices included extrajudicial arrest and internment as well as the use of a coercive set of 'five techniques' in the process of interrogation in order to induce confessions.
72. The court found that that the actions of the UK authorities amounted to a practice 'incompatible with the convention', noting specifically 'the accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system'.
73. Having heard the evidence, the court commented as follows:
- It is inconceivable that the higher authorities of a State should be unaware of the existence of such a practice. Furthermore, under the convention, those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.*
74. The development of the principle of strict liability in dealing with states reinforces that liability in international law. In other words, the state is under an obligation to organise its institutional apparatus so as to ensure that fundamental human rights are protected and, where they are violated, to 'investigate and punish those responsible and to provide reparation to the victim'.

¹⁷ 74 Reports of Judg. Dec. 1152, 1998 111.

¹⁸ N Ireland v United Kingdom (1978) 25 European Court of Human Rights (Series A).

The accountability of states in respect of omissions or tolerance of violations

75. International human rights law has evolved to the point where states can be held responsible because they have failed to prevent a violation or to respond to violations as required by international law.
76. The court in the Velasquez-Rodriguez case describes such failure as ‘the lack of due diligence to prevent the violation or to respond to it’.
77. This principle expands the accountability of the state to cover the official tolerance of actions, even where proof of the victim’s fate is unavailable. The facts of the Velasquez-Rodriguez case revealed evidence of a pattern of forced disappearances. The evidence included the fact that ‘it was public and notorious knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders ...’ The Court also heard evidence that the disappearances followed a similar pattern and were carried out in a systematic manner. These facts, taken together with the fact that officials failed repeatedly to prevent or investigate the crimes, were sufficient to hold the state responsible once the case at hand was shown to fit the pattern.
78. The Inter-American Court of Human Rights noted as follows:
- If it can be shown that there was an official practice of disappearances in Honduras carried out by the government or at least tolerated by it, and if the disappearance can be linked to that practice, the allegations will have been proven to the court’s satisfaction.*
79. The court went further and held:
- that where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible.*
80. Thus the concept of state responsibility or liability for a failure to act or prevent or punish violations is not limited to cases where the perpetrators are state agents and problems exist with regard to a lack of evidence. The state may be held accountable even where private persons or groups act to deprive individuals of their fundamental rights, if it fails to act to investigate and punish such actions.

81. The key factor in testing responsibility is whether a human rights violation has been committed with the support or tolerance of the public authority or if the state has allowed the violation to go unpunished.¹⁹
82. The European Court of Human Rights has also held that private citizens may hold the state responsible for tolerating human rights abuses that have been carried out. Thus for example, a state whose legal framework leaves individuals vulnerable to violations of their fundamental rights without adequate recourse, or fails to enact laws restraining the excessive use of force by the authorities, or neglects to punish such abuses, may be held accountable at the international level for failing to guarantee rights recognised under international law.

¹⁹ See *Godinez-Cruz*, Inter-American Court of Human Rights, 20 Jan 1989 (Series C No. 5); *Gangaram Panday*, Inter-American Court of Human Rights, 21 Jan 1994 (Series C No. 16).

APPENDIX 1

Applicability of the Geneva Conventions to South Africa

The provisions of the Geneva Conventions that apply to the situation in South Africa are set out below:

1. Common Article 2 to the Geneva Conventions

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

The Convention shall apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

2. Common Article 3 to the Geneva Conventions

In the case of armed conflict not of an international character occurring in the territory of one or more of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms, and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall, in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To the end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder, of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;

- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (2) The wounded and the sick shall be collected and cared for. Any impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict shall further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

3. Fifth paragraph of Protocol I

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

Article 1(2) of Protocol I

In cases not covered by this Protocol or by any other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Article 1(3) of Protocol I

This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

Article 1(4) of Protocol I

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Article 96(3) of Protocol I

The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

- (a) The Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
- (b) The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
- (c) The Conventions and this Protocol are equally binding upon all Parties to the conflict.

Article 1(1) of Protocol II

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

APPENDIX 2

These Conventions and Protocols must be read together with the 1980 'Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively Injurious or to have Indiscriminate Effects' and the concomitant 'Protocol on Prohibitions or Restrictions on the use of Mines, Booby Traps and Other Devices' (Protocol II).

Article 3 of Protocol II reads as follows:

General restrictions on the use of mines, booby traps and other devices

This Article applies to:

- (a) Mines;
- (b) Booby-traps; and
- (c) Other devices.

1. It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians.
2. The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:
 - (a) Which is not on, or directed at, a military objective; or
 - (b) Which employs a method or means of delivery which cannot be directed at a specific military objective; or
 - (c) Which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
3. All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions, which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

At Article 2, paragraphs 4 and 5, 'Other devices', 'Military Objective' and 'Civilian objects' are defined in the following terms:

'Other devices' means manually emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.

'Military objective' means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

'Civilian objects' are all objects which are not military objectives as defined in paragraph 4.

Frederic de Mulinen, in his handbook published by the ICRC²⁰ makes the following statement:

43. Sparing of Civilian Persons and Objects:

Constant care shall be taken to spare the civilian population, civilian persons and civilian objects.

44. Information needed:

The Commander shall keep himself informed on concentrations of civilian persons, important civilian objects and specially protected establishments.

50. Conduct of Attack

51. Choice of Objectives;

Within tactically equivalent alternatives, the directions, objectives and targets of attack shall be chosen so as to cause the least civilian damage.

52. Verification:

The Military character of the objective or target shall be verified by reconnaissance and target identification

53. Weapons

To restrict civilian casualties and damages, the means of combatant weapons shall be adapted to the target

Thus an operative or soldier who operates outside of the scope of the Conventions is punishable in accordance with ordinary law and loses the protection of the status of a combatant.

²⁰ De Mulinen, Frederic. Handbook on the Law of War for Armed Forces. Geneva:ICRC, 1987, Part 5: Conduct of Operations.

‘Grave Breaches’ specified in Protocol I (Articles 11 and 85)

The following acts:

- Seriously endangering, by any wilful and unjustified act or omission, physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of an armed conflict, in particular physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation which is not indicated by the state of health of the person concerned or not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and in no way deprived of liberty.

The following acts, when committed wilfully and if they cause death or serious injury to body and health:

- Making the civilian populations or individual civilians the object of attack;
- Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.
- Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- Making non-defended localities and demilitarised zones the object of attack;
- Making a person the object of an attack in the knowledge that he is *hors de combat*;
- The perfidious use of the distinctive emblem of the red cross and red crescent or other protective signs.

The following acts, when committed wilfully and in violation of the Conventions and the Protocol:

- The transfer by the occupying power of parts of its own population into the territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside this territory;
- Unjustifiable delay in the repatriation of prisoners of war or civilians;
- Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

- Attacking clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given, causing as a result extensive destruction thereof when such objects are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort;
- Depriving a person protected by the Conventions or by Protocol I of the rights of fair and regular trial.

‘Grave breaches’ specified in the four 1949 Geneva Conventions (Articles 50, 51, 130, 147 respectively)

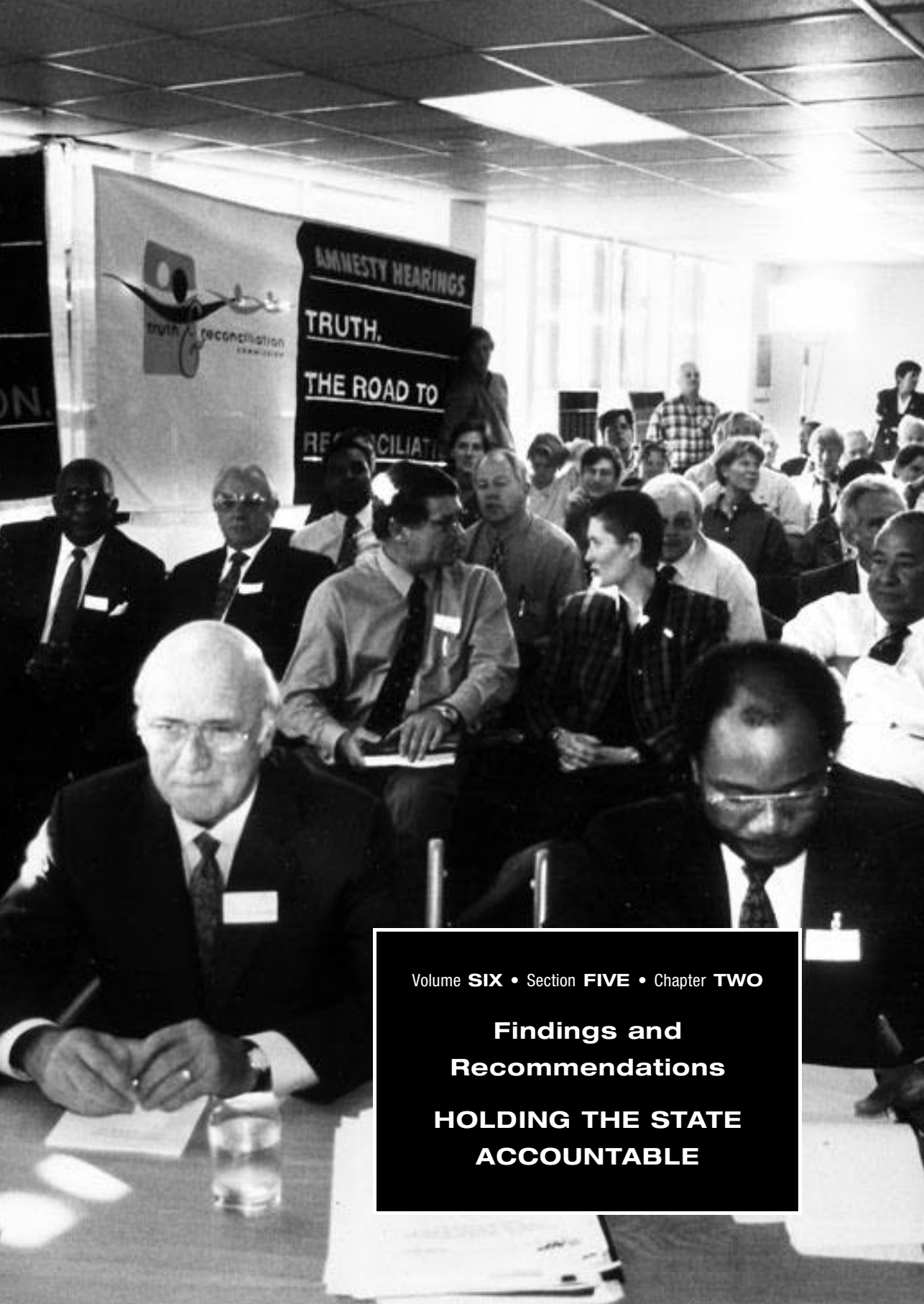
- Wilful killing;
- Torture or inhuman treatment;
- Biological experiments;
- Wilfully causing great suffering;
- Causing serious injury to body or health;
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

‘Grave breaches’ specified in the third and fourth 1949 Geneva Conventions (Articles 130 and 147 respectively)

- Compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power;
- Wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Conventions.

‘Grave breaches’ specified in the fourth 1949 Geneva Conventions (Articles 147)

- Unlawful deportation or transfer;
- Unlawful confinement of a protected person;
- Taking of hostages.



Volume **SIX** • Section **FIVE** • Chapter **TWO**

**Findings and
Recommendations
HOLDING THE STATE
ACCOUNTABLE**

Holding the State Accountable

1. In its five-volume Final Report, the Truth and Reconciliation Commission (the Commission) was guided by Section 4 of its enabling Act²¹ in evaluating the role played by those who were involved in the conflicts of the past. The relevant sections read as follows:

The functions of the Commission shall be to achieve its objectives, and to that end it shall –

- (a) Facilitate and where necessary initiate or co-ordinate, enquiries into....
 - (iii) The identity of all persons, authorities, institutions and organizations involved in gross violations of human rights;
 - (iv) The question whether such violations were the result of deliberate planning on the part of the State or a former state or any of their organs or of any political organization, liberation movement or other -group or individual; and
 - (v) Accountability, political or otherwise, for any such violations.

2. Describing how findings were made, the Commission stated:

... the Commission is of the view that gross violations of human rights were perpetrated in the conflicts of the mandate era. These include:

The state and its security, intelligence and law-enforcement agencies, the SAP, the SADF and the NIS ...²²

3. The Commission wishes to restate its position in its Final Report that, whilst it has made adverse findings on the basis of the evidence it received, it remains a commission of inquiry and, as such, is not bound by the same rules of evidence as a court of law. The Commission based its findings on a balance of probabilities and its conclusions should not be interpreted as judicial findings of guilt but rather as findings of responsibility within the context of its enabling Act.
4. In making these findings, the Commission was guided in its deliberations by international humanitarian law and the Geneva Conventions. The Commission

²¹ The Promotion of National Unity and Reconciliation Act No. 34 of 1995.

²² Volume Five, Chapter Six, p. 209.

also endorsed the internationally accepted position that apartheid was a crime against humanity.

5. Whilst the Commission was obliged by its enabling act to evaluate the conduct of all those responsible for committing gross human rights violations, the Commission did not hold that all parties were equally responsible for the violations committed in the mandate period. Indeed, the evidence before the Commission has revealed that the former state was the major violator.
6. The Commission wishes to restate that a legally constituted and elected government is expected to act lawfully and in accordance with accepted international principles of humanitarian law. A state must be held to a higher standard of moral and political conduct than any other role player in a violent conflict. After all, a state has at its command powers, resources, privileges, obligations and responsibilities that liberation movements and other role players do not.
7. The Commission's primary finding in its previous report was that:²³

The predominant portion of gross violations of human rights was committed by the Former State through its security and law-enforcement agencies.

Moreover, the South African State in the period from the late 1970's to early 1990's became involved in activities of a criminal nature when, amongst other things, it knowingly planned, undertook, condoned and covered up the commission of unlawful acts, including the extra-judicial killings of political opponents and others, inside and outside South Africa.

In pursuit of these unlawful activities, the State acted in collusion with certain other political groupings, most notably the Inkatha Freedom party (IFP).

8. The Commission made its findings at a time when the amnesty process had not yet been completed. The amnesty process is now complete and the Amnesty Committee has completed its report.²⁴ This chapter will show that amnesty decisions have tended to support the original findings of the Commission. In dealing with the findings and an analysis of the amnesty process, it is necessary to review how international humanitarian law has evolved to deal with conflicts and gross human rights violations.

²³ Volume Five, Chapter Six, p. 212.

²⁴ See Section One of this volume.

THE APPLICATION OF INTERNATIONAL LAW TO THE SOUTH AFRICAN SITUATION

Introduction

9. The Commission made findings against the South African government and its security forces based on the information it received. These included statements from victims, submissions by organs of civil society, political parties, international human rights groups, local non-governmental organisations (NGOs) and community-based organisations (CBOs), confessions made by amnesty applicants and many other interested parties.
10. It was, however, the statements made by individual victims and perpetrators to the Commission that presented the most compelling picture of the reign of terror conducted by the organs and agencies of the former state. Overwhelmingly, these statements revealed a picture of the gross human rights violations that were perpetrated by the state. These included the widespread use of torture, the use of excessive and indiscriminate force in public order policing, the abduction and disappearance of activists and the extrajudicial killing of political opponents and activists.
11. The Commission was able to investigate a number of cases thoroughly and also used its section 29 powers to hold subpoena hearings which effectively compelled many perpetrators to apply for amnesty.
12. In order to ensure the integrity of the information that it received, the Commission applied a policy of low-level corroboration to each case before declaring a person to have been a victim. Many have criticised this policy. However the Commission did not have the capacity to conduct a full-scale investigation into each case. Therefore, it selected cases and conducted strategic investigations. The Commission acknowledges the fact that more thorough investigations may have yielded more information about particular individuals and incidents. However, it is the Commission's view that it is unlikely that this would have impacted on its view of the role that the former state played in the commission of gross human rights violations, nor on its view that the former state acted in a criminal manner.
13. It is indeed the Commission's opinion that more information would simply have strengthened the patterns that had already emerged.

14. The Commission recorded the fact that patterns of abuse manifested themselves throughout South Africa in much the same way. These were not isolated incidents or the work of mavericks or 'bad apples'; they were the product of a carefully orchestrated policy, designed to subjugate and kill the opponents of the state. In any event, the Commission's findings are supported by the submissions made by many victims to various human rights organisations during the apartheid period.
15. The Commission has also been criticised for making findings without having completed the amnesty process. It should be noted, however, that the Commission did take cognisance of the information contained in many applications. Further, the Commission did not make findings in respect of specific incidents where applications had not been heard or where the Amnesty Committee had not yet made a decision.

FINDINGS OF THE COMMISSION IN RESPECT OF THE FORMER STATE AND ITS ORGANS

Categories of gross human rights violations defined in the Act

State responsibility for torture

16. The Commission found in its five-volume Final Report that torture was systematic and widespread in the ranks of the South African Police (SAP) and that it was the norm for the Security Branch of the SAP during the Commission's mandate period.
17. The Commission also found that the South African government condoned the practice of torture. The Commission held that the Minister of Police and Law and Order, the Commissioners of Police and Commanding Officers of the Security Branch at national, divisional and local levels were directly accountable for the use of torture against detainees and that Cabinet was indirectly responsible.
18. The Human rights instruments that are pertinent to the question of torture include:
 - a. The International Covenant on Civil and Political Rights;
 - b. The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, and
 - c. The International Convention on the Elimination of All Forms of Racial Discrimination.

19. These Conventions require that no one shall be arbitrarily deprived of life and that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
20. The Convention Against Torture requires that each State Party 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'. The Convention allows no exception to this, and for that reason it is important to note the following:

No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency may be invoked as a justification for torture.

21. The Commission made its findings on torture based on evidence received from victims through the human rights violations process, perpetrators in amnesty applications and evidence given before the Commission by senior politicians and security force officials of the former government. In addition, local and international human rights groups made a number of submissions to the Commission, based on the studies they had carried out during the apartheid period.
22. The Commission received over 22 000 statements from victims alleging that they had been tortured. In most instances, the torture had been at the instance of members of the security forces.
23. The Commission received a number of applications from amnesty applicants applying for more than ninety-eight incidents of torture and severe assaults.
24. It is important to note that, although the Commission received over 22 000 statements from victims and only very few amnesty applications for torture, many human rights groups estimated that more than 73 000 detentions took place in the country between 1960 and 1990. It was established practice for torture to accompany a detention. Detention, arrest and incarceration without formal charges were commonplace in South Africa at that time. Whilst a plethora of laws existed to silence political dissent, the notorious section 29 of the Internal Security Act 74 was used to detain people indefinitely, without access to a lawyer, family member, priest or physician. Section 29 also permitted the state to hold a detainee in solitary confinement.

25. It is accepted now that detention without trial allowed for the abuse of those held in custody, that torture and maltreatment were widespread and that, whilst officials of the former state were aware of what was happening, they did nothing about it.
26. The torture techniques that have been identified through these cases are the following: assault; various forms of suffocation, including the 'wet bag' or 'tubing' method; enforced posture; electric shocks; sexual torture; forms of psychological torture, and solitary confinement.
27. A submission made to the Commission based on a study released by doctors between September 1987 and March 1990²⁵ found that 94 per cent of detainees in the study claimed either physical or mental abuse. The study found that the beating of detainees was widespread and that half of those alleging physical abuse still showed evidence of the abuse on physical examination. On assessment of their psychological status, 48 per cent of the former detainees were found to be psychologically dysfunctional.
28. Deaths in detention were also commonplace and were the result of the treatment meted out to persons in custody.
29. The Commission found that a considerable number of deaths in detention were a direct or indirect consequence of torture, including those cases where detainees had taken their own lives. The Commission declared those deaths to be induced.
30. In its Final Report, the Commission found that 'little effective action was taken by the state to prohibit or even limit [the use of torture] and that, to the contrary, legislation was enacted with the specific intent of preventing intervention by the Judiciary'.²⁶ The Commission found that the South African government condoned the use of torture as official practice.²⁷

²⁵ Affiliated to NAMDA practicing at a clinic near the centre of Durban.

²⁶ Volume Two, Chapter Three, p. 220.

²⁷ Ibid.

31. Whilst the Commission received thousands of statements alleging torture, few amnesty applications were received specifically for torture. Those received were from applicants Andries Johannes van Heerden [AM3763/96]; Willem Johannes Momberg [AM4159/96]; Stephanus Adriaan Oosthuizen [AM3760/96]; PJ Cornelius Loots [AM5462/97]; Jacques Hechter [AM2776/96]; Christo Nel [AM6609/97]; Lieutenant Colonel Antonie Heystek [AM4145/97]; Colonel Anton Pretorius [AM4389/96]; Helm 'Timol' Coetzee [AM4032/96]; Johannes Jacobus Strijdom [AM5464/97]; Paul van Vuuren [AM6528/97]; Roelof Venter [AM2774/96]; Eric Goosen [AM4158/96]; Marius Greyling [AM8027/97]; Karl Durr [AM8029/97]; Frans Bothma [AM8030/97]; Andy Taylor [AM4077/96]; WCC Smith [AM5469/97]; Jeffrey Benzien [AM5314/97], and Gert Cornelius Hugo [AM3833/96].²⁸

32. It is clear that it was the norm for agents of the state to carry out various torture practices on those who were in their custody or incarcerated. In dealing with questions of accountability, one needs to establish whether the state was aware of the torture taking place and whether it took any action to prevent it happening. In other words, did the state take any action against its agents for the commission of torture and, once it knew that torture was widespread, did it do anything to prevent its repetition?

33. The former government conceded that torture occurred, but claimed that it represented the actions of a few renegade policemen. Former President FW de Klerk stated in his submission to the Commission that:

*The National Party is prepared to accept responsibility for the policies that it adopted and for the actions taken by its office bearers in the implementation of those policies. It is however not prepared to accept responsibility for the criminal actions of a handful of operatives of the security forces of which the Party was not aware and which it never would have condoned.*²⁹

34. Contrary to Mr de Klerk's claim of ignorance of the practice, Mr Leon Wessels, the National Party's former deputy Minister of Police, conceded that it was not possible to deny knowledge of torture. Mr Wessels testified at a special hearing on the role of the State Security Council that:

*it was foreseen that under those circumstances people would be detained, people would be tortured, everybody in the country knew that people were tortured.*³⁰

²⁸ For details see Volume Two, Chapter Three, pp. 214–18. See also section on Torture and Death in Custody, pp 187–214.

²⁹ Second submission by the National Party, 14 May 1997, p. 10.

³⁰ Johannesburg hearing, 14 October 1997.

35. The principles that have been enunciated earlier in this chapter can be summarised as follows:
 - a The state is held strictly responsible for the conduct of its agents who commit gross violations of human rights.
 - b State responsibility may be invoked even where the identity of the agent is unknown.
 - c The state has the evidentiary burden to explain its action in the face of credible allegations of abuse by state agents.
 - d States are also held responsible for 'lack of due diligence to prevent the violation or to respond to it' (official tolerance).
36. A key factor here is proving that the human rights violation took place with the support or tolerance of public authority or that the state allowed the violation to go unpunished.
37. The Commission noted in its Final Report that victim statements and amnesty applicants implicated a number of senior officers for having had knowledge of or having covered up incidents of torture. In the case of Mr Stanza Bopape, the then Commissioner of Police covered up the actions of the officers responsible for Bopape's death. Condonation of torture by superior officers was further evidenced by the fact that most well-known torturers were promoted to higher positions.
38. The Commission also noted that no prosecutions resulted from allegations of torture, even though the use of torture emerged in most political trials. The cases of Ahmed Timol, Neil Aggett and Lindy Mogale are pertinent.
39. Magistrates and judges seldom protected detainees or ruled in their favour, even though a pattern of abuse was familiar.
40. In a number of cases, the families of victims or detainees themselves laid charges against the state, resulting in out-of-court settlements.
41. More distressing is the fact that many judges and magistrates continued to accept the testimony of detainees, despite the fact that most of them knew that the testimony had been obtained under interrogation and torture whilst in detention. In this way, the judiciary and the magistracy indirectly sanctioned this practice and, together with the leadership of the former apartheid state, must be held accountable for its actions.

42. A number of human rights bodies made representations to the state about the treatment of detainees and persons in custody. In April 1982, the Detainees Parents Support Committee met with the Minister of Law and Order and the Minister of Justice to submit a dossier that included seventy-six statements alleging torture. The dossier named ninety-five individuals as perpetrators and covered the period 1978 to 1982. The ninety-five individuals were all members of the Security Branch and came from eighteen different branch offices. Of the eighteen offices detailed, John Vorster Square, Protea police station and the office in Sanlam building in Port Elizabeth headed the list. A report was subsequently made to parliament, which was informed that forty-three of these cases had been investigated and that eleven of the claims were unfounded. Presumably the remaining thirty-one were found to be of substance, yet no action was taken.
43. In May 1983, the Ad Hoc Committee of the Medical Association of South Africa (MASA) published a report as a supplement to the South African Medical Journal in which it stated that:³¹
- there are insufficient safeguards in the existing legislation to ensure that that maltreatment of detainees does not occur. Persuasive evidence has been put before the Committee that where harsh methods are employed in the detention and interrogation of detainees, this may have extremely serious and possibly permanent effects on the physical and mental health of the detainee...*
44. The only response from government was a set of directives issued by the Minister of Law and Order in December 1982 as safeguards for those detained under Section 29 of the Terrorist Act. Paragraph 15 stated that:
- A detainee shall at all time be treated in a humane manner with proper regard to the rules of decency and shall not in any way be assaulted or other wise ill-treated or subjected to any form of torture or inhuman or degrading treatment.*
45. The state did not bother to ensure that the directives were explained and no system was put in place to monitor whether detainees were being treated properly or that their human rights were being safeguarded.
46. The case of Mr Stanza Bopape implicates a number of superior officers in the cover-up and tolerance of torture.

31 This followed the study done by NAMDA referred to earlier.

47. Given the statements of victims, their families, the testimony of amnesty applicants such as Messrs Charles Zeelie, Jeffrey Benzien, Andy Taylor and Paul van Vuuren, and Generals Loggerenberg, Van der Merwe and others on the practice of torture and the condonation and cover up by superior officers when cases went horribly wrong, there can be no doubt that torture was widespread, well known and tolerated.
48. Although aware of the opprobrium being directed at them for this practice, the state continued to do nothing to end it. The state also did nothing about the violators or the agency that harboured them, the Security Branch. No mechanisms were put in place to monitor whether torture was still happening, nor to prevent it from happening. Neither the superior officers nor the officers carrying out the torture were sanctioned in any way. The attitude of the former state can only be described as one that 'tolerated and officially condoned' the practice of torture and the actions of their agents.
49. The Commission therefore confirms the findings it previously made, based on the further evidence it has received that the former state and its agents were responsible for the torture of those they regarded as opponents; and that the state perpetuated a state of impunity by tolerating and sanctioning the practice of torture, the legacy of which still exists today.

Abductions

50. The Commission received fifty-seven amnesty applications for eighty incidents of abduction. The fifty-seven applications included the abduction of thirty-five Umkhonto we Sizwe (MK) operatives, eighteen of whom were abducted inside the country and seventeen outside South Africa.
51. Of the fifty-seven abductions, more than twenty-seven resulted in the death of the victim. This raises the possibility that targeted assassinations may have been the perpetrators' intention from the outset.
52. The Commission also received more than 1500 statements dealing with disappearances, including enforced disappearances.
53. The Commission stated in its Final Report that the former state's primary purpose in carrying out abductions was to obtain information. Abductees were often killed in a bid to protect the information that had been received.

54. The victims of these abductions either belonged to MK or supported the movement internally. Amnesty applicants testified that they found it preferable to abduct rather than detain officially. Once the information was obtained, the abducted person would be killed. In many other instances, applicants testified that they attempted to 'turn' or 'recruit' individuals into working for the state. The Commission also learnt that, where the attempt to turn the abductee failed, killing the individual became necessary – although many amnesty applicants denied this. However, in terms of international law, families merely have to prove that the abductee was last seen alive in the hands of an agent of the state for the obligation or onus to explain the deceased's whereabouts to fall on the state.
55. The Commission also stated in its Final Report that this *modus operandi* allowed for greater freedom to torture without fear of consequences. The testimony of many *askaris* at amnesty hearings was at odds with that of white members in their particular units. In their testimony, *askaris* highlighted the brutality of the torture and abuse that many abductees were subjected to. The cases of Nokuthula Simelane³² and Moses Morodu³³ offer examples of this.
56. It is also possible that operatives lost all sense of reality when dealing with abductees and became totally enmeshed in the brutality of the moment. Had the abductee been released or the body found, the heinous behaviour of the abductors and torturers would have been revealed. This was possibly an even more powerful motive to conceal the truth.
57. In its findings on extrajudicial killings, the Commission noted that a particular pattern was established: that is, political opponents were abducted, interrogated and then killed. In evidence that emerged through the amnesty process, another pattern emerged: that of abduction followed by torture or undue pressure to inform and/or become an informer or *askaris*. Those who did not succumb in this way were killed. Information was then leaked to MK that those who had been captured had been turned and had become *askaris*. The most devastating effect of this practice was that those who were abducted did not come home and that families had to live with the political stigma that their loved ones were perceived to be traitors.

32 Amnesty hearings, Pretoria, 28–30 June 1999 and 29–30 May 2000; AC/2001/185.

33 Amnesty hearing, 26 October 1999; AC/2000/010.

58. These abductions must be distinguished from those incidents where the intention of the perpetrators at the outset was to assassinate political opponents. In such operations, the abduction itself was merely a means to capturing the person, and the interrogation and torture that followed were secondary to the intention to kill.
59. Thus the cases of Griffiths Mxenge, Topsy Madaka and Sipiwe Mthimkulu, the 'Pebco Three', the 'Cradock Four' and the Ribeiros should be classified as political assassinations rather than abductions. Here the intention of the perpetrators was to eliminate the individuals concerned and to silence them forever.
60. In the KwaNdebele group of cases, abduction was followed by interrogation, torture and beatings and the abductee was then returned. The intention of these abductions was to intimidate and silence opposition.
61. The principle of customary international law is to hold the state responsible in instances such as these on a strict liability basis. Thus, the former state must be held strictly responsible for the abductions, disappearances and deaths of the abductees. The state is held responsible even in those instances where the perpetrator may not have intended that the final consequence of the abduction would be the death of the abductee. The intention of the perpetrator is irrelevant; the fact of the matter is that death ensued.
62. In those instances where the purpose of the abduction was killing, the state incurs responsibility for both the killing and the abduction. In terms of the accepted principle, even where the perpetrator responsible for the abduction or the disappearance has not been identified, it simply needs to be established that forced disappearance was committed by a police agent. In such an instance, the state is held responsible for accounting for the disappearance.
63. International human rights law places the burden on the state to account for the actions of its agents. Thus it is not sufficient for the state to allege (as it did in the cases of Nokuthula Simelane³⁴ and the four MK members abducted from Lesotho (namely Nomasonto Mashiya, Joyce Keokanyetswe 'Betty' Boom, Tax Sejamane and Mbulelo Ngono)³⁵ that they recruited or turned these agents and that were returned to exile in order to infiltrate the movement.

34 Amnesty hearings, Pretoria, 28–30 June 1999 and 29–30 May 2000. See also AC/2001/185.

35 See amnesty hearings, Johannesburg, 10–13 October 2000 and Bloemfontein 13–15 November 2000.

64. In all of these cases, using the strict liability test, it is likely that the state would be held criminally liable for their disappearances. In the case of Kurt v Turkey, the European court of human rights held that, once the applicant was in the custody of the security forces, the responsibility to account for the victim's subsequent fate shifted to the authorities.
65. In terms of international law and a state's responsibility to guarantee human rights, a state can be held responsible for failing to prevent or respond to a violation. As early as the 1980s, the former state was aware of the fact that disappearances were taking place. Allegations were mounting against the security forces as being responsible.
66. The question is: what did the state do to investigate the allegations being made or what action did the state take against those alleged to be involved in such practices?
67. Although it has been shown that agents in the employ of the state were responsible for the abductions of many political activists, that a pattern had been established and that this had become part of an orchestrated grand plan, the leadership of the former state continued to deny its responsibility for these gross human rights violations. Indeed, in the light of the above, Mr de Klerk might want to reconsider his theory of 'bad apples and mavericks'³⁶. There is no doubt that the apartheid state must be held responsible for the actions and deeds of its agents and that the state's failure to investigate or to take action created a climate of impunity and criminality in the security forces.
68. A key factor when deciding whether a state is responsible is whether the violation has taken place with the support or tolerance of the authority or the state has allowed the violation to go unpunished. In this instance, the state allowed the death squads to act with impunity and abduct, interrogate, torture and kill. Nothing was done to stop them, even when the disappearances became public.
69. Instead the state continued to claim innocence and chose rather to sully the reputations of those who had been abducted and killed. As a result, the minds and memories of family members and loved ones have been haunted by uncertainty, suspicion and mistrust as they continue to wonder whether the loved one was a spy and why the loved one has not returned home.

³⁶ Evidence by Mr FW de Klerk on behalf of the National Party to the TRC, 14 May 1997.

70. The amnesty cases and the evidence of the victims before the Commission have been sufficient to establish a pattern and an assumption that these victims must have died at the hands of the forces that abducted them. In this regard, efforts must be made to restore their dignity and true reputations as patriots who paid the price and were killed in the violence of the past.
71. The law must also take its course in dealing with those who came forward with half-truths and lies. Efforts must be made to integrate and ease the lot of those who became *askaris*. In most instances, their testimony was at considerable variance with that of their white colleagues and superiors. We may never know what pressure was placed on them to 'turn'. What we do know is that, in those instances where they did not succumb or refused to do so, they were killed horribly. The cases of Simelane and Masiya are examples of this.

State responsibility for extrajudicial killings

72. The Commission noted in its Final Report that, as the levels of conflict intensified in the country, the security forces came to believe that it was far preferable to kill people extrajudicially than to rely on the legal process. Many amnesty applicants testified to this in their applications. Deaths in detention began in the 1960s and were attributed to suicides, accidents and natural causes.³⁷
73. Thereafter came the clandestine killings and the death squads. A factor that may account for the rise in extrajudicial deaths and the setting up of death squads was the law that required an inquest in the case of an unnatural death. In order to have an inquest, a body must be produced and examined. While the dead cannot speak for themselves, a forensically examined body could and often did.
74. Inquests are the judicial arena in which the magistracy has shown blind and obdurate loyalty to the former state over the rule of law. In most inquest hearings, despite evidence to the contrary, the word of the police and particular members of the Security Branch was accepted almost unquestioningly, often leaving families and those who defended them astonished.
75. The value of the inquest proceedings was that, in many instances, families of victims were represented by lawyers, who did their utmost to uncover the truth and used the law to do it. This is where the reputation of the former government

³⁷ See Volume Two, Chapter Three, pp. 205–15.

came unstuck. The apartheid government was obsessed with rule by law, and laws were created to cover almost every illegitimate act they could get away with. However, it was legal proceedings in inquest matters that stripped away the veneer of legitimacy and revealed the venality of the agents of the state. The adverse publicity that the government attracted abroad as a result of these deaths in detention forced the state to go underground and look for other mechanisms to deal with persons perceived to be political opponents.

76. Brigadier Jack Cronje [AM2773/96], one of the first officers to appear before the Amnesty Committee, testified that the Security Branch was given orders in 1986 to drop all restraint when dealing with the enemies of the state.

It didn't matter what was done or how we did it, as long as the floodtide of destabilization, unrest and violence was stopped.

77. This, in effect, gave the security forces *carte blanche* to maim and kill, allowing the former apartheid state to move even further into the criminal arena. This was particularly so in the case of its internal operations, where it had to operate at a covert and clandestine level so that no operation was traceable to the state. It was this that led directly to the setting up of various death squads in the country – such as the Civil Co-operation Bureau (CCB) and Vlakplaas – and the training of surrogate forces such as the hit squads in KwaZulu and Natal.
78. In its quest for legality, the former state tried to draw a veil of legitimacy over its operations in the neighbouring states. Even today the military argues that its operations were legitimate, authorised and thus legal. Raids were increasingly openly acknowledged. These raids remain questionable in international law.
79. The fact that our amnesties may not be valid across our borders has meant that there have been almost no applications for amnesty from members of the military.
80. A factor that the state also relied on was that assassinations could be blamed on the liberation movements and, where people disappeared, the police often claimed that those involved had gone into exile. The fact that there was nobody to draw attention to the actions of the state meant that there was no call for an inquiry or inquest, thus creating a further level of impunity for agents of the state. As time went on, the deeds became more daring and more grisly. This is, of course, the problem with license and impunity, where political actions become increasingly blurred and descend into total criminality. It accounts for

why people like Colonel Eugene de Kock and some amnesty applicants will remain in custody. Some of their actions were acts of sheer criminality.

81. The Commission relied on a preliminary analysis of amnesty applications. Three years later, now that the amnesty process is complete, it is clear that the information that emerged from the amnesty hearings confirms the patterns and classifications made in the Final Report.
82. The archive of the Commission has been considerably enriched by the detail that has emerged through the amnesty hearings.
83. Amnesty applications can be categorised as follows:
 - a abductions followed by killing (discussed earlier);
 - b assassinations of persons considered to have a high political profile both inside and outside the country;
 - c assassinations of individual MK and Azanian People's Liberation Army (APLA) personnel both inside and outside the country, and
 - d cross-border raids.
84. Again, if one examines the picture that emerges from the amnesty process, it is clear that authorisation for individual assassinations took place at different levels. Agents believed that they had a general mandate to kill political opponents whom they believed to be contributing towards the instability of the state. Evidence in the 'Pebco Three' hearing confirms that there had been an instruction from the Minister of Law and Order to 'destabilise the Eastern Cape'. The testimony in amnesty hearings supports the view that, as far as external operations were concerned, approval was usually sought from Security Branch headquarters.
85. TREWITS³⁸, which was set up in 1986, probably represented the state's attempt to collect and share intelligence between all structures, with the intention of operating in a more co-ordinated manner and planning joint operations. Given the fact that both National and Military Intelligence sat on this structure, the state cannot deny that intelligence was used to identify and then eliminate those regarded as political opponents.
86. It is the entrapment operations of the state that really engender a sense of revulsion and horror because they targeted not trained military cadres, but callow township youth who were perceived to be threats to the state because of their

³⁸ See Volume Two, Chapter Three, pp. 275–98 for a discussion on the establishment of TREWITS and target development.

political beliefs. The operations involved mainly youth and school activists who were perceived to be potential MK recruits. The nature of the different operations reveals real evil in their planning and execution. The incident of the 'Nietverdiend Ten'³⁹ and the KwaNdebele youth⁴⁰ highlight the grisly machinations of state agents.

87. The supply of defective hand grenades to the Duduza youths by the Soweto security structure defies all rules of justice.⁴¹ What kind of state targets its own youth in this way? How can a politician fail to ask questions after hearing about these incidents?
88. The decision to grant amnesty in this instance raised some serious questions for the Commission. Did we not take reconciliation too far? Surely the killing of youths cannot be justified as political, and raises questions about the proportionality factor.
89. The amnesty applicants have confirmed their own role in the extrajudicial killings of political opponents. In terms of their actions, they have breached the provisions of the Geneva Conventions and the principles enshrined in international humanitarian law. They have also contravened South Africa's own domestic law. In confirming that they acted as members of the security forces, their actions create a problem for the former state, which must shoulder the responsibility for their actions. There can be little doubt that, in setting up these covert death squads, the former state could have had no misunderstanding about the intention of these units, and indeed intended that those identified as political opponents would be identified, targeted for assassination and ultimately killed. When a state resorts to acting or causing its agents to act outside the boundaries of the law, it acts criminally and must be seen as a criminal state. In the Commission's opinion, the former state must be held responsible for the killings of political opponents in that it knowingly planned, authorised, sanctioned, condoned and covered up the commission of these unlawful acts. It acted extrajudicially and criminally, thus leading the Commission to conclude that it ultimately became a criminal state.
90. The findings of the Amnesty Committee support that view.

39 Amnesty hearings, Johannesburg, 21–31 October 1996; Pretoria, 24 February–13 March 1997 & 6–8 April 1999; AC/1999/30, AC/1999/31, AC/1999/188, AC/1999/190, AC/1999/192, AC/1999/193, AC/1999/194, AC/1999/197; Final Report, Volume Two, Chapter Three, pp. 264–5.

40 Amnesty hearings, Johannesburg, 21–31 October 1996; Pretoria, 24 February–13 March 1997 & 13 April 1999; AC/1999/30; AC/1999/33, AC/1999/189, AC/1999/191; AC/1999/248; Final Report, Volume Two, Chapter Three, p. 264.

41 Volume Two, Chapter Three, pp. 259–398; Volume Three, Chapter Six, pp. 628–631; Amnesty hearings, Pretoria, 2–5 August 1999; AC/2000/58.

COMMAND RESPONSIBILITY

Introduction

91. In dealing with the question of Command responsibility, a key case that has come to embody the contradictions in modern International law is that of General Tomayuki Yamashita.⁴² General Yamashita was tried by a United States Military Commission at the end of the Second World War for atrocities committed by Japanese forces in the Philippines – which included murder, rape and pillage. On the 6 February 1946, General Douglas MacArthur affirmed the death sentence imposed on General Yamashita.

92. Yamashita appealed to the United States Supreme Court, arguing that he had neither committed the crimes for which he had been found responsible nor ordered that they be committed. Writing the judgment for the Appeal Court, Chief Justice Harlan Fiske Stone rejected Yamashita's appeal and stated:

[T] his overlooks the fact that the gist of the charge is an unlawful breach of duty by an army commander to control the extensive and widespread atrocities specified ...It is evident that the conduct of military operations by troops whose excesses are unrestrained by the order or efforts of their commander would almost certainly result in violations...Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

93. Justices Wiley B Rutledge and Frank Murphy dissented. Judge Murphy wrote:

Nowhere was it alleged that that [Yamashita] personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command.

94. These conflicting views raised in the Yamashita case represents the two main schools of thought on the question of command responsibility. On the one hand, General MacArthur, Chief Justice Stone and the military commission considered it to be a dereliction of duty for a Commander not to control the behaviour of his troops. The approach embodies a 'should have known or must have known' approach. Justice Murphy's dissent represents the other view, namely that prosecutors must prove that a commander knew about the commission of

⁴² Yamashita v. Styer, Commanding General, U.S. Army Forces, Western Pacific, US Supreme Court 327 U.S. 1 (1946).

widespread crimes by his troops before his failure to take action against such conduct makes him criminally liable.

95. Not surprisingly, the second is the approach that is followed today. Article 86 of Protocol I of 1977 (additional to the Geneva Convention of 1949 regarding the duty of the parties to an international armed conflict to act against grave breaches) provides that 'if they knew, or had information which should have enabled them to conclude in the circumstances at the time' such crimes were taking place, they are required to 'take all feasible measures within their power to prevent or repress their commission'.

96. One of the most important statements made in modern history is that made by the prosecution in its summation at Nuremberg in the High Command case:

Somewhere, there is unmitigated responsibility for these atrocities. It is to be borne by the troop? Is it to be borne primarily by the hundreds of subordinates who played a minor role in this pattern of crime? We think it is clear that it is not where the deepest responsibility lies. Men in the mass, particularly when organized and disciplined in armies, must be expected to yield to prestige and authority, the power of example...Mitigation should be reserved for those upon whom superior orders are pressed down, and who lack the means to influence general standard of behavior. It is not, we submit, available to the commander who participates in bringing the criminal pressures to bear, and whose responsibility it is to ensure the preservation of honorable military traditions.⁴³

97. Yet the Nuremberg Military Tribunal refused to apply this 'almost strict liability' standard. Instead, it established that in order to hold a superior responsible for the criminal acts of his subordinates:

there must be a personal dereliction that can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence.

98. In the United States v Leeb⁴⁴, the tribunal found that the commander must have had knowledge of an order or have acquiesced in its implementation.

⁴³ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 to 1 October 1946 (Sessions 187 and 188, 26–27 July 1946).

⁴⁴ Von Leeb (High Command Case), Trials of the Major War Criminals before the International Military Tribunal under Control Council Law, Nuremberg, No. 10 (1951).

99. The statute adopted by the Security Council for the operations of the tribunal for the former Yugoslavia follow the standard of Protocol I and the dissenting view of Justice Murphy in the Yamashita case.
100. In essence, this view provides that commanders are culpable only if they knew about crimes that were being committed by their forces and did not do what they could to stop them.
101. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of Celebici, concluded that Protocol I was customary international law.
102. The international tribunals set up for the former Yugoslavia and Rwanda have made rulings on the question of command responsibility. Their rulings are pertinent to understanding international customary law on this point, with particular reference to two categories of individual responsibility for commanders or other superiors. They examine their potential responsibility, which may arise because of their role either in planning, instigating or assisting perpetrators of the violations, and that which they incur for the actions of their subordinates. In both instances, the legal implication of the omissions on the part of state authorities is also canvassed.

Responsibility for complicity

103. In dealing with the atrocities of the past, the search for justice and accountability has meant that it is important to go beyond those who commit the crimes – the trigger-pullers – and to identify those who are complicit in the violations because they planned and conceptualised them.
104. In international law this concept has been formulated in various legal instruments. At Nuremberg, Council Control Law No. 10 singled out accessories, consenting participants, those connected with plans to commit crimes, and members of organisations associated with the crime. Likewise, Article 111 of the Genocide Convention criminalised conspiracy, incitement and complicity in the commission of genocide. The International Law Commission included complicity in its elaboration of the Nuremberg principles. Article 7 (1) of the ICTY statute provides that:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

105. In a further legal development, the Rome Statute of the International Criminal Court criminalises a range of associated acts, such as ordering, soliciting, inducing, aiding, abetting or assisting in the commission of the crime in a detailed scheme that conditions guilt on specific acts or mental state.
106. The tribunals have interpreted each of the elements of Article 7(1). In terms of the *Blaskic* case⁴⁵, an 'order' does not need to be in writing or in any particular form. It can be explicit or implicit and can be proved through leading evidence of a circumstantial nature. Nor does it require that the superior give the order directly to the perpetrator. In the *Akayesu*⁴⁶ case, the court held that it was the *mens rea* of the superior that was important, not the *animus* of the perpetrator – that is, the subordinate who executes the order. If one applies this principle to the occasion when Minister le Grange instructed General Petrus Johannes Coetzee to assemble a team to strike at the offices of the ANC in London in 1982, it becomes clear that he took part in the crime. Minister le Grange is deceased but, had he been alive, he would no doubt have needed to apply for amnesty for this act to escape potential prosecution. In this instance, General Coetzee applied for amnesty for his role in the London bombing.
107. General Mike Geldenhuys, the then Commissioner of Police, expressed his opposition to the fact that serving policemen were to be used. He appears thereafter to have played no role beyond remaining silent. Minister le Grange instructed General Coetzee that, notwithstanding his objections: 'the government had decided to that the operation would need to go ahead'. Commissioner Geldenhuys could in all probability be held responsible for his omission in that he knew of the intention to commit a crime in another country and did nothing about it.
108. In the *Tadic*⁴⁷ case, the trial chamber of the ICTY elaborated on the meaning of 'accomplice' liability and concluded that the accomplice is guilty if 'his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident' and that he 'had knowledge of the underlying act'. This test was not challenged and has been adopted by other chambers of the ICTY. In the *Akayesu* case, the ICTR defined 'planning' to mean 'one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases'.

45 Appeals Chamber, ICTY, paras 281–2 citing *The Prosecutor v Jean Paul Akayesu*, Judgment of ICTR Trial Chamber, 2 September 98.

46 Appeals Chamber, ICTY, paras 281–2 citing *The Prosecutor v Jean Paul Akayesu*, Judgment of ICTR Trial Chamber, 2 September 98.

47 *Prosecution v Dusko Tadic*, Judgment of the Trial Chamber II, 7 May 1997, ICTY.

109. 'Instigating' was defined as 'prompting another to commit an offense with a causal connection between the instigation and the perpetration of the crime'. The ICTY held that whilst 'a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated (i.e. that the contribution of the accused has an effect on the commission of the crime), it is not necessary to prove that the crime would not have been perpetrated without the accused's involvement'.
110. If one applies these principles to our situation, Minister le Grange would have been held responsible for the 1985 incident known as Operation Zero Zero. In terms of testimony before the Amnesty Committee, Le Grange authorised a plan that provided for the issue of defective hand grenades to a number of young Congress of South African Students (COSAS) activists on the East Rand. The hand grenades were to be used in operations against the state. However, the timing devices had been tampered with, which resulted in seven youths being killed and eight severely injured. In addition, a young woman who was suspected of being an informer was 'necklaced'⁴⁸, making her one of the first necklace victims in the country. Whilst Minister le Grange might not have known that Ms Maake Skosana would be killed, there is a causal link between her death and the hand grenade incident.
111. In 1987, the then Minister of Law and Order Adriaan Vlok [AM4399/96] authorised the destruction of Cosatu House⁴⁹ in central Johannesburg on the night of 3 May 1987. A team from Vlakplaas, assisted by the Witwatersrand Security Branch and including its technical and explosives sections, undertook the operation. Although nobody was killed, there were approximately twenty people in the building at the time. The building itself was extensively damaged. Minister Vlok could technically have been charged for attempted murder.
112. In July 1988, Minister Vlok authorised the placing of dummy explosives in several cinemas around South Africa to provide a pretext for the seizure and banning of the film, *Cry Freedom*, which details the death of detainee Steve Biko at the hands of the Port Elizabeth Security Branch. This action followed a number of unsuccessful attempts to exert pressure on the Publications Control Board to ban the film. In giving reasons for his actions before the Commission, Minister Vlok expressed the view that he had tried the legal route and failed,

⁴⁸ Burnt to death using petrol and a tyre placed around the victim.

⁴⁹ Headquarters of the Congress of South African Trade Unions (COSATU).

and had therefore resorted to illegality as he had judged 'that this film would have been a risk as it was inciteful'.

113. In August 1988, Minister Vlok was allegedly ordered by then State President PW Botha to render Khotso House 'unusable', but to do so without loss of life. Khotso House was the headquarters of the South African Council of Churches, considered to be an opponent of the former state. Numerous anti-apartheid organisations, including the United Democratic Front, also had offices in the building. This case provides an interesting study as, in his evidence before the Amnesty Committee, Minister Vlok testified that, although he had not been given specific instructions to bomb Khotso House, he could not think of a legal way to carry out the State President's injunction. He also testified that, since President Botha had said that 'it should involve no loss of life', he was led to believe that that Mr Botha had been suggesting unlawful means. This operation, which was also conducted by Vlakplaas with assistance from the Witwatersrand security Branch and the explosives section at security Branch Headquarters, took place on the night of 31 August 1988. Given the legal principles enunciated above, there can be little doubt that Mr PW Botha remains liable for these operations.
114. All of these operations indicate that there was direct political authorisation for these unlawful activities, which involved loss of life and/or the potential for loss of life and damage to property.
115. The pattern that was followed by successive apartheid governments was to pass to laws to legitimise their conduct. When that failed, they did not hesitate to act outside of the law and resort to criminality.
116. In the Blaskic case⁵⁰, aiding and abetting was defined as providing practical assistance, encouragement or moral support with a substantial effect on the perpetration of the crime. In terms of the Blaskic decision, an omission may constitute aiding and abetting as long as the 'failure to act had a decisive effect on the commission of the crime'. The *mens rea* in such a case consists of 'knowledge that his acts assist the commission of the crime' and the accused must have 'intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct'. The Blaskic judgment notes that: 'it is sufficient that the aider and abettor knows that one of a number of crimes will be committed'.

⁵⁰ Appeals Chamber, ICTY, paras 281–2 citing *The Prosecutor v Jean Paul Akayesu*, Judgement of ICTR Trial Chamber, 2 September 98.

117. In the Foca case⁵¹, the trial chamber described ‘aiding and abetting’ as a contribution which may take the form of ‘practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime. In this instance, the assistance need not have a causal connection to the act of the principal and it may involve an act or omission and take place before, during or after the commission of the crime’. In order for an individual to be held responsible for aiding and abetting, s/he must know that the acts assist in the commission of a specific crime by the principal. While the individual is not required to share the principal’s *mens rea*, ‘he must know of the essential elements of the crime (including the perpetrator’s *mens rea*) and take the conscious decisions to act in the knowledge that he thereby supports the commission of the crime.’

Command responsibility (omissions)

118. Under international law, an individual may be held responsible for omissions by the doctrine of superior or command responsibility. As set out earlier in this section, this doctrine is ancient in origin and emerged as an important principle particularly after World War II. It has also been a subject of considerable importance for international tribunals, which have recognised command responsibility as a principle firmly established in international law.

119. Article 7(3) of the ICTY statute reflects this rule:

The fact that any of the acts was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

120. The command responsibility principle is also present in Article 86(2) of the First Additional Protocol to the Geneva Conventions of 1949, which provides that:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

⁵¹ Appeals Chamber, ICTY, para 391 citing *The Prosecutor v Furundzija* supra paras 235 and 249.

121. Command responsibility requires three elements following proof of the crime itself:
- a a superior–subordinate relationship between the accused and the perpetrator of the crime;
 - b that the accused knew or had reason to know that the crime was about to be or had been committed; and
 - c that the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator.

122. The same principle has been applied in dealing with civil responsibility under the Alien Tort Claims Act in the United States. In the case of Paul v April⁵², a federal court held that Prosper Avril, a Haitian military dictator, was personally responsible for a systematic pattern of egregious abuses, since the perpetrators acted under his instructions and within the scope of the authority granted by him. The court heard evidence that he had known that the torture was being committed.

123. In the case of Forti v Suarez-Mason,⁵³ the court noted that:

under International law, responsibility for torture, summary execution or disappearances extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.

124. Using this principle, all former heads of the apartheid state could be held responsible for the commission of gross human rights violations committed by their agents.

125. The meaning of each of the elements of command responsibility require some discussion.

Superior–subordinate relationship

126. Jurisprudence on this point envisions that the principle of superior responsibility encompasses heads of state, political leaders and other civilian superiors in positions of authority.

⁵² 901 F. Supp. 339 (SD FLA 1994).

⁵³ 672 F. Supp. 1531, 1537-8 (N.D. CAL.1987).

127. In clarifying this issue, it is important to note the following:
- a The commander may be at any level.
 - b The commander, even if in an *ad hoc* command position, is responsible for the acts of men operating under him.
 - c Control may be direct or indirect.
 - d Control may be *de facto* as well as *de jure*.
128. The Foca⁵⁴ case clarifies that a superior–subordinate relationship cannot be determined by reference to formal status alone. What must be established is whether the superior had the material ability to exercise his powers to prevent and punish the commission of the subordinates’ offences.
129. It is clear that those superiors (either *de jure* or *de facto*, military or civilian) who are clearly part of a direct or indirect chain of command and who have the power to control or punish the acts of subordinates incur criminal responsibility.
130. The tribunals have not interpreted ‘chain of command’ literally but have held rather that as long as the fundamental requirement of an effective power to control the subordinate, in the sense of preventing or punishing criminal conduct is satisfied, the principle will hold.

Knowledge

131. Knowledge has been elaborated in international law to include: ‘knew or had information which should have enabled them to conclude in the circumstances at the time’; ‘knew or had reason to know’; ‘either knew or, owing to the circumstances at the time should have known’, and ‘either knew, or consciously disregarded information which clearly indicated that subordinates have or are about to commit international crimes’. International law takes into account the law as elaborated after the World War II trials and the terms of Additional Protocol I to the Geneva Conventions, which was written in 1977.
132. The ICTY interpreted customary international law in the Celebic case to be that a superior cannot be held responsible unless:
- He effectively knows, through direct or circumstantial evidence at his disposal, that his subordinates have committed or are about to commit the crimes; or*
- He has reason to believe that they have or are about to commit such crimes.*

⁵⁴ Appeals Chamber, ICTY.

133. The Celebic case draws a distinction between military commanders and civilian superiors, suggesting that a higher standard of proof will be required in the case of civilian superiors.

134. In the Blaskic case, the trial chamber restated the Celebic decision and then conducted its own review of the war crimes case from World War II. The trial chamber concluded that:

after World War II, a standard was established according to which a commander may be liable for crimes by his subordinates if he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction.

135. After turning to the Additional Protocol, the trial chamber in this judgment found that:

if a commander has exercised due diligence in the fulfilment of his duties lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defense where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.

136. This standard does not mean that the superior must have information on subordinate offences in his actual possession in order for liability to attach. It is sufficient that the superior has some general information in his possession that, 'would put him on notice of possible unlawful acts by his subordinates'. The information may be written or oral and does not need to be in the form of reports submitted pursuant to a monitoring system; nor does it have to provide specific information about unlawful acts. In the Celebic case, the Appeals Chamber posits, for example, that if a military commander has received information that some of the soldiers under his command have a violent or unstable character or have been drinking prior to going out on a mission, this may be considered as meeting the knowledge requirement. In this regard, the fact that the state used individuals like Eugene de Kock, Ferdi Barnard and others like them may attach liability to those who appointed them to carry out these deeds. They should indeed have expected them to do so because of the identification of quirks in their character.

Reasonable and necessary measures

137. The question of whether a commander took appropriate steps to prevent atrocities is a factual issue and is dependent on the circumstances of each case. International law is clear that, whilst a superior cannot do the impossible, he can be held responsible for failing to take measures within his real capacity. The ICTY has also held that punishing a perpetrator after the event does not satisfy this obligation if the commander had reason to know beforehand that crimes might be committed. It is not necessary that there should be a causal link between the superior's omission and the violation.

138. The Kordic and Cerkez⁵⁵ cases deal with the twin obligations of preventing and punishing.

the duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned or when he has reasonable grounds to suspect subordinate crimes. The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself. Civilian superiors would be under a similar obligation, depending upon the effective powers exercised and whether they include an ability to require the competent authorities to take action.

139. If one applies this test to some of the cross-border operations, a number of people could find themselves facing criminal action, given the fact that hardly anybody applied for amnesty for these operations.

140. General Coetzee testified as to his involvement in the Maseru raid and the raid on Gaborone. It is known that these raids were authorised by the former government, despite the fact that no minuted decision can be found in either the records of the State Security Council or Cabinet. Many high-ranking individuals, including Minister Vlok, have argued that, if such unlawful activity had been authorised, such authorisation would be reflected in minutes. The fact that these two raids were not reflected in minutes negates this argument.

141. It is clear that the Commission has no reason to change its findings. In addition, were the state to pursue a vigorous prosecution policy, many high-ranking politicians could find themselves sitting behind bars.

⁵⁵ Trial Chamber, ICTY.



Volume **SIX** • Section **FIVE** • Chapter **THREE**

**Findings and
Recommendations
HOLDING THE ANC
ACCOUNTABLE**

Holding the ANC Accountable

■ INTRODUCTION

1. In its five-volume Final Report, the Truth and Reconciliation Commission (the Commission) fully endorsed the international law position that apartheid was a crime against humanity. It also recognised that both the African National Congress (ANC) and the Pan Africanist Congress (PAC) were internationally recognised liberation movements that conducted a legitimate struggle against the former South African government and its policy of apartheid.
2. The Commission noted that the ANC made submissions to the Commission, including handing over a report on internal inquiries it had conducted in exile. It is important to restate that the ANC was, in all respects, more frank and co-operative with the Commission than either the state or the PAC.

FINDINGS

3. The Commission noted that, of the three main parties to the conflict, only the ANC committed itself to observing the tenets of the Geneva Protocols and, in the main, conducting the armed struggle in accordance with international humanitarian law. This report acknowledges the commitment of the ANC to upholding the Geneva Protocols as well as its comparative restraint in conducting the armed struggle – at least in terms of the manner in which it identified its targets and its leadership’s decision to instruct its cadres to abandon the land-mine campaign when it became clear that it was resulting in the deaths and injuries of innocent civilians.
4. However, the Commission drew a distinction between the conduct of a ‘just war’ and the question of ‘just means’. The Commission found that, whilst its struggle was just, the ANC had, in the course of the conflict, contravened the Geneva Protocols and was responsible for the commission of gross human rights violations. For this reason the Commission held that the ANC and its organs – the National Executive Council (NEC), the Secretariat and its armed wing Umkhonto we Sizwe (MK) – had, in the course of their political activities

and in the conduct of the armed struggle, committed gross human rights violations for which they are morally and politically accountable.

THE POSITION AFTER THE HANDING OVER OF THE FINAL REPORT

5. As mentioned above, the Commission wishes to place on record that it sought in its findings to draw a distinction between a 'just war' and 'just means'. It did not criminalise the struggle. It was, however, obliged in terms of its mandate set out in its founding Act⁵⁶ to determine the question of responsibility for the commission of gross human rights violations.
6. On the eve of handing over its Final Report, the ANC sought to interdict the Commission from doing so. The essence of the application was to challenge the Commission's interpretation of the *audi alterem partem* rule and to compel the Commission to meet with it to discuss the proposed findings. This court challenge is dealt with in Section One, Chapter Four of this volume. The High Court of the Western Cape found against the ANC, thereby allowing the Commission to hand its report over to President Mandela. There was, however, a great deal of acrimony between the Commission and the ANC about the findings made. Yet the fact is that the Commission said nothing that had not already been brought to the Commission by the ANC itself. It was indeed the ANC's disclosures and acknowledgment that gross human rights violations had been committed in the conduct of the struggle that assisted the Commission in coming to its conclusions.
7. In February 1999, at a sitting of both houses of parliament convened to discuss the Report, Deputy President Thabo Mbeki reiterated his complaint that the ANC had not been able to meet with the Commission to discuss its findings against the ANC. He made the following statement:

What we had sought to discuss with the TRC pertained to such obviously important matters as the definition of the concept of gross violations of human rights in the context of a war situation and other issues relating to war and peace and the humane conduct of warfare. One of the central matters at issue was, and remains, the erroneous determination of various actions of our liberation movement as gross violations of human rights, including the general implication that any and all military activity which results in the loss of civilian lives constitutes a gross violation of human rights. Indeed, it could also be said that the erroneous

⁵⁶ The Promotion of National Unity and Reconciliation Act No. 34 of 1995, (the Act).

*logic followed by the TRC, which was contrary even to the Geneva Conventions and Protocols governing the conduct of warfare, would result in the characterisation of all irregular wars of liberation as tantamount to a gross violation of human rights. We cannot accept such a conclusion*⁵⁷.

8. The Commission is not required to respond to criticism of its findings by the ANC and other critics. However, at the time that the findings of responsibility were made, the work of the Amnesty Committee was not complete and there was some expectation that the Commission would re-examine these findings in the light of the amnesty decisions and the evidence received through this process. In doing so, it is necessary to deal with both international law and international humanitarian law.

INTERNATIONAL HUMANITARIAN LAW

9. The Geneva Conventions were adopted in 1949 and South Africa acceded to them in 1952. In 1977, additional Protocols I and II were adopted. In 1980, the ANC deposited a declaration with the President of the International Committee of the Red Cross (ICRC) committing the ANC to international humanitarian law.⁵⁸
10. The principles of international humanitarian law that apply to the situation in South Africa are set out in Chapter One of this section. The chapter also deals with the ANC's declaration that it would govern the conduct of its struggle in accordance with international humanitarian law.

Moral equivalence

11. One of the criticisms the ANC levelled at the Commission was that of 'moral equivalence'. The ANC claimed that the Commission equated the actions of those who fought a just cause against apartheid with those who fought in defence of an unjust cause.
12. The Commission's position has always been⁵⁹ that it was obliged by statute to deal even-handedly with all victims. Its actions in this respect were guided, amongst other things, by the principle that victims should be treated equally, without discrimination of any kind. Despite this, however, the Commission did not suspend moral judgment and drew a distinction between the actions of the state and those of the liberation movements.

⁵⁷ Hansard: Feb 5–March 26 1999.

⁵⁸ See the Appendix to this chapter.

⁵⁹ See Volume One.

13. When dealing with the question of even-handedness and moral equivalence (whether making its findings against the state, the liberation movements or other parties), the Commission relied on internationally accepted human rights principles. In order to arrive at a definition of a gross human rights violation, the Commission relied on the definition contained in the Act and, in making its assessment, took into account the political context and the circumstances within which the violation had taken place.
14. This did not, however, mean that the Commission treated the conflict as a conflict between equal parties. The Commission recognised that the might of the state, with all its power and legitimacy (however ill-conferred) was in a far stronger position than were the liberation movements.
15. The Commission also never characterised the war that the former state waged against its own people as either morally or legally justified.
16. The Commission also took care not to use apartheid definitions of legal conduct.

IUS IN BELLO AND IUS AD BELLUM

17. The ANC also criticised the Commission for failing to deal adequately with the fact that the apartheid state acted in breach of the Geneva Conventions and the Additional Protocols. According to this view, the actions that the state considered to be legitimate were war crimes. For this reason it is important to elucidate the distinction between a 'just war' and 'just means'.
18. In its five-volume Final Report, the Commission stated the following:

The application of some of the principles and criteria of just war theory have proved difficult and controversial, especially when dealing with unconventional wars, that is wars of national liberation, civil wars and guerrilla wars within states. The distinction between means and cause is a dimension of just war theory that cannot be ignored. Often this distinction is made in terms of justice in war (ius in bello) and justice of war (ius ad bellum).

19. In dealing with the doctrine of justice in war, the Commission stated:

There are limits to how much force may be used in a particular context and restrictions on who or what may be targeted. Two principles dominate this body of law:

The use of force must be reasonably tailored to a legitimate military end;

Certain individuals are entitled to specific protection, making a fundamental distinction between combatants and non-combatants. Thus even an enemy soldier who is armed and ready for combat may be harmed and even killed, but a civilian or a sick, wounded or captured soldiers may not be harmed.

20. The Report stated further:

The Commission's confirmation that the apartheid system was a crime against humanity does not mean that all acts carried out in order to destroy apartheid was necessarily legal, moral and acceptable. The Commission with the international consensus that those who were fighting for a just cause were under an obligation to employ just means in the conduct of this fight.

As far as justice in war is concerned, the framework within which the Commission made its findings was in accordance with international law and the views and findings of international organisations and judicial bodies. The strict prohibitions against torture and abduction and the grave breach of killing and injuring defenceless people, civilians and soldiers 'hors de combat' required the Commission to conclude that not all actions in war could be regarded as morally or legally legitimate, even where the cause was just.

21. Given the ANC's own commitment to upholding the Geneva Conventions and the various principles of international humanitarian law – as well as its own Declaration in 1980 – it is difficult to understand why it wishes to pursue this argument. The Commission, however, stands by this distinction. Hans-Peter Gasser, a former Senior Legal Adviser to the ICRC has stated:

The rules of international law apply to all armed conflicts, irrespective of their origin or cause. They have to be respected in all circumstances and with regard to all persons protected by them, without any discrimination. In modern humanitarian law, there is no place for discriminatory treatment of victims of warfare based on the concept of 'just war'.

22. Professor Kader Asmal, a member of the ANC National Executive and a leading expert in international law, explained the ANC's commitment to the Geneva Conventions as follows:

The applicability of the humanitarian rules of war to conflicts between an incumbent state and a national liberation movement fighting for self-determination is

clearly accepted. The Protocols to the 1977 Geneva Conventions are intended to apply to such a conflict and were subscribed to by the ANC in 1980. Although the Apartheid state did not ratify the relevant Protocol, that Protocol merely codified pre-existing contemporary law on the subject. Thus both belligerents in South Africa were under an obligation to treat the conflict as one governed by the law of war. Under Article 85, paragraph 5 of the Geneva Protocol, 'grave breaches' of the Convention and Protocol constitute war crimes.⁶⁰

23. The report of the Motsuenyane Commission on conditions in the ANC camps in Angola spelt out the ANC's obligations under international humanitarian law, as well as the applicability of Article 75 of Protocol I of 1977 and Common Article 3 of the Geneva Conventions on the conditions and treatment of MK prisoners in their custody. The Motsuenyane Commission also referred to the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights. This report was accepted by the ANC and its findings were referred to the Commission.
24. Thus a just cause cannot mean that all restraint in the conduct of the war should be allowed to fall away. Although the cause of the liberation movements amounted to a just war, certain incidents that impacted on those who were *hors de combat* and 'civilians' were considered to be breaches of international law. A number of incidents involving indiscriminate bombings that led to the injury and death of civilians are regarded in law as breaches, the responsibility for which the group or movement that committed these acts must acknowledge.
25. This debate is a crucial one in modern times as the distinction between 'freedom fighter' and 'terrorist' becomes more blurred.
26. Again, the principle that derives is that the fact that the liberation movements' cause was just does not mean that they were not required to act justly in the conduct of that war. Thus the *ius in bello* cannot be separated from the *ius ad bellum*.
27. In essence, the effect of this distinction is to hold individuals, organisations, states and organs of the state accountable for their actions. Thus military commanders cannot evade the consequences of their orders; nor can subordinates evade punishment or accountability on the basis of having followed orders. The

⁶⁰ Asmal, K, Asmal L, and Roberts, RS, Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance. Cape Town, David Phillip, 1996.

responsibility to act within the boundaries of international humanitarian law binds all actors, both state and non-state parties. According to Professor Kader Asmal:

Traditionally, these two branches of international law have addressed separate issues: international humanitarian law has been concerned with the treatment of combatants and non-combatants by their opponents in wartime, while international human rights law has been concerned with the relationship between states and their own national son peacetime. Yet, even in earlier times, they shared a fundamental concern: a commitment to human dignity and welfare, irrespective of the status of the individual (combatant or non-combatant) and of the circumstances under which his rights and responsibilities are to be exercised (peacetime or wartime)⁶¹.

SPECIFIC FINDINGS

28. The Commission made its findings based, in the main, on frank and substantial submissions by the ANC and the testimony of both the political and military leadership at public hearings. In addition, the Commission took into account the statements of victims and testimony received from amnesty applicants and during section 29 hearings.

29. The Commission stated that:

The ANC has accepted responsibility for all actions committed by members of MK under its command in the period 1961 to august 1990. In this period there were a number of such actions – in particular the placing of limpet and land-mines – which resulted in civilian casualties. Whatever the justification given by the ANC for such acts – misinterpretation of policy, poor surveillance, anger or differing interpretations of what constituted a ‘legitimate military target’ – the people who were killed or injured by such explosions are all victims of gross human rights violations of human rights perpetrated by the ANC. While it is accepted that targeting civilians was not ANC policy, MK operations nonetheless ended up killing fewer security force members than civilians.

⁶¹ Ibid.

30. With respect to the actions of MK during the armed struggle, the Commission found that:

Whilst it was ANC policy that the loss of civilian life should be avoided, there were instances where members of MK perpetrated gross violations of human rights in that the distinction between military and civilian targets was blurred in certain armed actions, such as the 1983 Church street bombing of the SAAF headquarters, resulting in gross violations of human rights through civilian injury and loss of life.

In the course of the armed struggle there were instances where members of MK conducted unplanned military operations using their own discretion, and, without adequate control and supervision at an operational level, determined targets for attack outside of official policy guidelines. While recognising that such operations were frequently undertaken in retaliation for raids by the former South African Government into neighbouring countries, such unplanned operations nonetheless often resulted in loss of life, amounting to gross violations of human rights. The 1985 Amanzimtoti shopping centre bombing is regarded by the Commission in this light.

In the course of the armed struggle the ANC through MK planned and undertook military operations which, though intended for military or security force targets sometimes went awry for a variety of reasons, including poor intelligence and reconnaissance. The consequences in these cases, such as the Magoo Bar incident and the Durban esplanade bombings were gross violations of human rights in respect of the injuries to and loss of lives of civilians.

While the Commission acknowledges the ANC's submission that the former South African government had itself by the mid-1980's blurred the distinction between military and 'soft' targets by declaring border areas 'military zones' where farmers were trained and equipped to operate as an extension of military structures, it finds that the ANC's landmine campaigns in the period 1985 –1987 in the rural areas of the Northern and Eastern Transvaal cannot be condoned, in that it resulted in gross violations of the human rights of civilians including farm labourers and children, who were killed or injured, The ANC is held accountable for such gross human rights violations.

Individuals who defected to the state and became informers and/or members who became state witnesses in political trials and/or became Askaris were often labelled by the ANC as collaborators and regarded as legitimate targets to be killed. The Commission does not condone the legitimisation of such individuals as military targets and finds that the extra-judicial killings of such individuals constituted gross violations of human rights.

The Commission finds that, in the 1980's in particular, a number of gross violations of human rights were perpetrated not by direct members of the ANC or those operating under its formal command but by civilians who saw themselves as ANC supporters. In this regard, the Commission finds that the ANC is morally and politically accountable for creating a climate in which such supporters believed their actions to be legitimate and carried out within the broad parameters of a 'people's war' as enunciated by the ANC.

31. If these findings are analysed, it can be seen that they fall into the following categories:
 - a attacks ostensibly on military targets but where civilians are killed and injured;
 - b unplanned and indiscriminate attacks on targets outside of official policy guidelines and which affect civilians;
 - c planned military operations that go wrong and where civilians are killed;
 - d the deliberate targeting of individuals labelled as traitors;
 - e attacks carried out by MK on both military and civilian targets, and
 - f attacks carried out by supporters of the ANC. In this regard, actions by UDF supporters and the SDUs are pertinent.

32. If one examines each of these categories in terms of the Geneva Conventions and Protocol I⁶², they are clearly defined as grave breaches.
 - a Articles 50, 51, 130 and 147 specify the following grave breaches of the four Geneva Conventions respectively: wilful killing; torture or inhuman treatment; biological experiments; wilfully causing great suffering; causing serious injury to body or health, and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.
 - b The following are considered to be grave breaches in terms of Articles 130 and 147 of the third and fourth Geneva Conventions: compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile power, and wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the conventions.
 - c The following are considered to be grave breaches of the fourth Geneva Convention in terms of Article 147: unlawful deportation or transfer; unlawful confinement of a protected person, and taking of hostages.

⁶² See Appendix 2 to Chapter One of this section.

- d Articles 11 and 85 of Protocol I specify what constitutes a grave breach. For our purposes, the following acts, when committed wilfully and if they cause death or serious injury to body and health constitute grave breaches: making the civilian population or individual civilians the object of attack; launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; making non-defended localities and demilitarised zones the object of attack; making a person the object of an attack in the knowledge that he is *hors de combat*, and depriving a person protected by the Conventions or by Protocol I of the rights of a fair and regular trial.
33. An analysis of the information received by the Commission confirms that there were no actions of note taken by MK inside South Africa during the period 1964 to 1975.
34. The period 1976 to 1984, however, saw a steady rise in the number of armed attacks. The Commission recorded a total of 265 incidents in this regard.
35. Another notable feature of this period are attacks on police stations and police officers, who were deemed to be collaborators and were therefore seen as legitimate targets for execution.
36. David Simelane and Obed Masina, for example, were granted amnesty for the killing of Sergeant Orphan Hlubi Chapi outside his Soweto home in June 1978. It was, however, the formation of the ANC Special Operations Unit in 1979 that led to the launch of several high-profile attacks on police stations, state infrastructure and a major attack on SADF personnel, namely the Church Street bombing. Here a car bomb placed outside the South African Air Force headquarters in Pretoria led to the deaths of nineteen people. In terms of the numbers of casualties, this was the most devastating attack by MK in its entire history. The Commission received amnesty applications for a total of seventy-nine incidents carried out by this unit during this period.⁶³

⁶³ See Section Three, Chapter Two in this volume.

37. The amnesty applications reveal that, whilst orders were given in certain cases, targets were for the most part selected by the unit in question. For example, Mr Maake, a member of the Nchabaleng unit which operated around Kwandabele, was responsible for the death of a local police officer. Maake testified at his amnesty hearing that decisions about specific operations were taken by the unit itself. Mr Shoke, a member of another unit, testified that:

What you must understand that guerrillas as opposed in fact to conventional forces, we exercise what we call command initiative, you rely on the initiative of the individual and everybody in MK was being prepared in fact to become a Commander.

38. Whilst some units testified to the fact that decisions were taken by consensus, there is no doubt that that a number of civilians were killed because of the individualised nature of target selection. In addition, assassinations frequently targeted police officers or individuals perceived to be collaborators with the former state. For example, the members of the elimination unit ('Icing Unit') engaged in six operations, including three assassinations, before they were caught in September 1986.
39. Evidence before the Commission in respect of targets indicates that attacks were aimed primarily at the state and its organs and those who were branded as collaborators, and that it was not ANC policy to engage in operations that deliberately targeted civilians. In his amnesty hearing, Aboobaker Ismail testified as follows:
- We never set out deliberately to attack civilian targets. We followed the political objectives of the African National Congress in the course of a just struggle. However in the course of a war, life is lost, and the injury to and the loss of life of innocent civilians becomes inevitable. The challenge before us was to avoid indiscriminate killing and to focus on security forces.*
40. Yet, despite the stated intentions and the clear policy of the ANC with regard to the selection of targets, the majority of these casualties were civilians.
41. Another facet of MK operations was the targeting of those regarded as collaborators. These included police officers, their family members, councillors, state witnesses in trials, and suspected informers. In terms of the Geneva Conventions and Protocol I to the Conventions, all of these killings are regarded as grave breaches and therefore constitute 'war crimes' in terms of the definitions.

42. In the submission made by the ANC to the Commission in response to its findings, the ANC made it clear that they regarded spies as legitimate targets for killings. In addition, they raised the fact that civilians killed in the course of attacks on military targets were permissible collateral damage.
43. After its Kabwe Conference, the ANC hardened its stance on civilians. The ANC stated in its submission to the Commission that the Kabwe Conference:
reaffirmed ANC policy with regard to targets considered legitimate: SADF and SAP personnel and installations, selected economic installations and administrative infrastructure. But the risk of civilians being caught in the crossfire when such operations took place could no longer be allowed to prevent the urgently needed, all round intensification of the armed struggle. The focus of the armed operations had to shift towards striking directly at enemy personnel, and the struggle had to move out of the townships to the white areas.
44. Testimony from amnesty applicants indicates that they clearly saw civilian casualties as a necessary consequence of military operations, almost an acceptable form of collateral damage.
45. It is equally clear that action was rarely taken against operatives or units who were responsible for these breaches of humanitarian law. Whilst the ANC acknowledged in its submission that a number of attacks carried out by MK were not in line with ANC policy, it is clear that the operatives concerned were not censured, nor were they repudiated by the movement. The ANC did, however, seek to educate the rank and file on what constituted ANC policy.
46. There is no doubt, however, that as the number of civilian casualties began to rise, ANC President Oliver Tambo and the leadership of the ANC became gravely concerned. In 1987, Mr Tambo expressed his concern about the number of unnecessary civilian casualties resulting from the landmine campaign and ordered that all cadres be fully educated about ANC policy with regard to legitimate targets. Failure to comply with these orders would be considered violations of policy and action would be taken against offenders.
47. In 1988, the NEC issued a statement on the conduct of the armed struggle and expressed its concern at the recent spate of attacks on civilians. Whilst amnesty applicants were fairly sanguine about the legitimacy of their targets, the political leadership was clearly concerned.

ACTS COMMITTED BY CIVILIANS PRIOR TO 1990

48. While MK operations undoubtedly contributed significantly to resistance activities, particularly in the pre-1990s period, civilian activity inside the country took place on a larger scale. The submission made to the Commission by the Foundation for Equality before the Law cited 80 507 unrest-related incidents in the period 1984 to 1992. It also referred to 979 cases of burning and 'necklacing'.
49. In its five-volume Final Report, the Commission described the United Democratic Front (UDF) as a loose federation that brought together a large number of social, civic and political organisations of differing backgrounds, racial constituencies and political orientations. The purpose of the UDF was to act as an umbrella body for opponents of the state who sought to achieve a non-racial, democratic and unitary state. Whilst its founding document stated that it was not a front for the banned liberation movement, it became increasingly supportive of the ANC.
50. The UDF became the rallying point for a wide range of affiliates comprising youth and civic organisations, scholar and student organisations, church and welfare organisations, trade unions, sporting and cultural organisations, and political and quasi-political organisations. It was able to mobilise very large groups of people for rallies and meetings, which were characterised by powerful oratory and wide-ranging demands for political change.
51. The Commission stated that, from 1985, the UDF sought to dismantle government and security force control and administration. It sought to promote and enact the concept of 'people's power', which envisaged administrative, welfare and judicial functions in the townships being assumed by community-based and sectoral organisations. This included the establishment of forums to administer civil and criminal justice through people's courts.
52. The Commission made the following findings against the UDF:⁶⁴

The Commission acknowledges that it was not the policy of the UDF to attack and kill political opponents, but finds that members and supporters of UDF affiliate organisations often committed gross violations of human rights in the context of widespread State-sponsored or –directed violence and a climate of political intolerance.

⁶⁴ Volume Five, Chapter Six, pp. 246–7.

The UDF facilitated such gross violations of human rights in that its leaders, office bearers and members, through their campaigns, public statements and speeches, acted in a manner which helped create a climate in which members of affiliated organisations believed that they were morally justified in taking unlawful action against State structures, individual members of State organisations and persons perceived as supporters of the State and its structures. Further, in its endorsement and promotion of the ‘toyi-toyi’, slogans and songs that encouraged and/or eulogised violent actions, the UDF created a climate in which such actions were considered legitimate. Inasmuch as the State is held accountable for the use of language in speeches and slogans, so must the mass democratic movement and liberation movements be held accountable.

The Commission finds that factors referred to in the paragraph above led to widespread excesses, abuses and gross violations of human rights by supporters and members of organisations affiliated to the UDF. These actions include:

- The killing (often by means of ‘necklacing’), attempted killing and severe ill-treatment of political opponents, members of state structures such as black local authorities and the SAP, and the burning and destruction of homes and properties;*
- The violent enforcement of work stay aways and boycotts of, among others, private and public transport and private retail shops, leading to killing, attempted killing and severe ill-treatment;*
- Political intolerance resulting in violent inter-organisational conflict with Azapo and the IFP, among others.*

The UDF and its leadership:

- Failed to exert the political and moral authority available to it to stop the practices outlined above, despite the fact that such practices were frequently associated with official UDF campaigns such as consumer boycotts or campaigns against black local authorities. In particular, the UDF and its leadership failed to use the full extent of its authority to bring an end to the practice of necklacing, committed in many instances by its members and supporters.*
- Failed to take appropriately strong or robust steps or measures to prevent, discourage, restrain and inhibit its affiliates and supporters from becoming involved in action leading to gross violations of human rights, as referred to above.*

- *Failed to exert sanctions or disciplinary action on member organisations whose members were involved in the gross violations of human rights described above, or failed to urge such member organisations to take appropriate actions against their members.*
 - *The Commission notes that the political leadership of the UDF has accepted political and moral responsibility for the actions of its members. Accordingly the UDF is accountable for the gross violations of human rights committed in its name and as a consequence of its failure to take the steps referred to above.*
53. The Commission based its findings on the evidence it received both through the human rights violations and the amnesty processes. However, partially because the UDF had already disbanded by 1991, and because no central structure existed to encourage amnesty applications, the number of amnesty applications received do not tally with the figures that the Commission received in respect of violations. The Commission received eighty-five applications, which included fourteen acts not considered to be gross human rights violations. The remaining seventy-one applications dealt with offences ranging from arson affecting government property to gross human rights violations in which people were killed.
54. Whilst it was not UDF policy to kill, there is no doubt that the targeting of certain individuals and their families for killing and arson involving their property was tolerated and encouraged in certain quarters. Some of the most shocking incidents took place during this era. Many organisations targeted those they regarded as traitors and collaborators. Police officers, councillors in the former local government, informers and their families were regarded as fair game.
55. For example, in the amnesty application of Mr Mziwoxolo Stokwe for the killing of Mr Skune Tembisile Maarman, Stokwe testified that COSAS identified Maarman as a police informer and stoned him to death. Later he was necklaced. Eight people including Stokwe were charged for his killing. Stokwe and his group also launched attacks on the homes of perceived collaborators, including a school principal and two councillors.
56. When Stokwe discovered that one of the comrades, Ntiki Fibana, had agreed to appear as a witness for the State, the group decided to deal with her in the following way:

We got information that Ms Ntiki was at her home together with the police with intention of removing her property. We rushed to the place and when the police

saw the crowd they drove away, they left Ntiki inside the house. We took her out and set the house alight. Thereafter we stoned her to death and set her alight with the tyre on her neck. No meeting took a decision to kill Ms Ntiki, but we had to deal with the situation immediately as she was there during that conflict moment. After we killed, we had a meeting where we took a decision to cross the borders of South Africa, to Lesotho for military training and to join Umkhonto weSizwe.

57. Whilst these kinds of incidents are considered to be gross human rights violations, they need to be contextualised. At the time, the country was engulfed in violence in which the apartheid state was the primary actor. It had established covert units, including death squads, whose main intention was to assassinate those considered to be political opponents, and was using all its might to crush opposition. Youth were targeted and enticed into entrapment operations. It would have been quite impossible for the UDF leadership to control the violence and actions of groups within communities all over the country. While the leadership may have uttered words of restraint, it is unlikely that they would have been heeded. This context of violence gave rise to some of the worst excesses in our country.
58. In testimony before the Amnesty Committee, Mr Stokwe stated the following:
- As a member of Cosas, when it was said that the country must be ungovernable, those were the means to try and send a message to the government. That is why we are in this present situation today. In a war, if you focus on a certain target and there are stumbling blocks in front of you, you would start with them because we would not be able to reach our goal because they were informers. So in order to reach our target, we had to start with them, so that was our strategy.*
59. Amnesty was also sought for an incident in which a police officer, Mr Benjamin Masinga, was killed by members of UDF affiliated organisations. Masinga was taken from his house, attacked with sticks, stones, bricks and axes rendering him unconscious. He was dragged to a nearby school, was doused with petrol and was then set alight.
60. These and other incidents reveal that the perpetrators believed that they were acting under a broad political directive to eliminate those considered to be a threat to the struggle and the movement. In some instances they had contact with members of MK and the ANC but, even where this had been the case, they

testified that they were not acting under orders. They saw it as their role to make the country ungovernable and to eliminate those who were perceived to be 'collaborators'.

61. There is no evidence of UDF leadership encouraging killing or the commission of gross human rights violations. It is also clear from the testimony before the Commission that they did not play an active role in the commission of gross human rights violations. However, the general clarion call that they made to make the townships ungovernable and to eliminate those who collaborated led to the commission of gross human rights violations for which the leadership of the UDF must accept responsibility.
62. Information that emerged from the hearings of the Amnesty Committee strengthens the findings made by the Commission in its Final Report.

GROSS VIOLATIONS OF HUMAN RIGHTS COMMITTED BY THE ANC IN EXILE

Introduction

63. In its five-volume Final Report, the Commission recorded that it had received the reports of the Stewart, Skweyiya, Sachs and Motsuenyane Commissions of Inquiry. All of these commissions had been appointed by the ANC. The Commission also had sight of the report of the Douglas Commission. These commissions of inquiry investigated allegations of human rights abuses in the ANC camps and in exile. The Commission also received evidence from victims testifying to their experiences both in the camps and in exile.
64. The Commission must also record its appreciation to the ANC for the frank way in which it handled this question during its submissions to the Commission and during the two political party hearings. The disclosures made enabled the Commission to get a sense of the problems encountered when dealing with young people in the camps and how justice was dispensed in the camps. The ANC also handed over a file that dealt with a number of the executions that had taken place in the camps.
65. A number of section 29 hearings took place, during which those named as responsible for abuses were questioned about their role and the prevailing conditions. The Commission received twenty-one amnesty applications from

members of the ANC's security department. However, nine applications were later withdrawn. This deprived victims of the opportunity to find out what had happened to their loved ones.

66. The twelve remaining applications included four killings, three cases of negligence that may have contributed to deaths, one shooting and eleven cases of assault of persons in the custody of the ANC. All of these applications were granted. Eight of them were dealt with at a public hearing.
67. Whilst the movement at a leadership level made frank disclosures, the same cannot be said of the welfare desk. The Commission was required to deal with this desk on a daily basis in order to verify information supplied by victims and their families. In more than 250 instances, the Commission was unable to obtain any response from the welfare desk, thereby creating further suspicions in the minds of many families about the deaths or disappearances of loved ones.
68. The death of Mr Thabo Naphtali provides one example of this. In terms of the evidence given to the Commission, he was accidentally shot during a night skirmish in the camp at Viana. Although his family knew that he had gone into exile, the movement neither notified them that he had died nor informed of the circumstances of his death. They discovered these facts only at the amnesty hearing.
69. In terms of international law, the fact that persons died in custody at the hands of the ANC places the responsibility for their deaths on the ANC.
70. The Commission recorded the following findings, on the basis of the evidence before it:⁶⁵

The ANC and particularly its military structures responsible for the treatment and welfare of those in its camps were guilty of gross violations of human rights in certain circumstances and against two categories of individuals, namely suspected 'enemy agents' and 'mutineers'.

The Commission found that suspected agents were routinely subjected to torture and other forms of severe ill treatment and that there were cases of such individuals being charged and convicted by Tribunals without proper attention to due process, sentenced to death and executed. The Commission found that the

⁶⁵ Volume Five, Chapter Six, p. 242.

human rights of individuals so affected were grossly violated. Likewise, the Commission found that the failure to communicate properly with the families of such victims constituted callous and insensitive conduct.

The Commission also found that all so-called mutineers who were executed after conviction by military Tribunal, irrespective of whether they were afforded proper legal representation and due process or not, suffered a gross violation of their human rights.

With regard to the allegations of torture and ill treatment, the Commission found that although torture was not within ANC policy, the security department of the ANC routinely used torture to extract information and confessions from those being held in camps particularly in the period 1979–1989. The Commission noted the various forms of torture detailed by the Motsuenyane commission, namely the deliberate infliction of pain, severe ill-treatment in the form of detention in solitary confinement, and the deliberate withholding of food and water and/or medical care, and finds that they amounted to gross violations of human rights.

71. The Motsuenyane Commission submitted its report to the ANC in August 1993. Its conclusion was that there had been severe abuses in ANC detention camps over a number of years. In one detention camp, the Commission concluded that:

Quatro was intended to be a rehabilitation centre. Instead, it became a dumping ground for all who fell foul of the Security Department, whether they were loyal supporters accused of being enemy agents, suspected spies or convicts. All were subjected to torture, ill-treatment and humiliation far too frequently to achieve its purpose as a rehabilitation centre.

72. The Motsuenyane Commission also found that adequate steps were not taken in good time against those responsible for such violations.

Commentary

73. Testimony before the Amnesty Committee has confirmed that there were abuses in exile. The security department of the ANC routinely used torture and assault as a means to extract information from those it suspected of being enemy agents or dissidents. In those instances where operatives were executed, it is clear that there were some instances of due process being afforded to those accused of offences. In the main, however, due process was given perfunctory observance and these so-called trials cannot be conceived of as remotely

resembling fair trials or hearings. These actions are contraventions of the Geneva Conventions and Protocol I.

74. The information that the Commission received subsequent to the submission of its five-volume Final Report has confirmed that the Commission was correct in making the findings that it did.

GROSS VIOLATIONS OF HUMAN RIGHTS COMMITTED BY SELF-DEFENCE UNITS

75. In its Final Report, the Commission made the following finding against the ANC in respect of the commission of gross human rights violations perpetrated by self-defence units (SDUs):

Whilst the Commission accepts that the violent conflict which consumed the country in the post-1990 period was neither initiated by nor in the interests of the ANC, the ANC must nonetheless account for the many hundreds of people killed or injured by its members in the conflict. While the ANC leadership has argued that its members were acting in self-defence, it is the Commission's view that at times the conflict assumed local dynamics in which proactive revenge attacks were carried out by both sides. High levels of political intolerance among all parties, including the ANC, further, exacerbated this situation; the Commission contends that the leadership should have been aware of the consequences of training and arming members of SDUs' in a volatile situation in which they had little control over the actions of such members. The Commission therefore found that in the period 1990 to 1994, the ANC was responsible for:

- *Killings, assaults and attacks on political opponents including members of the IFP, PAC, Azapo and the SAP*
- *Contributing to a spiral of violence in the country through the creation and arming of self-defence units (SDUs).*

While acknowledging that it was not the policy of the ANC to attack and kill political opponents, the Commission finds that in the absence of adequate command structures and in the context of widespread state-sponsored or directed violence and a climate of political intolerance, SDU members often 'took the law in their own hands' and committed gross violations of human rights.

The Commission takes note that the political leadership of the African National Congress and the command structure of Umkhonto WeSizwe accepted political and moral responsibility for all the actions of its members in the period

1990–1994 and therefore finds that the leadership of the ANC and MK must take responsibility and be accountable for all gross violations of human rights perpetrated by its membership and cadres during the mandate period.

76. The finding was based on evidence that the Commission received from victims who testified or made statements to the Commission, evidence at hearings and submissions handed to the Commission.

Response of the ANC

77. In its response to the Section 30 finding, the ANC argued that the finding:

has the deliberate intention, contrary to the truth readily available to the TRC, of shifting the blame for the political violence which occurred in the period since 1990 away for the apartheid regime to the democratic movement and condemning the oppressed for the efforts they took to defend themselves against a very intense campaign of repression and terror.

78. The ANC also restated what it had said in its submission to the Commission in May 1997:

The post-1990 violence was the work of the state, was organised at the highest level, and was aimed at strengthening the hand of the government at the negotiations table by forcing a progressively weakened ANC into a reactive position in which it would be held hostage to the violence and forced to make constitutional concession.... the ANC was not engaging in 'ongoing conflict', nor were the majority of the people on the ground embroiled in 'ongoing conflict': they were being attacked by covert units operating in accordance with the wishes of the apartheid regime.

Amnesty process

79. The Commission received a number of applications from members of ANC-aligned SDUs for violations committed during the 1990s. However, this was the result of a concerted effort made by a few individuals. Regrettably, a large number of SDUs were not reached in time and many did not have access to legal assistance. In certain instances, they did not qualify because of ongoing violence, which culminated in further incidents of violence linked but occurring beyond the mandate period. In this regard, the Commission visited a number of young people in prison.

Environment in the townships during the period in question

80. In the period following the unbanning of the ANC, the townships were in turmoil. The stakes were high for both the state and its surrogate, the IFP, both of whom were opposed to the ANC taking power. Township residents were constantly under attack by surrogate forces of the state, which included members of the IFP, renegade forces and members of the rightwing who were, in many instances, armed by the state.
81. The violence affected particularly Gauteng and KwaZulu/Natal. It was against this backdrop of state-sponsored violence that the activities of the SDUs took place.

Findings in respect of SDUs

82. In assessing whether the findings that were made in respect of the SDUs remain relevant in the light of the evidence emerging from the amnesty process, the Commission needed to confirm the following:
- a Was the ANC responsible for the creation and arming of the self-defence units?
 - b Was the Commission's finding that there was not an adequate command structure correct?
 - c Whilst acknowledging the state's role in sponsoring the violence, did SDUs take the law into their own hands and perpetrate gross human rights violations?
 - d Did all of this contribute to the violence of the 1990s?

The ANC's role in the creation of self-defence units

83. The SDU's were created amidst the spiralling violence of the negotiation period. The former state engaged in a strategy of negotiating with the liberation movements on the one hand and fomenting violence on the other. This meant that supporters of the ANC were left vulnerable to attack by dark surrogate forces, which later became known as the 'Third Force'.⁶⁶ After a mass funeral in Soweto in 1990, ANC President Nelson Mandela publicly pledged the ANC's commitment to the formation and training of SDUs. In addition, at its consultative conference in Durban 1990, the ANC resolved to take steps to defend itself with all the means at its disposal and to create people's self-defence units as a matter of urgency as it came under increasing pressure at local level to intervene and respond to the violence.

⁶⁶ See Appendix to Section Four in this volume.

84. In its attempts to manage and control the process, the ANC released a document called 'For the sake of our lives', which attempted to prescribe and regulate the structures and activities of the SDUs. The thrust of this policy document was that SDUs should operate in terms of a political rather than a military strategy and that the long-term goal should be peace. It was envisaged that SDUs would be well trained and highly disciplined.
85. The document envisaged that, although MK members would play a role in the establishment of SDUs, it was imperative that they be controlled from within communities because of the past history of informally established units. It was also envisaged that the units would receive political instruction of some sort. Local MK members were granted permission to participate in these structures. MK involvement took the form of recruiting and training of SDU members and supplying weapons. In some instances, individual members of MK participated in the clashes and skirmishes that took place.
86. ANC policy required that selected units supplied certain SDU units with weapons. A special unit was set up within the ANC to assist with the arming of SDUs. These included Ronnie Kasrils, Aboobaker Ismail, Riaz Saloojee, Muff Anderson and Robert McBride. All of these applied for amnesty for supplying weapons and assisting SDUs. In the KwaZulu/Natal area, Jeff Radebe, Ian Munro Phillips and Siphso Joel Daniel Sithole were involved in the supply of weapons and assistance to the SDUs.
87. It is important to note that the ANC was not the only supplier of weapons. In most instances, the SDU units had other sources of supply.
88. There is no doubt that the ANC played a major role in establishing SDUs in both the Transvaal and KwaZulu/Natal areas.

Command structures

89. In KwaZulu and Natal, SDUs consisted in the main of loose formations comprising youth and community members in a particular community. There was no formal command structure. However, while ANC branch leadership often assumed the command of these structures, ANC structures themselves were often not well established or formalised and consisted of a handful of supporters who came together for particular events or occasions. Thus ordinary residents living in ANC-aligned areas might find themselves having to participate in an

attack simply because they lived in an area. In many instances, there was no specific commander and the group that came together acted in concert either to defend themselves or to launch an attack.

90. What emerged from the amnesty process was that geographical location played a crucial role. Living in a particular area compelled you to take sides in the conflict. In addition, clan or group loyalty often dictated from whom people received their orders. This meant that ostensible political conflicts were fused with other motives, land disputes and issues of an economic nature. Revenge and reprisal featured strongly in the ongoing conflict.
91. These issues must, however, be viewed against the larger political conflict and violence being sponsored by the former state.
92. In Gauteng, the Tokoza units stayed in close contact with the ANC, and the local branch played a monitoring and disciplinary role. Despite this, these units were also responsible for acts of great violence. In many other townships in Gauteng, links depended largely on whether strong ANC branches existed at a local level. In a number of instances, MK members also played a role in establishing and training SDU members. Vosloorus is an example of this. In most instances, SDUs were established through community structures, often in response to attacks from the IFP.

Role of leadership

93. In their evidence, amnesty applicants in Gauteng stated that, whilst they consulted with leadership on policy and guidelines, they did not inform them of their plans and did not advise them about the nature of their operations. Decision-making took place at community level.
94. Whilst many prominent ANC leaders played a major role in supporting local SDUs, in KwaZulu and Natal they also played a crucial role in peace-building efforts.
95. Evidence emerging from amnesty applications confirms that many SDU members on the ground were cognisant of the fact that the ANC at national level was pursuing a strategy of peace through negotiations. However, at a regional level, the violent conflict between the warring sides reduced the impact of the national strategy. Survival required that you be ready to defend yourself. Testimony from the amnesty hearings reveals that, at a community level, many felt that leadership was not in touch with what was happening on the ground.

96. Another factor that played a major role in the conflict was the fact that ANC-aligned communities could expect little or almost no support from the police or any other state structure. Communities were left to defend themselves against attacks, which often resulted in their taking the law into their own hands.
97. Thus leadership of the SDUs was effectively in the hands of local ANC branches. While ANC policy did not allow for killing other than of a defensive nature, communities in these compelling circumstances tended to take their own decisions. Generally speaking, the ANC national and regional leadership was not involved in these decisions and, indeed, engaged in peace-building efforts in an attempt to restore peace.
98. Furthermore, in the vast majority of instances, no report was made to the national leadership after an attack. In many instances, operatives felt that, because no order or authorisation had been given, there was no necessity to report. The Commission's original finding that there was no adequate command structure is correct and is clearly borne out by the evidence that emerged from the amnesty process. In fact, command was *ad hoc* and dependent on the circumstances of the day in a particular area.

Were the SDUs responsible for the commission of gross human rights violations?

99. The picture that emerges from the amnesty process is that communities found themselves in conflict with the IFP and the state. As they could not rely on protection from the organs of the state, they felt compelled to take the law into their own hands to protect themselves. Evidence reveals that issues of a personal nature – such as loyalty to a particular chief or clan – often became intertwined in the particular conflict. The support that the former state lent to the IFP meant that ANC-aligned communities were at a great disadvantage. They became very vulnerable and an easy target for 'Third Force' activity. Within this context, gross human rights violations were perpetrated.

Nature of violations committed by SDUs

100. The Commission's founding Act determined that killings, abductions, torture, severe ill-treatment and attempts, plots and conspiracies to commit the above constituted gross human rights violations. Amnesty applicants have testified in

their amnesty applications to killings; arson attacks on homes of members of the IFP, police officers and those perceived to be collaborators, and attacks on hostels. In a number of instances, houses were occupied at the time of the attacks. Abduction of suspects was a particular *modus operandi* of the East Rand SDUs. This was followed by interrogation of suspects, and later by summary execution. In this sense, SDUs acted no differently from agencies of the state in using torture as a mechanism to extract confessions from alleged suspects that they were 'IFP members'. In most instances, these confessions were believed and often resulted in the 'suspect' being killed. However, one has to question the validity of an admission made under duress.

101. SDU members were responsible for the targeted killing of those they suspected of being informants, collaborators and members of the IFP. In many instances, identification was made on spurious grounds. Many young members of SDU units were involved in reconnaissance work, the cleaning of weapons and lesser offences such as the collection of money from residents for weapons.
102. In KwaZulu and Natal, members of SDUs targeted many IFP members for assassination. An example of this is the killing of a prominent IFP leader, Mr Mkhize, in Umkomaas in November 1990. Those ANC members suspected of being informers or of having defected to the IFP or the state were also targeted for assassination. Fatal mistakes were made by SDU members, which resulted in the deaths of many who were innocent. In one such incident, a bus containing school children was ambushed in the belief that it was carrying members of the IFP. In this tragic incident, six children were killed and many others were injured. The reason the amnesty applicants advanced for the attack was that the IFP was forcing them to leave the area and that they were being displaced from their homes.
103. Internecine war also took place within the ranks of the SDUs. A number of SDU members were killed in internal clashes. Internal fighting among the ranks of different units as well as with members of the ANC Youth League was a major problem. In Tokoza, an 'eye for an eye' policy was adopted. If an SDU member took the life of a member, his life would be forfeit. A number of amnesty applicants testified about this. The evidence is often chilling, as applicants describe the brutal circumstances under which most of these youth lived. It was often kill or be killed.

104. In one incident involving members of a SDU and members of the ANC Youth League, nine ANC members were killed. Several of the victims were under 17 years of age. In this incident, the victims were first shot and later hacked and stabbed to death.
105. Cognisant of this rising problem, a unit was established in the Cape to deal with the tensions between members of different SDUs. They too became involved in the violence that was taking place.
106. In KwaZulu and Natal, internal disputes between ANC and SACP members led to bitter conflict, so that Mr Harry Gwala was forced to intervene in the matter and broker a peace deal. Mr Blade Nzimande also approached the parties to settle the dispute. Most peace efforts failed and a number of people on both sides of the conflict were killed.
107. A small number of SDUs were involved in armed robberies. Robberies were certainly not considered to be ANC policy, but they took place nevertheless. In one incident in KZN, a number of people were killed and others injured. There is also no doubt that many of the incidents involved the personal agendas of individuals rather than the movement. One such incident involved an attack on the Lembede family at their shop, ostensibly on the grounds that they were IFP members. This family is related to the late Anton Lembede, a former ANC President.
108. Similarly a number of SDUs in Gauteng were involved in armed robberies, ostensibly to obtain funds to purchase weapons.

Conclusion and validity of findings

109. It is clear from the evidence that emerged in the amnesty hearings that the conflict took on a life of its own. Once SDUs were established, attempts by ANC leadership to establish control failed dismally. Youth with little or no proper training made decisions spontaneously, based on the need to deal with unfolding events. Often the attacks that took place were in the nature of reprisal strikes; but many were simply based on revenge or the need to get even. Target selection was often capricious and usually followed by killing. Again, the mere labelling of an opponent as the 'IFP' or an 'informer' legitimated the killing of that particular person. The immature way in which people were identified as belonging to

another group had tragic consequences. Clothes in some instances would be used as an identifying mark, or the speaking of Xhosa instead of Sesotho.

110. The evidence that emerged from the amnesty process confirms the correctness of the original findings that the Commission made in respect of SDUs. The evidence has also revealed much more of the political context within which the conflict took place. The picture that emerges is of structures let loose once they had been established. Had ANC leadership been more pro-active in the control and management of these units, there is no doubt that many of incidents would not have taken place and fewer lives would have been lost. Although the ANC did not train all of the units and was not the major supplier of arms, it was politically responsible for the establishment of these units and should have played a greater role in managing them. This failure led directly to the commission of gross human rights violations by many SDUs. In the circumstances, the findings of the Commission are still valid.

APPENDIX

ANC Statement on Signing Declaration on Behalf of the ANC and Umkhonto we Sizwe. Adhering to the Geneva Conventions of 1949 and Protocol I of 1977. At the Headquarters of International Committee of the Red Cross, Geneva, November 28, 1980

Mr President

Ladies and Gentlemen

The African National Congress of South Africa is deeply honoured to be received today by the International Committee of the Red Cross and by its President, M. Alexandre Hay. Our movement, the oldest national liberation movement in Africa, has had a number of meetings with the delegates of the ICRC in the past and we have come to respect their probity and fairness. The Red Cross has rightly been described as the guarantor of the impartiality and efficacy of the famous Conventions of 1949 whose reaffirmation and development in 1977, largely under the auspices of the ICRC, has led to our presence here in Geneva today.

We recognise that your Committee, associated as it is with the work of the Conventions and the need to provide relief and hope to prisoners of war and civilians caught in the violence of war, must remain non-political if it is to retain the trust of governments. But you will not, I hope, take it amiss if I explain the presence of the delegation of the African National Congress in Geneva today to participate in what is a solemn and historic ceremony for my movement.

Apartheid, the policy of official discrimination enshrined in the law and constitution of South Africa, has now been legally denounced as a crime against humanity and has led to an International Convention for the Suppression and Punishment of the Crime of Apartheid. Protocol I of 1977 itself recognises that 'practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination' constitute grave breaches of the Conventions and must therefore join the list of crimes identified at the Nuremberg War Crimes Tribunal.

The international community has therefore recognised that the war waged by this nefarious system against the vast majority of its population is not merely a matter of domestic concern and that any conflict which arises in South Africa cannot be described as a civil war.

The state of war which exists in South Africa is a war of national liberation, for self-determination on the basis of the Freedom Charter, whose adoption we are celebrating the 25th anniversary this year. It is, as Article 1 of Protocol I of 1977 recognises, an armed conflict in which peoples are fighting against 'colonial domination and alien occupation and against regimes in the exercise of their right to self-determination'.

In the past 12 years, since the Teheran conference on Human Rights, the development of international law under the auspices of the United Nations has led to a recognition that the concept of international armed conflict extends to cover wars of national liberation. The International Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva from 1974 to 1977, gave concrete expression to such a development.

We in the African National Congress of South Africa solemnly undertake to respect the Geneva Conventions and the additional Protocol I in so far as they are applicable to the struggle waged on behalf of the African National Congress by its combatants, Umkhonto we Sizwe.

In consequence, we demand that the South African regime stop treating our combatants as common criminals. The regime has no right to execute them as it did our noble patriot Solomon Mahlangu and as it would have in the case of James Mange if it had not been for the strength of international public opinion. It has no right to impose savage sentences of imprisonment, contrary to the rules and spirit of international law. There is, therefore, a heavy obligation and an imperative duty on States Parties to the Geneva Conventions to ensure that the South African regime observes the basic tenets of civilisation in its treatment of ANC prisoners of war. This is envisaged both in the Geneva Conventions (to which the South African regime is a party) and in Article 1(1) of the 1977 Protocol where States Parties to the Convention undertake 'to respect and to ensure respect for this Protocol in all circumstances'. It is therefore incumbent on South Africa's major trading partners to encourage the South African regime, whether or not the regime ratifies the Protocol, to stop committing war crimes by executing our combatants, torturing them and generally ill-treating them contrary to international law.

We in the African National Congress have taken the serious step of making a solemn Declaration at the headquarters of the ICRC this afternoon because we have for nearly 70 years respected humanitarian principles in the struggle. We have always defined the enemy in terms of a system of domination and not of a people or a race.

In contrast, the South African regime has displayed a shameless and ruthless disregard for all the norms of humanity.

In signing this Declaration, the African National Congress of South Africa solemnly affirms its adherence to the Geneva Conventions and to Protocol I of 1977. As we have done in the past, so shall we continue, consistently and unreservedly, to support, fight for and abide by the principles of international law. We shall do so in the consciousness of justice, of progress and peace. It is therefore a historic duty that I fulfil on behalf of the African National Congress by signing the following declaration:

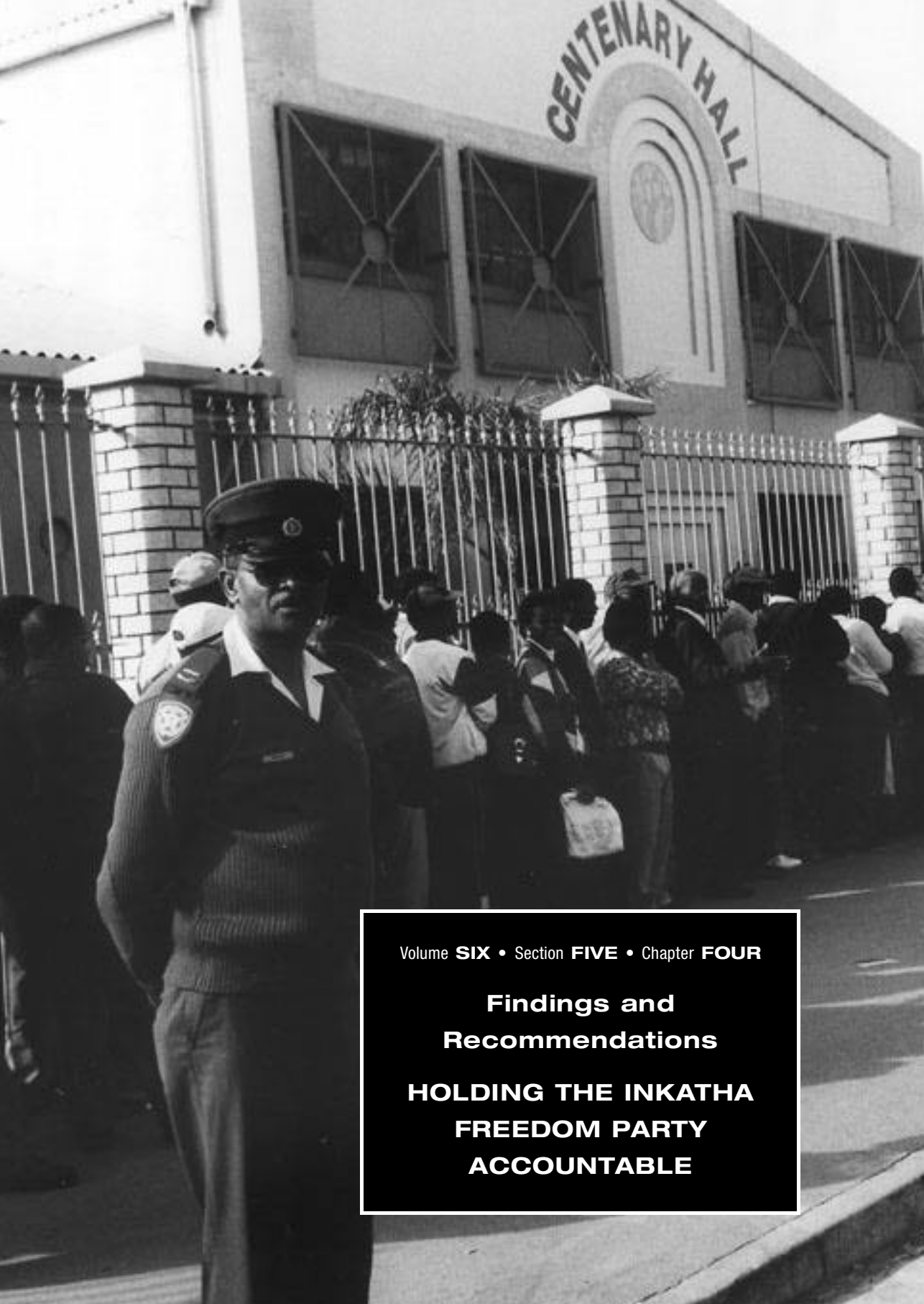
It is the conviction of the African National Congress of South Africa that international rules protecting the dignity of human beings must be upheld at all times. Therefore, and for humanitarian reasons, the African National Congress of South Africa hereby declares that, in the conduct of the struggle against apartheid and racism and for self-determination in South Africa, it intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts.

Wherever practically possible, the African National Congress of South Africa will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of armed conflicts and the 1977 additional Protocol I relating to the protection of victims of international armed conflicts.

O R Tambo
President
ANC of South Africa

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Volume **SIX** • Section **FIVE** • Chapter **FOUR**

**Findings and
Recommendations**

**HOLDING THE INKATHA
FREEDOM PARTY
ACCOUNTABLE**

Holding the Inkatha Freedom Party Accountable

1. In its Final Report, the Truth and Reconciliation Commission (the Commission) made findings against the Inkatha Freedom Party (IFP) and associated structures and institutions. In particular, it found against the IFP that:

The IFP was responsible for the commission of gross violations of human rights in the former Transvaal, Natal and KwaZulu, against persons who were perceived to be leaders, members or supporters of the UDF, the ANC or its alliance partners such violations formed part of a systematic pattern of abuse which entailed deliberate planning on the part of the organisation.

2. The Commission based this finding on, *inter alia*:
 - a speeches by the IFP president and senior party officials that had the effect of inciting supporters of the IFP to commit acts of violence;
 - b the arming of IFP supporters in contravention of existing legislation;
 - c mass attacks by IFP supporters on communities and leaders of the United Democratic Front (UDF) and/or the African National Congress (ANC);
 - d collusion with the South African government's security forces to commit violations; in particular, a pact with the South African Defence Force (SADF) to create a paramilitary force for the organisation with the intention of causing death and injury to UDF/ANC members;
 - e the establishment of a hit squad within the KwaZulu Police and the Special Constable structure of the SAP with the intention of causing death or injury to UDF/ANC supporters;
 - f training large numbers of IFP supporters, under the auspices of the Self-Protection Project, with the objective of preventing the holding of elections in April 1994 by violent means;
 - g conspiring with right-wing organisations and former members of the government's security forces to commit acts that resulted in loss of life or injury, and
 - h creating a climate of impunity by expressly or implicitly condoning gross human rights violations and other unlawful acts committed by members of the IFP.

3. The Commission made further findings against several groups aligned to the IFP:

Caprivi trainees

4. The Commission found that, in 1986, the SADF conspired with Inkatha to provide the latter with a covert, offensive paramilitary unit ('hit squad') to be deployed illegally against persons and organisations perceived to be opposed to or enemies of both the South African government and Inkatha. The SADF provided training, financial and logistical management and behind-the-scenes supervision of the trainees who were trained by the Special Forces unit of the SADF on the Caprivi Strip.
5. The Commission found that this illegal deployment of the Caprivi trainees led to gross violations of human rights, including killing and attempted killing, for which it found former President PW Botha, General Magnus Malan and Dr MG Buthelezi accountable.

KwaZulu Police

6. The Commission found that the KwaZulu Police (KZP), in the period 1986 to 1994, acted in a biased and partial manner and overwhelmingly in furtherance of the interests of Inkatha, and later the IFP, in that:
 - a through acts of commission, it worked openly with Inkatha, and through acts of omission, it failed to protect or serve non-IFP supporters;
 - b it was responsible for large numbers of politically motivated gross human rights violations (killings, attempted killings, incitement and conspiracy to kill, severe ill-treatment, abduction, torture and arson), the victims of which were almost exclusively non-IFP members;
 - c it neglected to observe basic investigative procedures;
 - d it deliberately tampered with evidence;
 - e it ensured that KZP and IFP suspects in political violence matters were concealed, often for lengthy periods, in KZP and SADF camps;
 - f it issued false police certificates and identity documents to members of the IFP who were involved in political violence, in order to prevent their arrest and convictions and to facilitate their continued criminal activities; and

g it took part in killings and purported to investigate the very matters in which its members had been involved as perpetrators.

7. In conclusion, the Commission found that, although there were honourable exceptions in that some members of the KZP did carry out their duties in an unbiased and lawful manner, the KZP generally was characterised by incompetence, brutality and political bias in favour of the IFP, all of which contributed to the widespread commission of gross human rights during the period under review.

Special Constables

8. The Commission found that the Special Constables were deliberately established and trained to assist Inkatha against the latter's political enemies, and that Special Constables, acting alone and in concert with Riot Unit 8 of the SAP, regularly committed serious unlawful acts in order to support and assist Inkatha in the period prior to and during the so-called 'seven-day war'.

Esikhawini hit squad

9. The Commission found that, in 1990, senior members of the IFP conspired with senior members of the KZP to establish a hit squad in Esikhawini Township near Empangeni, Natal, to be deployed illegally against people perceived to be opposed to the IFP. The hit squad consisted of Caprivi trainees and members of the KZP. Its members took instructions from senior members of the IFP and of the KZP to eliminate political activists affiliated to the ANC and the Congress of South African Trade Unions (COSATU), as well as members of the SAP who were seen not to be supportive of the IFP.

Self-protection unit members

10. The Commission found that IFP self-protection unit (SPU) project, although officially placed within the ambit of the Peace Accord and containing an element of self-protection, was also intended to furnish the IFP with the military capacity to prevent by force the central government and the Transitional Executive Council (TEC) from holding elections which did not accommodate the IFP's desires for self-determination. Such armed resistance entailed the risk of unlawful death and injuries to persons.

RESPONSE TO THE COMMISSION'S FINDINGS

11. The IFP criticised the Commission's report and, in the parliamentary debate on the report held on 25 February 1999, Mr MA Mncwango of the IFP said of the Commission that it:

has remained stuck in the mind-set of the total onslaught against the IFP that is the legacy of yesterday's politics. Its final report is a clumsily crafted anecdotal mythology through which it has sought to give credibility to yesterday's liberation propaganda ... The final report of the TRC will be consigned to the dustbin of history .⁶⁷

12. He suggested that the work of the Commission had been negatively affected by its bilateral origins as a political accommodation between the ANC and NP and consequently was 'clueless' in its analysis of 'black-on-black conflict', unlike its work in regard to the white/black conflict.

13. With regard to findings made against Dr MG Buthelezi, he said that the Commission's main source of information came from the 'twisted' confessions of people seeking amnesty who had told the Commission what it wanted to hear. He noted with regard to the Caprivi and Esikhawini hit squad operatives:

This distortion clearly happened in the testimony of discredited witnesses and self-confessed killers such as Daluxolu Mandlanduna Luthuli, Romeo Mbambo and Andries Nosenga, who are changing their versions of the facts of their crimes until they concocted lies to implicate Minister Buthelezi in their activities (interjections). In due course, all these were proved to be lies.

14. In respect of the findings made against Dr Buthelezi as President of the IFP and former leader of the KwaZulu Government, Mncwango said that:

While the TRC found no evidence of wrongdoing, or a specific violation of human rights by Dr Buthelezi, it seeks to hold him accountable for the generic violation of human rights. This is legally obscene and morally repugnant. One is politically accountable when certain actions may be the consequence of the policies adopted by a leader. But Minister Buthelezi never adopted any policy other than non-violent passive resistance and the echoing demand for all-inclusive negotiations, which in the final analysis were exactly what caused the demise of apartheid and led to the birth of the new South Africa.

⁶⁷ Hansard, 25 February 1999, p. 77.

15. Mr Mncwango is not correct in his assertion that ‘the TRC found no evidence of wrongdoing, or a specific violation of human rights by Dr Buthelezi ...’. The Commission did in fact make findings against Dr Buthelezi himself. The Commission found that Dr Buthelezi knew that the Caprivi trainees were to be illegally deployed in an offensive manner against people perceived to be anti-Inkatha and was aware that such armed resistance would entail the risk of unlawful death and injury. He was held accountable for killings and attempted killings. The Commission also found that, with regard to the SPUs and the establishment of the Mlaba Camp in the 1993/4 pre-election period, one of the aims of the training was to furnish Inkatha with the military capacity forcibly to prevent the holding of elections, and that Dr Buthelezi was aware that such armed resistance would entail the risk of unlawful death and injury. The Commission found that the SPU project constituted a conspiracy to commit gross human rights violations, for which, *inter alia*, Dr Buthelezi was held accountable.

16. In coming to its findings on Dr Buthelezi’s involvement in the Caprivi trainee exercise, the Commission had regard to very substantial quantities of former State Security Council memoranda and documents, which recorded the progress of the training project in significant detail. These documents, the authenticity of which was never challenged, established that senior SADF officers (Lt. Colonel van Niekerk and Colonel van den Berg) met with Dr Buthelezi on 31st October 1989. This was after the SADF had withdrawn from the Caprivi project. Van Tonder summarised this meeting in a report to a superior officer (Vice Admiral Putter) as follows:

The Chief Minister expressed his concern over the situation in Mpumalanga and the fact that he was losing the ‘armed struggle’. He referred to the ‘cell’ idea for offensive action, which did not get off the ground.

17. At the same meeting Dr Buthelezi expressed concern that he was:

losing the armed struggle and in that regard emphasized that ‘offensive steps’ were still a necessity; meaning the deployment of ‘hit squads’.

18. Van Tonder was specifically subpoenaed by the Commission to comment on this report, and he confirmed his recollection of the meeting. He records Mr MZ Khumalo as saying that, at the very least, Dr Buthelezi still required ‘cells’ capable of taking out undesirable members.

19. Mr Mncwango went so far as to accuse one of the Commissioners, namely the Revd Dr Khoza Mgojo, as having been 'personally involved in supplying arms used in the seven-day war to the fighting units in Richmond'. According to Mr Mncwango, the late Mr Sifiso Nkabinde said in an affidavit that Dr Mgojo had 'used the Federal Theological Seminary (Fedsem) in Imbali as a stock facility for the weapons and he personally handed out these weapons'. To date, no evidence has been tendered to the Commission or to any other structure to support this claim in any way.

REVIEW PROCEEDINGS BROUGHT BY MINISTER BUTHELEZI AND THE IFP

20. Some two years after the publication of the Interim Report presented to the President on 29 October 1998, Minister Mangosuthu Buthelezi and the IFP sought to review and set aside certain findings made by the Commission. They did so essentially on the basis that the findings in question were defamatory of Dr Buthelezi and the IFP. They also complained of certain procedural irregularities.
21. Originally the applicants sought an order recalling the Report and expunging the findings to which they took offence. Although that relief was abandoned, they sought an order compelling the Commission to publish in its final Report a statement setting out certain 'errata' and requiring the Commission to forward the errata to all parties to whom the Report has been distributed where this was practically possible.
22. Dr Buthelezi and the IFP (the Applicants) complained that some thirty-seven findings contained in the Commission's Report – which implicated them in gross human rights violations, criminality and conspiracy – could not have been based on factual and objective information. The Applicants also contended that the Commission had failed to comply with fair procedures and did not afford them a proper and appropriate opportunity to make representations to it in respect of evidence in its possession and the findings it intended to make. The Applicants complained that the findings unjustifiably infringed their entitlement to a good name and reputation and have impaired their right to dignity and political activity free of unwarranted attack. They complained that the findings in question represented a failure by the Commission, its commissioners and employees to apply their minds to the evidence, as there was no rational connection between the factual evidence and the findings made.

23. The Commission contended that the findings were justifiable and that there had been no procedural unfairness. The Commission also contended that there had been an unreasonable delay in launching the application and that no satisfactory explanation for the delay of two years had been furnished. A delay of this magnitude was especially serious in regard to the nature of the mandate of the Commission and its limited lifespan.
24. It was apparent from the Applicants' founding papers that their primary concern was the finding by the Commission that they were implicated in the establishment of a covert offensive para-military unit (also referred to as a 'hit squad') that was deployed against the political enemies of the Applicants. Indeed this was the only finding which was prominently attacked in their legal papers. The Commission contended that the findings in question were proper and, in the light of the oral and authenticated documentary evidence and information on hand, beyond question.
25. The Commission refused to change these critical findings. It was, however, amenable to negotiation on the adjustment of certain lesser findings in order to facilitate settlement and the issue of its Codicil.
26. The case was settled out of court only a few days before the matter was set down for hearing on 29 January 2003. The Commission agreed to the adjustment of certain lesser findings, such as those relating to the activities of certain gangs and the compilation of statistics derived from victim statements. With regard to these findings the Commission replaced findings against the IFP to read as findings against 'members and/or supporters of the IFP'. The Commission has also adjusted similar findings in relation to the ANC and other role players.
27. The bulk of the complaints advanced by the IFP and Minister Buthelezi were rejected by the Commission. Its findings concerning Minister Buthelezi's accountability in his representative capacity as the President of the IFP, the Chief Minister of KwaZulu and the only serving Minister of Police in the KwaZulu Police also remained undisturbed. The Commission was satisfied that there was overwhelming evidence to support these and other key findings concerning the IFP and Minister Buthelezi.
28. As part of the settlement, the Commission agreed to publish an appendix in which the IFP and Minister Buthelezi explained why they disagreed with the core findings of against them.⁶⁸

⁶⁸ See appendices to this chapter, below.

SCHEDULE OF CHANGES AND CORRECTIONS TO THE TRC REPORT

Pursuant to review proceedings instituted by the IFP and Minister Buthelezi, upon reconsideration of its initial findings and upon receipt of extensive representations made by the IFP and Minister Buthelezi, the following changes and corrections to the TRC report are made. The original text is followed by the adjusted text.

1. Volume 2, Chapter 5, paragraph 248

248 The Commission heard evidence of the involvement of Caprivi trainees in the KwaMakhutha massacre on 21 January 1987 in which thirteen people, mostly women and children, were killed and several others injured in the AK-47 attack on the home of UDF activist Bheki Ntuli. A large number of people including former Minister of Defence General Magnus Malan and MZ Khumalo of the IFP, were tried for murder in 1996 in the Durban Supreme Court. Although the accused were acquitted, the Supreme Court found that Inkatha members trained by the SADF in the Caprivi were responsible for the massacre and that the two state witnesses, being members of the SADF Military Intelligence, were directly involved in planning and execution of the operation. The court was not able to find who had provided backing for the attack.

Paragraph 248 is amended as follows:

The Commission heard evidence of the involvement of Caprivi trainees in the KwaMakhutha massacre on 21 January 1987 in which thirteen people, mostly women and children, were killed and several others injured in the AK-47 attack on the home of UDF activist Bheki Ntuli. A large number of people including former Minister of Defence General Magnus Malan and MZ Khumalo of the IFP, were tried for murder in 1996 in the Durban Supreme Court. Although the accused were acquitted, the Supreme Court found that Inkatha members trained by the SADF in the Caprivi were responsible for the massacre and that the two state witnesses, being members of the SADF's Directorate of Special Tasks, were directly involved in planning and execution of the operation. The court was not able to find who had provided backing for the attack. The Commission is mindful of the fact that senior members of the former SA Defence Force and Inkatha were acquitted in this lengthy trial on charges of murder and conspiracy to murder. In its findings, the Commission explains fully, in Volume 3 (Regional Profile) as well as in volume 5 (Findings Volume), the basis upon which it found, on a balance of probabilities, that the SADF and Inkatha are nonetheless accountable for the human rights violations committed by Caprivi trainees.

2. Volume 1, Chapter 12, paragraph 44 (l) , page 444:

Tembisa (26-28 November 1996).

Commissioners heard stories of state repression in the 1980s in this township and in the neighbouring Ivory Park informal settlement. In the 1990s, the IFP-aligned Toaster gang committed many violations in the context of violence between the ANC and the IFP.

This paragraph is amended as follows:

Tembisa (26-28 November 1996).

Commissioners heard stories of state repression in the 1980s in this township and in the neighbouring Ivory Park informal settlement. In the 1990s, the Toaster gang, comprising members who claimed to be IFP supporters, committed many violations in the context of violence between the ANC and the IFP.

3. The statement in volume 2, chapter 5, para 283, p. 476:

283 As such, hit squad members had access to KwaZulu government resources, such as vehicles, arms and ammunition. A measure of protection from prosecution was made possible through the collusion of the KZP as well as instruments of the state security forces. Further, Inkatha officials conspired with senior KZP officials to set up hit squads to eliminate ANC/SDU elements. The activities of the hit squads operating in the Esikhawini area near Richards Bay, the New Hanover area of the Natal Midlands, and the activities of a hit squad known as the Black Cats in Wesselton and Ermelo in the Transvaal are documented in other sections of the Commission's report.

This paragraph is amended as follows:

283 As such, hit squad members had access to KwaZulu government resources, such as vehicles, arms and ammunition. A measure of protection from prosecution was made possible through the collusion of the KZP as well as instruments of the state security forces. Further, certain Inkatha officials conspired with senior KZP officials to set up hit squads to eliminate ANC/SDU elements. The activities of the hit squads operating in the Esikhawini area near Richards Bay, the New Hanover area of the Natal Midlands, and the activities of a hit squad known as the Black Cats in Wesselton and Ermelo in the Transvaal are documented in other sections of the Commission's report.

4. Volume 2, Chapter 5, paragraph 198, page 454:

198 Inkatha dominated the KwaZulu government (both its executive and its bureaucracy) to the extent that the government and Inkatha became interchangeable concepts. The organization effectively ruled the KwaZulu government as a one-party state and used KwaZulu government resources and finances to fund Inkatha party-political activities and in the execution of gross human rights violations against non-Inkatha supporters. The KZP came into existence in 1981 and was disbanded in 1994 following the April 1984 elections. Chief Buthelezi was the only ever serving Minister of Police in KwaZulu. Violations committed by the KZP are dealt with later in this report.

This paragraph is amended as follows:

198 Inkatha dominated the KwaZulu government (both its executive and its bureaucracy) to the extent that the government and Inkatha became interchangeable concepts. The organisation was the only political party that participated in the KwaZulu Government. The Commission heard evidence and made

findings that in certain instances, KwaZulu Government resources and finances were used to fund party-political activities and in the execution of gross human rights violations against non-Inkatha supporters. The KZP came into existence in 1980 and was disbanded and integrated into the SAPS in 1994 following the April 1994 elections. Chief Buthelezi was the only ever serving Minister of Police in KwaZulu. Violations committed by the KZP are dealt with later in this report. The SA Commissioner of Police retained a measure of control over the KZP.

5. Volume 2, Chapter 5, paragraph 279, page 475:

279 The role of the IFP in the political violence in the early nineties is dealt with under the relevant sections of the Commission's report. In brief, the IFP was found to be the foremost perpetrator of gross human rights violations in KwaZulu and Natal during this period. Approximately 9 000 gross human rights violations were perpetrated by Inkatha in KwaZulu and Natal from 1990 to May 1994. This constituted almost fifty per cent of all violations reported to the Commission's Durban office for this period and over one-third of the total number of gross human rights violations reported for the thirty-four-year period of the Commission's mandate.

This paragraph is amended as follows:

279 The role of the IFP in the political violence in the early 90s is dealt with under the relevant sections of the Commission's report. In brief, the statistical evidence, based on statements made to the Commission by witnesses, indicates that the foremost perpetrators of gross human rights violations (GHRVs) in KwaZulu and Natal for this period, were persons who were named by witnesses as being supporters of, or aligned to, the IFP. Approximately 9000 GHRVs were perpetrated by such persons in KZN and Natal from 1990 – 1994, which constituted 50% of all violations reported to the Commission's Durban office for this period, and over 33% of the total number of GHRVs reported for the 34 year period of the Commission's mandate. However, in the light of the fact that the vast majority of members and supporters of the IFP stayed away from the Commission, the Commission was denied the opportunity of recording the testimonies of the large numbers of IFP members and supporters who were victims of violence at the hands of supporters of the ANC or its affiliates. Accordingly, any statistical data concerning the respective culpability of the IFP and the ANC during these years, must be seen and understood in the light of the above.

6. Volume 2, Chapter 5, paragraph 280, page 475,:

The following passage is inserted at the beginning of para 280:

The Commission held public hearings into the violence in March 1990, that became known as the Seven Day War, but did not have the benefit of the participation of members and supporters of the IFP, who chose not to participate in the hearings. Thereby the Commission did not have the benefit of hearing the IFP's perspective of the nature and causes to this very intense period of violence and its findings are based on submissions received mainly from those involved in the conflict under the ANC banner.

7. Volume 2, Chapter 5, paragraph 282, page 476:

282 The Commission has made a finding that IFP supporters were conscripted into hit squads and that the activities of these hit squads became widespread in KwaZulu and Natal during the 1990s. From information received by the Commission, it would appear that the hit squad operations flowing from the Caprivi training and other political networks were predominantly supportive of the IFP, drawing in officials of the KwaZulu government and KZP as well as senior politicians and leaders of the party.

This paragraph is amended as follows:

282 A small number of IFP supporters and/or members became involved in hit squad activities, in various parts of KZN and Natal during the 1990s. Some of those involved had received training from the SA Defence Force in the Caprivi Strip and the evidence before the Commission indicated that they liaised with senior officials of the KZ Government and Inkatha Freedom Party.

7. Volume 2, Chapter 5, paragraph 285, page 477:

285 Inkatha supporters were also responsible for the commission of gross human rights violations in the province of KwaZulu/Natal in the run-up to the 1994 elections, when the IFP engaged in a campaign to disrupt the electoral process. During this period, Inkatha received arms and ammunition from right-wing organisations as well as sections of the security forces and embarked upon paramilitary training projects in which IFP supporters were trained in weapons handling and paramilitary tactics. This campaign continued until 29 April, just six days before the elections, when the IFP announced that it would contest the elections. The Commission found that approximately 3 000 gross human rights violations were perpetrated by Inkatha in KwaZulu and Natal from July 1993 to May 1994. This constituted more than 55 per cent of all violations reported to the Commission's Durban office for this period.

This paragraph is amended as follows:

285 Inkatha supporters were also responsible for the commission of gross human rights violations in the province of KwaZulu/Natal in the run-up to the 1994 elections which seriously disrupted the process leading up to the elections. During this period, certain senior IFP members received arms and ammunition from right-wing organisations as well as sections of the security forces and embarked upon paramilitary training projects in which IFP supporters were trained in weapons handling and paramilitary tactics. Just six days before the elections, when the IFP announced that it would contest the elections, political violence in the region came to an abrupt end. The Commission found that approximately 3 000 gross human rights violations were perpetrated by alleged Inkatha supports/ and or members in KwaZulu and Natal from July 1993 to May 1994. This constituted more than 55 per cent of all violations reported to the Commission's Durban office for this period. Allowance must be made for the fact that many IFP supporters declared that they would not report violations perpetrated against the IFP and would not participate in the Commission's process.

9. Volume 3, Chapter 3, first paragraph of the finding at paragraph 182 (page 220):

182 The Commission has made a comprehensive finding concerning Operation Marion. It is contained in a lengthy document which includes the full reasons for the finding and which can be found in the State Archives. The main features of the finding are as follows:

This paragraph is amended as follows:

182 The Commission has made a comprehensive finding concerning Operation Marion. It is contained in a lengthy document which includes the full reasons for the finding and which can be found in the State Archives. The Commission is mindful of the fact that senior members of the former SA Defence Force and Inkatha were acquitted in this lengthy trial on charges of murder and conspiracy to murder. In its findings, the Commission explains fully, in this volume as well as in volume 5 (Findings Volume), the basis upon which it found, on a balance of probabilities, that the SADF and Inkatha are nonetheless accountable for the human rights violations committed by Caprivi trainees. The main features of the finding are as follows:

10. Volume 3, Chapter 3, first sub-paragraph at paragraph 292, pages 267-268:

292 The full findings of the Commission on the event which became known as the Seven day War are recorded elsewhere in the Commission's report. In summary, they are as follows:

This paragraph is amended as follows:

292 The Commission held public hearings relating to the Seven-Day War, but did not have the benefit of the participation of members and supporters of the IFP, who chose not to participate in the hearings. The Commission did not have the benefit of hearing the IFP's perspective of the nature and causes of this intense period of violence and its findings are based on submissions received mainly from those involved in the conflict under the ANC banner. The full findings of the Commission on the event which became known as the Seven day War are recorded elsewhere in the Commission's report. In summary, they are as follows:

11. Volume 3, Chapter 3, the second last indented subparagraph of paragraph 294, page 270:

An informal inquest held in 1991 found that 'persons unknown' were responsible for the deaths. A second inquest was held in May 1995. The inquest magistrate, RA Stewart, found that former special constable Welcome Muzi Hlophe (aka 'BigBoy' Hlophe), SAP Lance Sergeant Peter Smith, KwaZulu government driver Abraham Shoba and a fourth unknown man were prima facie directly responsible for the killings. He also found that the original investigating officer, Major Joseph van Zyl, was an accessory to the killings and recommended that an investigation be opened with a view to a possible conviction of Van Zyl. He further found that the then Secretary of the KwaZulu Legislature, Mr. Robert Mzimela, KwaZulu employee Z Mkhize, and then head of the KLA Protection Unit Major Leonard

Langeni had been implicated in a cover-up operation. (Mzimela and Langeni were both involved in the operations of the Esikhawini hit squad – see below)

This paragraph is amended as follows:

An informal inquest held in 1991 found that ‘persons unknown’ were responsible for the deaths. A second inquest was held in May 1995. The inquest magistrate, RA Stewart, found that former special constable Welcome Muzi Hlophe (aka ‘BigBoy’ Hlophe), SAP Lance Sergeant Peter Smith, KwaZulu government driver Abraham Shoba and a fourth unknown man were prima facie directly responsible for the killings. He also found that the original investigating officer, Major Joseph van Zyl, was an accessory to the killings and recommended that an investigation be opened with a view to a possible conviction of Van Zyl. He further recommended an investigation into the roles of senior KwaZulu Government and Police officials who were strongly suspected of being involved in a cover-up operation.

12. Volume 2, Chapter 7, paragraph 186, page 625:

186 Inkatha was found to be the foremost perpetrator of gross human rights violations in KwaZulu and Natal during the 1990s. Approximately 9 000 gross human rights violations were perpetrated by Inkatha in KwaZulu and Natal from 1990 to May 1994. This constituted almost 50 per cent of all violations reported to the Commission’s Durban office for this period.

This paragraph is amended as follows:

186 Statistical evidence, based on statements made to the Commission by witnesses, indicates that the foremost perpetrators of gross human rights violations (GHRVs) in KwaZulu and Natal for this period, were persons who were named by witnesses as being supporters and/ or members of the IFP. Approximately 9000 GHRVs were perpetrated by such persons in KZN and Natal from 1990 – 1994, which constituted 50% of all violations reported to the Commission’s Durban office for this period, and over 33% of the total number of GHRVs reported for the 34 year period of the Commission’s mandate. However, in the light of the fact that the vast majority of members and supporters of the IFP stayed away from the Commission, the Commission was denied the opportunity of recording the testimonies of the large numbers of IFP members and supporters who were victims of violence at the hands of supporters of the ANC or its affiliates. Accordingly, any statistical data concerning the respective culpability of the IFP and the ANC during these years, must be seen and understood in the light of the above.

13. The finding in Volume 2, Chapter 7, paragraph 195, page 626:

THE COMMISSION MADE A COMPREHENSIVE FINDING ON THE SEVEN DAY WAR AND ON THE ACCOUNTABILITY OF THE PRIMARY ROLE-PLAYERS IN A CONFLICT THAT RESULTED IN THE COMMISSION OF MANY HUNDREDS OF GROSS VIOLATIONS OF HUMAN RIGHTS. THE ROLE-PLAYERS INCLUDE: THE RIOT UNIT OF THE SAP, INCLUDING SPECIAL CONSTABLES, AND THE SOUTH AFRICAN DEFENCE FORCE.

14. Volume 2, Chapter 7, paragraph 551, page 709 will be amended by the addition of the following bullet point:

- * The IFP perspective on the root causes, dynamics, political objectives and circumstances of the armed struggle and the so-called black-on-black conflict.

15. Volume 3, Chapter 3, paragraph 106, page 190:

160 By far the majority of reports of severe ill treatment were attributed to Inkatha. The number of acts attributable to Inkatha was double the number attributed to the police and more than three times the number attributed to the ANC. The number of reports of torture in this period rose to five times that of the previous period. The overwhelming majority of these acts were attributed to the SAP. The majority of reports of associated violations that occurred in the province during this period were attributed to the SAP, followed by those attributed to Inkatha. A small number of similar acts were attributed to other parties and organisations, namely, the ANC, the UDF, the KZP and the SADF.

The paragraph is amended as follows:

160 By far the majority of reports of severe ill treatment were attributed to members and/ or supporters of Inkatha. The number of acts attributable to IFP members and/ or supporters was double the number attributed to the police and more than three times the number attributed to members and/ or supporters of the ANC. The fact that the Commission received a greater number of reports implicating Inkatha must be considered within the context of most IFP members having elected not to participate in the Commission's process, and the IFP itself having distanced itself from the Commission's work after its initial submission. The number of reports of torture in this period rose to five times that of the previous period. The overwhelming majority of these acts were attributed to the SAP. The majority of reports of associated violations that occurred in the province during this period were attributed to the SAP, followed by those attributed to members and/ or supporters of Inkatha. A small number of similar acts were attributed to other parties and organisations, namely, the ANC, the UDF, the KZP and the SADF.

16. Volume 2, Chapter 7, the finding at paragraph 251, page 640:

THE COMMISSION FINDS THAT, ALTHOUGH THE SPU PROJECT WAS OFFICIALLY PLACED WITHIN THE AMBIT OF THE PEACE ACCORD AND THAT SELF-PROTECTION FORMED AN ELEMENT THEREOF, INHERENT IN THE PROJECT WAS ALSO AN INTENTION TO FURNISH INKATHA WITH THE MILITARY CAPACITY TO PREVENT BY FORCE THE HOLDING OF ELECTIONS WHICH DID NOT ACCOMMODATE INKATHA'S DESIRES FOR SELF-DETERMINATION. SUCH ARMED RESISTANCE WOULD ENTAIL THE RISK OF UNLAWFUL DEATH AND INJURY TO PERSONS AND, AS SUCH, CONSTITUTES A CONSPIRACY TO COMMIT MURDER.

The Commission will delete the last sentence of the bolded statement and substitute the statement with the following statement:

THE COMMISSION FINDS THAT, ALTHOUGH THE SPU PROJECT WAS OFFICIALLY PLACED WITHIN THE AMBIT OF THE PEACE ACCORD AND THAT SELF-PROTECTION FORMED AN ELEMENT THEREOF, INHERENT IN THE PROJECT WAS ALSO AN INTENTION TO FURNISH INKATHA WITH THE MILITARY CAPACITY TO

DISRUPT THE HOLDING OF ELECTIONS WHICH DID NOT ACCOMMODATE INKATHA'S DESIRES FOR SELF-DETERMINATION. THIS VERACITY OF THIS CONCLUSION HAS BEEN DISPUTED BY THE IFP.

16. Volume 2, Chapter 7, paragraph 253, page 641:

253 An informal alliance between the right wing and the IFP emerged after the formation of COSAG in 1993. The alliance played itself out in weapons smuggling an paramilitary training, primarily on white farms and KwaZulu nature reserves. There were also a few cases where IFP and right-wing members took part in joint attacks.

Paragraph 253 is substituted by the following paragraph:

253 An informal alliance between the right wing and the IFP emerged after the formation of COSAG in 1993. The alliance played itself out in weapons smuggling and paramilitary training, primarily on white farms and KwaZulu nature reserves. There were also a few isolated cases where certain IFP and right-wing members took part in joint attacks.

18. Volume 3, Chapter 3, last 3 sub-paragraphs of paragraph 208, page 239:

A formal inquest (Howick Inquest 13/88) into the killing of the three MAWU members found nine known Inkatha members responsible for the killings. Despite the inquest finding, no one has been charged for these killings to date. One of those named was Mr Vela Mchunu, a 'Caprivi trainee'. In order to prevent Mchunu from testifying at the inquest, KZP Captain Leonard Langeni and Chief Minister Buthelezi's personal assistant, Mr MZ Khumalo, arranged for him to be hidden at the Mkhuze camp. IN 1987, Sarmcol signed a recognition agreement with UWUSA, the Inkatha-aligned trade union, set up in opposition to COSATU.

In March 1998to the factory floor.

THE COMMISSION FINDS THE KILLING OF PROMINENT TRADE UNIONISTS IN MPHOPHOMENI TOWNSHIP BY MEMBERS OF INKATHA AND THE KZP SET IN MOTION A LENGTHLY PERIOD OF POLITICAL CONFLICT RESULTING IN WIDESPREAD GROSS HUMAN RIGHTS VIOLATIONS FOR WHICH INKATHA AND THE KZP ARE HELD ACCOUNTABLE.

This paragraph is amended as follows:

A formal inquest (Howick Inquest 13/88) into the killing of the three MAWU members found nine known Inkatha members responsible for the killings. Despite the inquest finding, no one has been charged for these killings to date. One of those named was Mr Vela Mchunu, a 'Caprivi trainee'. In an apparent attempt to prevent Mchunu from testifying at the inquest, KZP Captain Leonard Langeni and Mr MZ Khumalo, a senior Inkatha official, arranged for him to be hidden at the Mkhuze camp. In 1987, Sarmcol signed a recognition agreement with UWUSA, the Inkatha-aligned trade union, set up in opposition to COSATU.

In March 1998to the factory floor.

THE COMMISSION FINDS THE KILLING OF PROMINENT TRADE UNIONISTS IN MPHOPHOMENI TOWNSHIP BY MEMBERS OF INKATHA AND THE KZP SET IN MOTION A LENGTHLY PERIOD OF POLITICAL CONFLICT RESULTING IN WIDE-SPREAD GROSS HUMAN RIGHTS VIOLATIONS FOR WHICH ELEMENTS OF INKATHA AND THE KZP ARE HELD ACCOUNTABLE.

19. Volume 3, Chapter 3, paragraph 259, pages 256 – 7

The Commission has made a comprehensive finding regarding the KZP, in which it is described, inter alia, as a highly politicised force, openly assisting the IFP – by omission and by active participation -in the commission of gross human rights violations, as well as being grossly incompetent.

This paragraph is amended by the insertion of the first sentence below:

In investigating the activity of the KZP, which was disbanded and integrated into the SAPS in 1994, the Commission did not have the benefit of eliciting the view-point of and evidence from the KZP, as most of its senior members did not volunteer evidence to the Commission. The Commission has made a comprehensive finding regarding the KZP, in which it is described, inter alia, as a highly politicised force, openly assisting the IFP – by omission and by active participation - in the commission of gross human rights violations, as well as being grossly incompetent.

20. Volume 3, Chapter 3, first two sub-paragraphs of the finding at paragraph 390, pages 306 –7:

THE COMMISSION FINDS THAT, DURING THE PERIOD 1993 – 1994, THE SELF-PROTECTION UNIT PROJECT (SPU),ALTHOUGH OFFICIALLY PLACED WITHIN THE AMBIT OF THE PEACE ACCORD AND CONTAINING AN ELEMENT OF SELF PROTECTION, WAS ALSO INTENDED TO FURNISH THE INKATHA FREEDOM PARTY WITH THE MILITARY CAPACITY TO, BY FORCE, PREVENT THE CENTRAL GOVERNMENT AND THE TRANSITIONAL EXECUTIVE COUNCIL FROM HOLDING ELECTIONS WHICH DID NOT ACCOMMODATE THE IFP'S DESIRES FOR SELF-DETERMINATION.

IT WAS ADMITTED AT THE TIME BY THE PERSONS NAMED BELOW THAT SUCH ARMED RESISTANCE WOULD ENTAIL THE RISK OF UNLAWFUL DEATH AND INJURY TO PERSONS.

The second bolded paragraph starting with the words “It was admitted” and ending with the words “injury to persons” will be deleted. The first bolded paragraph will be amended as follows:

THE COMMISSION FINDS THAT, DURING THE PERIOD 1993 – 1994, THE SELF-PROTECTION UNIT PROJECT (SPU), ALTHOUGH OFFICIALLY PLACED WITHIN THE AMBIT OF THE PEACE ACCORD AND CONTAINING AN ELEMENT OF SELF PROTECTION, WAS ALSO INTENDED BY SENIOR INKATHA MEMBERS TO FURNISH THE INKATHA FREEDOM PARTY WITH A PARAMILITARY CAPACITY TO, BY FORCE, DISRUPT THE CENTRAL GOVERNMENT AND THE TRANSITIONAL EXECUTIVE COUNCIL FROM HOLDING ELECTIONS WHICH DID NOT ACCOMMODATE THE IFP'S DESIRES FOR SELF-DETERMINATION.

21. Volume 3, Chapter 3, paragraph 296, page 270:

296 In 1991, as a result of these concerns, Daluxolo Luthuli summoned Gcina Brian Mkhize [AM4599/97] to a meeting in Ulundi. Mkhize was a 'Caprivi trianee' who had joined the KZP and was posted to the Esikhawini Riot Unit in 1990. The meeting was held at KZP Captain Leonard Langeni's office in Ulundi early in 1991. At the time, Langeni was the officer commanding the then KLA Protection Unit. Others present at the meeting were Luthuli, Prince Gideon Zulu (then KwaZulu Minister of Pensions), Mr M R Mzimela (then Secretary of the KwaZulu Legislature), and Mr MZ Khumalo (then personal assistant to Chief Buthelezi).

This paragraph is amended as follows:

296 According to Daluxolo Luthuli and Gcina Brian Mkhize [AM4599/97] in 1991, as a result of these concerns, Luthuli summoned Mkhize to a meeting in Ulundi. Mkhize was a 'Caprivi trianee' who had joined the KZP and was posted to the Esikhawini Riot Unit in 1990. The meeting was held at KZP Captain Leonard Langeni's office in Ulundi early in 1991. At the time, Langeni was the officer commanding the then KLA Protection Unit. Others present at the meeting were Luthuli, Prince Gideon Zulu (then KwaZulu Minister of Pensions), Mr M R Mzimela (then Secretary of the KwaZulu Legislature), and Mr MZ Khumalo, a senior Inkatha official.

22 Volume 3, Chapter 3, second bolded sub-paragraph at paragraph 308, pages 276 –9:

INKATHA LEADERS APPROACHED THE INKATHA CENTRAL AUTHORITY IN ULUNDI BECAUSE THEY WERE CONCERNED THAT THEY WERE IN THE PROCESS OF LOSING THE STRUGGLE.

This sub-paragraph is amended as follows:

LOCAL INKATHA LEADERS IN ESIKAWENI APPROACHED CERTAIN SENIOR INKATHA OFFICIALS IN ULUNDI BECAUSE THEY WERE CONCERNED THAT THEY WERE IN THE PROCESS OF LOSING THE STRUGGLE.

The following sub-paragraph is inserted as the final bolded sub-paragraph of the bulleted findings relating to the hit squads on page 278:

THE COMMISSION NOTES THAT THE IFP DISPUTES THE VERSIONS OF DALOXOLO LUTHULI, GCINA BRIAN MKHIZE AND OTHERS. THE COMMISSION NOTES FURTHER THAT THOSE IFP MEMBERS IMPLICATED DID NOT MAKE THEMSELVES AVAILABLE TO THE COMMISSION TO REBUT THE EVIDENCE.

23. Volume 3, Chapter 3, finding at paragraph 318, page 286:

THE COMMISSION FINDS THAT THE KILLING OF SIXTEEN PEOPLE ON 8 NOVEMBER 1990 WAS CAUSED BY UNKNOWN SUPPORTERS OF THE IFP FROM THE BRUNTVILLE HOSTEL, CONSTITUTING GROSS VIOLATIONS OF HUMAN RIGHTS, FOR WHICH UNKNOWN INKATHA-SUPPORTING HOSTEL-DWELLERS ARE HELD ACCOUNTABLE.

This paragraph is amended by an insertion of an additional sentence and will read as follows:

THE COMMISSION FINDS THAT THE KILLING OF SIXTEEN PEOPLE ON 8 NOVEMBER 1990 WAS CAUSED BY UNKNOWN SUPPORTERS OF THE IFP FROM THE BRUNTVILLE HOSTEL, CONSTITUTING GROSS VIOLATIONS OF HUMAN RIGHTS, FOR WHICH UNKNOWN INKATHA-SUPPORTING HOSTEL- DWELLERS ARE HELD ACCOUNTABLE. THE COMMISSION NOTES THAT SINCE THE IFP DECLINED TO PARTICIPATE IN HEARING THAT THERE MAY BE OTHER PERSPECTIVES WHICH IT DID NOT HAVE THE BENEFIT OF RECEIVING AND ANALYSING.

24. The statement in Volume 5, Chapter 6, finding at the 5th sub-paragraph of paragraph 109, page 229:

IN KWAZULU SPECIFICALLY, THE HOMELAND GOVERNMENT AND POLICE FORCE (KZP) WERE RESPONSIBLE FOR:

The 5th sub-paragraph is amended as follows:

IN KWAZULU SPECIFICALLY, ELEMENTS OF THE HOMELAND GOVERNMENT AND POLICE (KZP) WERE RESPONSIBLE FOR:

25. Volume 5, Chapter 6, sub-paragraphs e, l and j of paragraph 116, pages 231 – 2:

- e the establishment in early 1986 of a covert, offensive paramilitary unit trained, armed and paid by Military Intelligence, and their deployment throughout KwaZulu until September 1990, during which the ‘Caprivi trainees’ killed large numbers of people and permanently altered the political landscape in the areas in which they were deployed (see separate find below);
- i the deployment of a joint KZP-IFP hit squad in Esikhawini township in 1990, and the resultant killing of over 100 people (see separate finding below);
- j the deployment of the IFP-based ‘Black Cats’ hit squad in Wesselton and Ermelo in 1990, and the resultant killing of large numbers of people;

Subparagraphs (e), (i) and (j) are amended as follows:

- e the establishment in early 1986 of a covert, offensive paramilitary unit trained, armed and paid by Military Intelligence, and their deployment throughout KwaZulu until September 1990, during which the several ‘Caprivi trainees’ killed large numbers of people and permanently altered the political landscape in the areas in which they were deployed (see separate find below);
- l the deployment of a hit squad in Esikhawini township comprising elements of the KZP and certain Inkatha supporters in 1990, which resulted in the killing of over 100 people (see separate finding below);
- j the deployment of the ‘Black Cats’ hit squad in Wesselton and Ermelo comprising Inkatha supporters in 1990, and the resultant killing of large numbers of people;

26. Volume 5, Chapter 6, paragraph 117 – 119, page 232:

- 117 The above mentioned incidents represent iconic events over the past twelve years in which IFP office-bearers, members and supporters were involved in acts of serious political violence. They do not purport to be a complete list of such incidents. However, the most devastating indictment of the role of the IFP in political violence during the Commission's mandate period is to be found in the statistics compiled by the Commission directly from submissions by victims of gross human rights violations. These established the IFP as the foremost perpetrator of gross human rights violations in KwaZulu and Natal during the 1990-94 period. Indeed, IFP violations constituted almost 50 per cent of all violations reported to the Commission's Durban office for this period, and over one-third of the total number of gross human rights violations committed during the thirty-four-year period of the Commission's mandate. The statistics also indicate that IFP members, supporters and office-bearers in KwaZulu and Natal were responsible for more than 55 per cent of all violations reported to the Commission's Durban office for the period between July 1993 and May 1994.
- 118 Other statistics derived from the Commission's database show that Inkatha/the IFP was responsible, in the mandate period, for some 3 800 killings in the Natal and KwaZulu area compared with approximately 1 100 attributed to the ANC and some 700 to the SAP. The IFP remains the major perpetrator of killings on a national scale, being allegedly responsible for over 4 500 killings compared to 2 700 attributed to the SAP and 1 300 to the ANC. These statistics suggest that the IFP was responsible for approximately 3.5 killings for on killing attributed to the ANC. A graph included in the Natal regional profile (Volume Three) illustrates that in 1987-88 the IFP exceeded even the SAP in terms of numbers of people killed by a single perpetrator organisation.
- 119 It must be noted here that, for much of the period in which the Commission was able to accept human rights violations statements, the IFP discouraged its members and supporters from making submissions to the Commission. The result is that only about 10 per cent of all statements taken in KwaZulu-Natal came from people linked to the IFP. The significant point is that the statistics derived from the Commission's database do not diverge from those published by other national and international bodies. All of these are consistent in identifying the IFP as the primary non-state perpetrator of gross human rights abuse in South Africa from the latter 1980s through to 1994.

The last sentence in paragraph 118 has been deleted and the paragraphs are amended as follows:

- 117 The above incidents represent iconic events over the past twelve years in which IFP office-bearers, members and supporters were involved in acts of serious political violence. They do not purport to be a complete list of such incidents. However, the most devastating indictment of the role of members and/ or supporters of the IFP in political violence during the Commission's mandate period is to be found in the statistics compiled by the Commission directly from submissions by victims of gross human rights violations. These established that members and/ or supporters of the IFP were the foremost perpetrator of gross human rights violations in KwaZulu and Natal during the 1990-94 period. Indeed, such violations constituted almost 50 per cent of all violations reported to the Commission's Durban office for this period, and over one-third of the total number of gross human rights violations committed during the thirty-four-year period of the Commission's mandate. The statistics also indicate that IFP members, supporters and office-bearers in KwaZulu and Natal were responsible for more than 55 per cent of all violations reported to the Commission's Durban office for the period between July 1993 and May 1994.

- 118 Other statistics derived from the Commission's database show that members and/ or supporters of the IFP were responsible, in the mandate period, for some 3 800 killings in the Natal and KwaZulu area compared with approximately 1 100 attributed to the members and/ or supporters of the ANC and some 700 to the SAP. Members and/ or supporters of the IFP remains the major perpetrator of killings on a national scale, being allegedly responsible for over 4 500 killings compared to 2 700 attributed to the SAP and 1 300 to members and/ or supporters of the ANC. These statistics suggest that members and/ or supporters of the IFP was responsible for approximately 3.5 killings for on killing attributed to the members and/ or supporters of the ANC.
- 119 It must be noted here that, for much of the period in which the Commission was able to accept human rights violations statements, the IFP discouraged its members and supporters from making submissions to the Commission. The result is that only about 10 per cent of all statements taken in KwaZulu-Natal came from people linked to the IFP. The significant point is that the statistics derived from the Commission's database do not diverge from those published by other national and international bodies. All of these are consistent in identifying members and/ or supporters of the IFP as the primary non-state perpetrator of gross human rights abuse in South Africa from the latter 1980s through to 1994. The Commission notes that a complete picture of the IFP-ANC conflict could not be formed due to the failure of by many IFP members and supporters to participate in the Commission and the absence of many countervailing complaints of violations against the IFP.

27. Volume 5, Chapter 6, first paragraph 121 pages 233 – 6:

- 121 The formal finding of the Commission in regard to the IFP is set out below:

DURING THE PERIOD 1982-94, THE INKATHA FREEDOM PARTY, KNOWN AS INKATHA PRIOR TO JULY 1990 (HEREINAFTER REFERRED TO AS "THE ORGANISATION") WAS RESPONSIBLE FOR GROSS VIOLATIONS OF HUMAN RIGHTS COMMITTED IN THE FORMER TRANSSVAAL, NATAL AND KWAZULU AGAINST

- PERSONS WHO WERE PERCEIVED TO BE LEADERS, MEMBERS OR SUPPORTERS OF THE UDF, ANC, SOUTH AFRICAN COMMUNIST PARTY (SACP) AND COSATU;
- PERSONS WHO WERE IDENTIFIED AS POSING A THREAT TO THE ORGANISATION;
- MEMBERS OR SUPPORTERS OF THE ORGANISATION WHOSE LOYALTY WAS DOUBTED.
- IT IS A FURTHER FINDING OF THE COMMISSION THAT SUCH VIOLATIONS FORMED PART OF A SYSTEMATIC PATTERN OF ABUSE WHICH ENTAILED DELIBERATE PLANNING ON THE PART OF THE ORGANISATION.
- THE COMMISSION BASED THIS FINDING ON THE FOLLOWING ACTIONS OF THE IFP:
- SPEECHES BY THE IFP PRESIDENT, SENIOR PARTY OFFICIALS AND PERSONS ALIGNED TO THE ORGANISATION'S IDEALOGY, WHICH HAD THE EFFECT OF INCITING SUPPORTERS OF THE ORGANISATION TO COMMIT ACTS OF VIOLENCE;

- ARMING THE ORGANISATIONS'S SUPPORTERS WITH WEAPONS IN CONTRAVENTION OF THE ARMS AND AMMUNITION, AND EXPLOSIVES AND DANGEROUS WEAPONS ACTS;
- MASS ATTACKS BY SUPPORTERS OF THE ORGANISATION ON COMMUNITIES INHABITED BY PERSONS REFERRED TO ABOVE, RESULTING IN DEATH AND INJURY AND THE DESTRUCTION AND THEFT OF PROPERTY;
- KILLING OF LEADERS OF THE POLITICAL ORGANISATIONS AND PERSONS REFERRED TO ABOVE;
- COLLUSION WITH THE SOUTH AFRICAN GOVERNMENT'S SECURITY FORCES TO COMMIT THE VIOLATIONS REFERRED TO ABOVE;
- ENTERING INTO A PACT WITH THE SADF TO CREATE A PARAMILITARY FORCE FOR THE ORGANISATION, WHICH WAS INTENDED TO AND DID CAUSE DEATH AND INJURY TO THE PERSONS REFERRED TO ABOVE;
- ESTABLISHING HIT SQUADS WITHIN THE KZP AND THE SPECIAL CONSTABLES STRUCTURE OF THE SAP TO KILL OR CAUSE INJURY TO THE PERSONS REFERRED TO ABOVE;
- UNDER THE AUSPICES OF THE SELF-PROTECTION UNIT PROJECT, TRAINING LARGE NUMBERS OF THE ORGANISATIONS'S SUPPORTERS WITH THE SPECIFIC OBJECTIVE OF PREVENTING, BYMEANS OF VIOLENCE, THE HOLDING OF ELECTIONS IN KWAZULU-NATAL IN APRIL 1994, UNDER A CONSTITUTION WHICH DID NOT RECOGNISE THE ORGANISATIONS'S DEMANDS FOR SOVEREIGNTY. IN ORDER TO ACHIEVE THIS OBJECTIVE, THE KWAZULU GOVERNMENT AND ITS KWAZULU POLICE STRUCTURES WERE SUBVERTED;
- CONSPIRING WITH RIGHT-WING ORGANISATIONS AND FORMER MEMBERS OF THE SOUTH AFRICAN GOVERNMENT'S SECURITY FORCES TO COMMIT ACTS WHICH RESULTED IN LOSS OF LIFE OR INJURY IN ORDER TO ACHIEVE THE OBJECTIVE REFERRED TO ABOVE;
- CREATING A CLIMATE OF IMPUNITY BY EXPRESSLY OR IMPLICITLY CONDONING GROSS HUMAN RIGHTS VIOLATIONS AND OTHER UNLAWFUL ACTS COMMITTED BY MEMBERS OR SUPPORTERS OF THE ORGANISATION.
- CHIEF MG BUTHELEZI SERVED SIMULTANEOUSLY AS PRESIDENT OF THE IFP AND AS THE CHIEF MINISTER OF THE KWAZULU GOVERNMENT AND WAS THE ONLY SERVING MINISTER OF POLICE IN THE KWAZULU GOVERNMENT DURING THE ENTIRE THIRTEEN-YEAR EXISTENCE OF THE KWAZULU POLICE. WHERE THESE THREE AGENCIES ARE FOUND TO HAVE BEEN RESPONSIBLE FOR THE COMMISSION OF GROSS HUMAN RIGHTS, CHIEF MANGOSUTHU BUTHELEZI IS HELD BY THIS COMMISSION TO BE ACCOUNTABLE IN HIS REPRESENTATIVE CAPACITY AS THE LEADER, HEAD OR RESPONSIBLE MINISTER OF THE PARTIES CONCERNED.

This paragraph is amended as follows:

121 The formal finding of the Commission on the actions by members, supporters or officials of the organisation, is set out below:

DURING THE PERIOD 1982-94 MEMBERS, SUPPORTERS AND/ OR OFFICIALS OF THE INKATHA FREEDOM PARTY, KNOWN AS INKATHA PRIOR TO JULY 1990 (HEREINAFTER REFERRED TO AS "THE ORGANISATION") WERE RESPONSIBLE FOR GROSS VIOLATIONS OF HUMAN RIGHTS COMMITTED IN THE FORMER TRANSVAAL, NATAL AND KWAZULU AGAINST:

- PERSONS WHO WERE PERCEIVED TO BE LEADERS, MEMBERS OR SUPPORTERS OF THE UDF, ANC, SOUTH AFRICAN COMMUNIST PARTY (SACP) AND COSATU;
- PERSONS WHO WERE IDENTIFIED AS POSING A THREAT TO THE ORGANISATION;
- MEMBERS OR SUPPORTERS OF THE ORGANISATION WHOSE LOYALTY WAS DOUBTED.
- IT IS A FURTHER FINDING OF THE COMMISSION THAT SUCH VIOLATIONS FORMED PART OF A SYSTEMATIC PATTERN OF ABUSE WHICH ENTAILED DELIBERATE PLANNING ON THE PART OF THE MEMBERS, SUPPORTERS OR OFFICIALS OF THE ORGANISATION.

THE COMMISSION BASED THIS FINDING ON THE FOLLOWING ACTIONS OF THE IFP:

- SPEECHES BY SENIOR PARTY OFFICIALS AND PERSONS ALIGNED TO THE ORGANISATION'S IDEALOGY, WHICH HAD THE EFFECT OF INCITING SUPPORTERS OF THE ORGANISATION TO COMMIT ACTS OF VIOLENCE;
- ARMING THE ORGANISATIONS'S SUPPORTERS WITH WEAPONS IN CONTRAVENTION OF THE ARMS AND AMMUNITION, AND EXPLOSIVES AND DANGEROUS WEAPONS ACTS;
- MASS ATTACKS BY SUPPORTERS OF THE ORGANISATION ON COMMUNITIES INHABITED BY PERSONS REFERRED TO ABOVE, RESULTING IN DEATH AND INJURY AND THE DESTRUCTION AND THEFT OF PROPERTY;
- KILLING OF LEADERS OF THE POLITICAL ORGANISATIONS AND PERSONS REFERRED TO ABOVE;
- OCCASIONAL COLLUSION WITH THE SOUTH AFRICAN GOVERNMENT'S SECURITY FORCES TO COMMIT THE VIOLATIONS REFERRED TO ABOVE;
- ENTERING INTO A PACT WITH THE SADF TO CREATE A PARAMILITARY FORCE FOR THE ORGANISATION, WHICH WAS INTENDED TO AND DID CAUSE DEATH AND INJURY TO THE PERSONS REFERRED TO ABOVE;
- ESTABLISHING HIT SQUADS WITHIN THE KZP AND THE SPECIAL

CONSTABLES STRUCTURE OF THE SAP TO KILL OR CAUSE INJURY TO THE PERSONS REFERRED TO ABOVE;

- UNDER THE AUSPICES OF THE SELF-PROTECTION UNIT PROJECT, TRAINING LARGE NUMBERS OF THE ORGANISATIONS'S SUPPORTERS WITH THE SPECIFIC OBJECTIVE OF PREVENTING, BY MEANS OF VIOLENCE, THE HOLDING OF ELECTIONS IN KWAZULU-NATAL IN APRIL 1994, UNDER A CONSTITUTION WHICH DID NOT RECOGNISE THE ORGANISATIONS'S DEMANDS FOR SOVEREIGNTY. IN ORDER TO ACHIEVE THIS OBJECTIVE, THE KWAZULU GOVERNMENT AND ITS KWAZULU POLICE STRUCTURES WERE SUBVERTED;
- CONSPIRING WITH RIGHT-WING ORGANISATIONS AND FORMER MEMBERS OF THE SOUTH AFRICAN GOVERNMENT'S SECURITY FORCES TO COMMIT ACTS WHICH RESULTED IN LOSS OF LIFE OR INJURY IN ORDER TO ACHIEVE THE OBJECTIVE REFERRED TO ABOVE;
- CREATING A CLIMATE OF IMPUNITY BY EXPRESSLY OR IMPLICITLY CONDONING GROSS HUMAN RIGHTS VIOLATIONS AND OTHER UNLAWFUL ACTS COMMITTED BY MEMBERS OR SUPPORTERS OF THE ORGANISATION.

CHIEF MG BUTHELEZI SERVED SIMULTANEOUSLY AS PRESIDENT OF THE IFP AND AS THE CHIEF MINISTER OF THE KWAZULU GOVERNMENT AND WAS THE ONLY SERVING MINISTER OF POLICE IN THE KWAZULU GOVERNMENT DURING THE ENTIRE THIRTEEN-YEAR EXISTENCE OF THE KWAZULU POLICE. WHERE THESE THREE AGENCIES ARE FOUND TO HAVE BEEN RESPONSIBLE FOR THE COMMISSION OF GROSS HUMAN RIGHTS, CHIEF MANGOSUTHU BUTHELEZI IS HELD BY THIS COMMISSION TO BE ACCOUNTABLE IN HIS REPRESENTATIVE CAPACITY AS THE LEADER, HEAD OR RESPONSIBLE MINISTER OF THE PARTIES CONCERNED.

28. Volume 5, Chapter 6, paragraph 122, page 234;

- 122 The Commission also made comprehensive findings with regard to a number of key incidents involving members of the IFP in KwaZulu-Natal, all of which are dealt with in more detail in the Natal regional study in Volume Three of this report. The commission has also made a finding on the KZP, which has been dealt with in the chapter on Homelands in Volume Two.

This paragraph is amended as follows:

- 122 The Commission also made comprehensive findings with regard to a number of key incidents involving members and/ or officials of the IFP in KwaZulu-Natal, all of which are dealt with in more detail in the Natal regional study in Volume Three of this report. The commission has also made a finding on the KZP, which has been dealt with in the chapter on Homelands in Volume Two.

APPENDIX 2

In its interim report the TRC made a number of adverse findings concerning the IFP and its President, Minister Mangosuthu Buthelezi. Both the IFP and Minister Buthelezi have taken issue with these findings. To that end, they instituted legal proceedings with a view to reviewing and setting aside those findings and requiring the TRC to publish appropriate corrections in its final report. The TRC accepts the validity of certain of these criticisms and has accordingly made appropriate corrections in its final report. In order to settle the dispute in respect of the remaining complaints and to enable the TRC to complete its mandate, the parties have agreed that the TRC will publish this appendix to the final report reflecting the viewpoint of the IFP and Minister Buthelezi concerning those findings with which they disagree.

APPENDIX TO THE FINAL TRC REPORT REFLECTING THE VIEWS OF THE INKATHA FREEDOM PARTY AND MINISTER BUTHELEZI CONCERNING THE FINDINGS MADE IN THE INTERIM TRC REPORT

In the review proceedings the IFP and Prince Buthelezi challenged some 37 findings made by the TRC in its interim report. In relation to some of the findings the TRC has made appropriate corrections in its final report. In respect of other findings which are in issue the views of the IFP and Prince Buthelezi are reflected below.

The findings of the TRC in question are, contrary to the statutory obligation imposed on it by section 4(e) of the Promotion of National Unity and Reconciliation Act 34 of 1995 ('the Act'), not based on factual and objective information and evidence received by the TRC. There is no rational connection between the evidence and material before the TRC and the conclusions reached by it in this regard.

The IFP and Prince Buthelezi wish to record in this regard that:

- The findings implicating the IFP and Prince Buthelezi in gross human rights violations, criminality and conspiracy are without any factual basis.
- The IFP and prince Buthelezi at no stage endorsed policies based on violence, criminal conduct or an armed struggle and they only advocated non-violence, passive resistance and self-defence where legally justified.
- The IFP and Prince Buthelezi have serious reservations regarding the

establishment and functioning of the TRC and its ability to make objective and factually correct findings. The TRC was the product of a mutual political accommodation reached between the ANC and the NP to the exclusion of the other participants in the conflicts of the past. The TRC was thus inclined to approach its mandate by focusing on black-on-white and white-on-black conflicts. It was ill-equipped to deal with black-on-black conflict and explore the genesis, dynamics, purposes and strategies of this conflict. The TRC process was conducted at a time very close to the animosity and tensions of the conflicts of the past and without the benefit of a historical perspective. In this context evidence was taken without any effective means of independent or adversarial verification.

- Notwithstanding the reservations which the IFP and Prince Buthelezi had regarding the TRC, they made written and oral representations to the TRC at the appropriate stages. The TRC has not taken account of these representations in arriving at its findings.
- In many instances the TRC's findings are based on unreliable, uncorroborated or hearsay evidence provided by persons who acknowledged that their conduct constituted an offence or delict. These persons sought amnesty in respect of such conduct which could only be granted if a link between their conduct and a political objective was established. This resulted in untruthful, unreliable or generally vague evidence which in some cases reflected adversely on the IFP or Prince Buthelezi. Such evidence should not have been accepted at face value by the TRC.
- The TRC acted contrary to the provisions of section 30 of the Act which required it to act in a procedurally fair manner and give notice of its contemplated findings to persons who might be implicated. The requirement of procedural fairness was aimed not only at protecting those persons who might be adversely affected but also at enabling the TRC to assess the other side of any given story or allegation. Firstly, the TRC failed to give the IFP and Prince Buthelezi notice of most of its contemplated findings. This meant that they were not afforded the opportunity of rebutting such findings and did not allow the TRC to consider their response to any particular allegation. Secondly, in respect of certain contemplated findings the TRC gave notice of such findings but failed to identify the evidence supporting such findings to enable the IFP and Prince Buthelezi to adduce countervailing evidence. Thirdly, in those cases where adequate notice of the contemplated

findings was given enabling the IFP and Prince Buthelezi to respond thereto the TRC failed properly to apply its mind to the response submitted. Despite the representations that were made rebutting these findings, the actual findings published in the interim report were in all material respects identical to the contemplated findings.

The TRC made a number of finding relating to black-on-black conflict. In this regard the figures of casualties suggested by the TRC are unsubstantiated and have been extrapolated through statistics based on an undisclosed and obviously erroneous methodology. Contrary to what is stated in the TRC's report, almost 400 Inkatha leaders were killed in a systematic plan of targeted mass assassination. More than 10,000 Inkatha members and supporters were killed and hundreds of thousands of them were dispossessed or suffered untold misery and gross human rights violations because of the armed struggle waged against Inkatha.

The TRC made certain findings relating to the KZP which suggested that on occasions they co-operated with the SAP in perpetrating gross human rights violations. These findings ignored certain relevant facts and are wrong. As the ruling part of KwaZulu, Inkatha had the responsibility of maintaining law and order. The TRC ignored the reality that Prince Buthelezi had no operational control over the KZP which, in terms of law, was under the control of the South African Government in respect of all matters relating to its deployment, training, promotion and operational control. Nothing in the TRC Report or in any credible evidence before the TRC detracts from the fact that Prince Buthelezi never ordered, authorized, approved, condoned or ratified any gross human rights violations.

Certain of the findings in the TRC report endeavour to connect crimes committed by individuals or groups operating at community level with the IFP or Prince Buthelezi. In particular the TRC has in its report reconstructed events relating to the training of 206 young people by the SADF in the Caprivi Strip. The findings in this regard are erroneous and in conflict with the approach taken by the Durban Supreme court to similar evidence before it in extensive criminal proceedings. These people were chosen on the basis of criteria determined by the SADF and trained by it in accordance with its chosen requirements. The training was requested by the KwaZulu Government solely to protect the lives of government officials and the integrity of government structures and assets which were being targeted by terrorism and insurrection related to the armed struggle. Prince Buthelezi was at the time reliably informed of ANC plans to assassinate him, which information was confirmed before

the TRC in the testimony of President Mbeki. The KwaZulu Government never had operational control of these trainees. No basis exists for suggesting Prince Buthelezi could have believed that 206 barely trained security guards could be deployed against hundreds of thousands of ANC cadres who were well equipped and well trained by Soviet and Cuban military personnel.

In fact, Inkatha and the KZG were the only major participants in the conflicts of the past which had no control over a private army to be deployed for political purposes. Private armies were available both to the exiled political forces, such as the ANC and the PAC through the military training camps abroad, as well as to the leaders of the TBVC states and, obviously, to the SAG. Prince Buthelezi's refusal to accept nominal independence was, as admitted by former State President FW de Klerk, the major cause of the demise of the great scheme of apartheid, as it prevented the SAG from consolidating its claim that the white minority was no longer ruling over the majority of disenfranchised black South Africans. The fact that the Zulu people remained South Africans and did not have an independent state, forced the chief Minister of the KZG to provide for their security.

This as the background leading to the training of the Caprivi trainees which was fully scrutinized during the 8 month Malan trial referred to in the TRC report. The trial court found nothing illegal in such training. In arriving at its conclusions the TRC failed to pay proper regard to the evidence before the Court and its judgment.

The TRC in making certain findings in relation to self protection units misconceived their true nature. The training of SPUs was legal and was intended to achieve legal purposes relating to community policing and defense supervised by the National Peace Accord. Factually, SPUs never became involved in the conflict of the past. The only contrary evidence available to the TRC was that of someone whose political allegiance changed from the IFP and its Leader. He was involved in the setting up of a military camp for self-protection training, which he did without any knowledge of the IFP Leader. The TRC never offered the opportunity to the IFP to produce evidence to counter the false testimony placed before it, during in camera hearings at which the IFP was not represented no afforded an opportunity to test such evidence.

The TRC wrongly concluded that the IFP and its Leader could have made plans to disrupt the April 1994 elections by deploying a thousand people trained for a few weeks, against the combined might of the SAP, the SADF and MK, the ANC's private army. In fact, the IFP and its Leader never considered any plan to disrupt the April

1994 elections, the Central Committee (the decision making body of the IFP) never passed a resolution to that effect and the IFP's structures were never involved in any illegal activity. When the IFP expressed its opposition to the 1994 elections, it did so in a principled fashion, relying on its usual methodology of passive resistance and nonviolence, by exercising its democratic option of not participating in such elections.

In various findings made by the TRC against the IFP it sought to create links between a variety of violent activities taking place within community dynamics and individual crimes on the one hand and Inkatha on the other hand. At no stage did Inkatha advocate a policy of violence. In fact, the public and private pronouncements of Inkatha's leader, Prince Buthelezi, indicate that he constantly urged members and supporters to refrain from violence. The TRC has ignored this body of evidence and has sought to rely on a statement by Prince Buthelezi reiterating the recognised principle that people are entitled to self defence and a statement in the KwaZulu Legislative Assembly in which he reaffirmed his legal responsibility to protect public officials and government assets against acts of violence.

The TRC has tried to make the findings against the IFP mirror the findings made against the South African Government and the ANC. Through the chain of command within the armed struggle the ANC had control of and was responsible for the violence and gross human rights violations committed by its members and supporters, who were acting in accordance with ANC stated policies. The same applies in respect of the covert operations of the South African Government and the illegal activities of the SAP and the SADF, which were conducted within the parameters of an existing structure accountable to certain leaders. In the IFP there was no chain of command or integrated structure which can in any way link community and individual violence to Inkatha or its Leader. In making its findings the TRC had ignored the absence of any causal link and has incorrectly adopted an extended notion of accountability.

Prince Buthelezi served simultaneously as President of the IFP and the Chief minister of the KwaZulu government and during the period 1982-1994 was the Minister of Police in the KwaZulu Government. The TRC sought to hold Prince Buthelezi politically accountable for the commission of gross human rights violations allegedly perpetrated by the entities by virtue of the positions which he held. As appears from this appendix prince Buthelezi does not accept that he can be held accountable, politically or otherwise, in his representative capacity for the commission of any gross human rights violations.

The TRC sought even to connect the IFP to the activities of the groups known as the 'Black Cats' and the 'Toaster Gang' as well as the activities of other groups which perpetrated violence within community level conflicts. Within this context the TRC adopted the expression 'hit squads' to refer to any group of people involved in community violence, suggesting that such people were structurally organized for such nefarious purposes and constantly involved in their pursuance. The reality is that the overwhelming majority of violence by Inkatha's members and supporters was the produce of occasional activities of unstructured groups without any underlying plan. On the contrary, the evidence submitted to the Goldstone Commission demonstrates that the violence targeted against Inkatha followed systematic and well strategized patterns and was the product of an underlying political campaign.

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Volume **SIX** • Section **FIVE** • Chapter **FIVE**

**Findings and
Recommendations**

**HOLDING THE PAN
AFRICANIST CONGRESS
ACCOUNTABLE**

Holding the Pan Africanist Congress Accountable

■ FINDINGS

1. In its Final Report, the Truth and Reconciliation Commission (the Commission) made findings of accountability against the Pan Africanist Congress (PAC) in respect of the commission of gross human rights violations.
2. The Commission stated in its report that it recognised the PAC as a legitimate liberation movement which had waged a just struggle against the apartheid government. However, in the course and conduct of that struggle, it had committed gross violations of human rights.
3. While the PAC did not formally commit itself to upholding the provisions of the Geneva Conventions or the Additional Protocols, it was nevertheless bound by international customary law and, in particular, by international humanitarian law.
4. The Commission made three major findings against the PAC. It made a finding against the PAC's armed grouping of the 1960s, Poqo; a finding against the PAC for violations committed in exile, and a finding against its armed wing APLA in the later period.

FINDING ON POQO

5. The Commission stated in its Final Report that:

*While the Commission takes note of the explanation tendered by the PAC that its activities in the early 1990's need to be understood in the context of the 'land wars of the time', it nevertheless finds that the PAC and **Poqo** were responsible for the commission of gross violations of human rights through **Poqo's** campaign to liberate the country. This unleashed a reign of terror, particularly in the Western Cape Townships. In the course of this campaign, the following groups suffered gross violations of their human rights:*

- Members of the police, particularly those living in Black townships;
- The so-called 'Kataganese', dissident members of the PAC who opposed

- the campaign and were subjected to physical attacks and assassinations by other Poqo members;
- Representatives of traditional authority in the homelands, that is Chiefs and headmen;
 - White civilians in non-combat situations.⁶⁹
6. In making these findings, the Commission relied on evidence received from victims and witnesses who made statements and submissions to the Human Rights Violations Committee. In terms of the evidence received, the commission of human rights violations by PAC members began with the activities of its 1960s armed grouping, Poqo. These included forcible conscription drives and attacks on the South African Police, white civilians, and alleged 'collaborators' and 'dissidents' within the movement.
 7. Poqo's activities in the early 1960s unleashed a reign of terror, particularly in the Western Cape townships, where it adopted aggressive conscription methods. These allowed no room for dissent and at times resulted in violent intolerance towards members and outsiders who criticised or failed to support its methods.
 8. The Commission found that Poqo militants targeted civilians indiscriminately, particularly in the November 1962 Paarl attacks, which resulted in the killing of two white civilians. It found that these attacks (on the prison, the police station and the private homes of white residents) were locally planned and executed in response to serious local grievances arising from the strong enforcement of influx control and the corruption of Bantu Administration Board officers. Although not officially sanctioned by the regional or national PAC leadership, the Paarl attacks fell in line with a mass uprising planned for 8 March 1963, which specifically targeted whites and government agents.
 9. The February 1963 attack on a group of whites sleeping at the roadside near Bashee (Mbashe) River Bridge in Transkei, in which five whites were killed, was also found to be an indiscriminate targeting of civilians. A massive police crack-down on the PAC followed. Fifty-five people were subsequently charged with murder, of whom twenty-three were convicted and sentenced to death.
 10. The PAC told the Commission that the incident needed to be understood in the context of the land wars of the time. Families were being forcibly moved from

⁶⁹ Volume Five, p. 244.

their plots and homes without compensation to make way for the construction of a new road between Umtata and Queenstown. In the light of this, the PAC considered their attack to be purely defensive.

11. The Commission took note of the explanation but nonetheless found the PAC and Poqo to have been responsible for the commission of gross violations of human rights in its indiscriminate targeting of civilians.
12. In 1962 and 1963, Poqo members engaged in attacks on representatives of traditional authorities in the homelands, killing two headmen in the St Marks district of Cofimvaba in the Transkei. The attacks were described by the PAC as 'aimed at those headmen and chiefs assisting the dispossession of African people through the rural rehabilitation scheme'. On 12 December 1962, armed Poqo members were intercepted by police while on their way to assassinate Chief Kaiser Matanzima. An armed clash took place at Ntlonze Hill in the Transkei. Seven Poqo members were killed in this encounter and three policemen were seriously injured. The Commission considered this incident to be in the nature of a military encounter in which both sides were armed. It concluded, therefore, that the injuries to the policemen and the deaths of the Poqo members did not constitute gross human rights violations.
13. In the early 1960s, a group of disaffected PAC supporters, dubbed the 'Katangese', began operating outside the PAC's policy framework. They soon became the targets of physical attacks, attempted assassinations and attacks by Poqo gangs.
14. The PAC considered police officers to be an extension of the apartheid machinery and hence legitimate military targets. Spies and informers fell into this category as well. Dissidents in the movement were treated as the 'enemy'. It needs to be remembered that there were continual fears that the liberation movement would be infiltrated by those in the employ of the state. Not unnaturally, vigilance tended to spill over into paranoia.
15. The PAC deliberately targeted 'white farmers' as they were considered to be 'settlers' and thus 'acceptable' targets for killing.
16. The activities of Poqo belong to the 1960s and it is not surprising that the Commission received no amnesty applications from members of Poqo for violations committed during this period. Nor did the PAC furnish the Commission

with any further information related to these matters, providing no reason for the Commission to change its findings in respect of Poqo.

17. The finding with respect to Poqo thus remains unchanged.

FINDING ON PAC 'INTERNAL' VIOLATIONS

18. Like the African National Congress (ANC), the PAC executed a number of persons in custody in their camps without due process. This was usually on the instructions of its high command. In terms of the Protocols, such killings are considered to be grave breaches of the conventions.

19. In its Final Report, the Commission made the following finding:

The Commission finds that a number of members of the PAC were extra-judicially killed in exile, particularly in camps in Tanzania, by APLA cadres acting on the instructions of its high command, and that members inside the country branded as informers or agents, and those who opposed PAC policies were also killed. All such actions constituted instances of gross violations of human rights for which the PAC and APLA are held to be responsible and accountable.⁷⁰

20. In assessing this finding, it is important to note that the violations that occurred in the ranks of the PAC in exile were largely the result of divisions within the PAC leadership, military command structures and APLA members. Evidence received by the Commission revealed that many such violations took place. Whilst the Commission received a number of statements from victims regarding their treatment in exile, it received only one amnesty application in connection with these violations. Unlike the ANC leadership, the PAC leadership made no submissions on this issue to the Commission.
21. The Commission also received statements from families of individuals who went 'missing in exile', and heard evidence of the killing and attempted killing of PAC cadres in exile for which the PAC was allegedly responsible. It also received evidence in respect of a number of cases of assault and torture in PAC camps in Tanzania. Assault and torture were used as mechanisms to deal with suspected dissidents or infiltrators. The PAC did not have a security division responsible for handling such matters. Nevertheless, sections 1.4 and 1.5 of its Disciplinary Code provided constitutional justification for the use of 'firm iron discipline' and

⁷⁰ Volume Five, 'Findings'.

for 'chopping off without ceremony' factional elements in the movement, 'no matter how important'.

22. The Commission found the PAC responsible for the extrajudicial killing and attempted killing of a number of PAC members in exile, particularly in the camps in Tanzania.
23. In reviewing these findings, the Commission records that it received no further information affecting the substance of this finding subsequent to the publication of its Final Report. Moreover, it reiterates that the Geneva Protocols applied to the PAC, even though the latter may not have considered itself bound by its provisions. The Convention on Torture makes it clear that torture is not permitted in any circumstances. Hence, cases of torture clearly constitute contraventions and gross human rights violations. Moreover, the execution of persons in custody without due process is considered to be a grave breach of the Protocols.
24. There is thus no reason, compelling or otherwise, for the Commission to change its findings in respect of these incidents.

VIOLATIONS AGAINST PAC MEMBERS AT HOME

25. The PAC was also responsible for violations against its own members inside South Africa after 1990, for which five applications for amnesty were received. In the main, they involved the killings of suspected informers. The Commission found the PAC responsible for the killing and attempted killing of members branded as informers and agents, as well as of those who opposed PAC policies.
26. The Amnesty Committee received four amnesty applications for the killing of three individuals suspected of collaborating with the security police. In one instance, a fellow PAC and APLA member was seen in the company of a police officer and was allegedly overheard talking to him and promising to report on a PAC meeting. He was killed. The amnesty committee accepted the amnesty applicant's explanation.⁷¹
27. In another application, an amnesty applicant took a decision to kill a comrade whom he regarded as an informer. Although he failed to do so, he himself was injured and captured in the course of his last attempt. He applied for amnesty for

⁷¹ See Section Three, Chapter Four of this volume.

the attempted killing. The Amnesty Committee accepted his version and his proposition that the attempted killing of this police informer was politically justified.⁷²

FINDINGS ON GROSS HUMAN RIGHTS VIOLATIONS COMMITTED BY PAC/ APLA DURING ITS ARMED STRUGGLE

28. The Commission's major finding on the Azanian People's Liberation Army (APLA) was in respect of the commission of gross violations of human rights committed in the course of the armed struggle inside the country during the 1980s and 1990s.

29. The Commission stated that:

[w]hile the PAC proclaimed a military strategy of a protracted people's war, which involved the infiltration of guerrillas into the country to conduct rural guerrilla warfare and attacks in the township, in actuality, the primary target of its operations were civilians. This was especially so after 1990 when, in terms of its 'Year of the Great Storm' campaign, the PAC/Apla targeted whites at random and white farmers in particular.

30. The Commission noted but rejected the PAC's explanation that the killing of white farmers constituted acts of war. To the contrary, the Commission found PAC actions against civilians and whites to have constituted gross violations of human rights for which the PAC and APLA leadership was held morally and politically responsible and accountable.

31. The Commission found that:

[t]he targeting of civilians for killing not only constitutes a gross violations of human rights of those affected but a violation of international humanitarian law. The Commission notes but rejects the PAC's explanation that its killing white farmers constituted acts of war for which it has no regrets and apologies. To the contrary, the Commission finds PAC action directed towards both civilians and whites to have been a gross violation of human rights for which the PAC and Apla leadership are held to be morally and politically responsible and accountable.

32. In dealing with this issue, an important factor to bear in mind is the PAC's political platform, captured in a statement made by Brigadier Mofokeng at the armed forces hearing:

The enemy of the liberation movement of South Africa and of its people was

⁷² Ibid.

always the settler colonial regime of South Africa. Reduced to its simplest form, the apartheid regime meant white domination, not leadership, but control and supremacy. The pillars of apartheid protecting white South Africa from the black danger, were the military and the process of arming of the entire white South African society. This militarization, therefore, of necessity made every white citizen a member of the security establishment.

33. The vast majority of amnesty applications fall into this category and will be considered in greater detail below.

SUBMISSION MADE BY THE PAC IN RESPONSE TO THE FINDINGS MADE BY THE COMMISSION

34. In terms of section 30 of its founding Act, the Commission sent the PAC a notice setting out its proposed findings on 27 August 1998. The PAC responded on 21 October 1998 through its secretary-general, Mr Ngila Muendane. The response reached the Commission's offices after the cut-off date and was not considered or taken into account at the time of the publication of the Commission's Final Report. In reviewing its findings, however, the Commission returned to the submission made by the PAC.
35. The first objection that the PAC raises in the submission is that the Commission labelled it a gross violator of human rights. The PAC argues that, if the Commission determined that its struggle was just, it was contradictory to find it a violator of gross human rights. The PAC made this point again after the Commission had handed over its Final Report to President Mandela in October 1998.
36. The second issue raised by the PAC was that of 'legal equivalence'. This echoed objections raised by the ANC that violations committed by members of the liberation movements were given legal equivalence to those perpetrated by members of the security forces.
37. Beyond this, the PAC did not respond in any detail to the Commission's findings; nor did it make reference to the problems and reservations it had raised with the Commission while the process was underway. Instead, it affirmed the work of the Commission, despite some general reservations on the Commission's findings on the liberation movements in general.

PAC COMMENTS DURING PARLIAMENTARY DEBATE

38. In the parliamentary debate on the Commission's Report, held on 25 February 1999, PAC President Dr Stanley Mogoba noted that the Commission had revealed the painful truth of past apartheid atrocities but had not succeeded in bringing about reconciliation:

The TRC unavoidably opened the wounds of many families who were hurting in silence. The skeletons of this country came tumbling out of the cupboards. Some of us who had experienced the terrible side of the apartheid repression knew some of the truth, but only a fraction of the truth.

39. However, while Dr Mogoba praised the Commission for 'the positive contribution' it had made in 'the manner in which it revealed the painful truth of past atrocities and shocking barbarity during apartheid', he criticised it for condemning the liberation movements for atrocities perpetrated during the liberation struggle:

Although the context of hostilities, war and the struggle for survival is grudgingly admitted, the condemnation is nevertheless made. How we may ask, can people who were fighting and killing to uphold an oppressive and inhuman apartheid system, which was roundly condemned as a crime against humanity, be placed on the same scales of justice with the victims of that system?⁷³

40. This, indeed, was the criticism levelled at the Commission by all the liberation movements, despite the fact that they themselves had played a leading role in drafting the legislation that required the Commission to adopt an 'even handed' approach to the commission of gross human rights violations. The legislation did not make a distinction between the state and any other party. It required the Commission to investigate *all* gross human rights violations. Moreover, in making its findings, the Commission found the former apartheid state to be the major perpetrator responsible for state-sponsored violence.
41. The Commission considered that the war waged by the liberation movements was a just war and upheld the finding of the United Nations that apartheid was a crime against humanity. Thus the fight against the apartheid government was considered to be just and legitimate. Reference should be made to Additional Protocol I to the Geneva Conventions of 1949 covering armed conflicts in which

⁷³ *The Sowetan*, 30 October 1998.

⁷⁴ Provisions relating to Geneva Convention of 1949 relating to the protection of victims in armed conflicts, (Protocol I) 1125 53 U.N.T.S.

people are fighting against racist or colonial regimes,⁷⁴ which was specially created to deal with the struggles being conducted in South Africa and Israel. The conflict was therefore regarded as an international armed conflict.⁷⁵

42. The PAC sought disingenuously to blur the lines between a 'just cause' and 'just means', striving to make the point that, if the struggle it waged was just, it could not possibly be a violator. Their point of departure was that, if the cause is just, it follows that the actions performed in support of that cause must also be just. In terms of the Geneva Convention and the Protocols, the means used also have to be just.
43. Taken one step further, the PAC insisted on the view that anybody they considered to be the enemy in terms of their own policy constituted a 'legitimate' target. This view is contrary to the provisions of international humanitarian law, which considers the only acceptable or legitimate target to be a 'combatant'. In addition, civilian casualties are perceived to be grave breaches of the Geneva Conventions and the party responsible for the killing is considered to have committed a gross violation of human rights.
44. The PAC also makes the point that the majority of people who die in war are innocent and that that is the very nature of war. This assertion, of course, evades the fundamental purpose of international humanitarian law which is to ensure that innocent people such as civilians are not killed, maimed and tortured and that they, particularly, are protected from the impact and ravages of war.

Application of the Geneva Conventions

45. The Geneva Conventions and the Additional Protocols set out comprehensively the situations in which grave breaches are said to be committed.⁷⁶ The Geneva Conventions stipulate that, even if one of the parties in a conflict is not a party to the Conventions, the other party will remain bound. Article 1(2) of Protocol I specifically states that, in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience. Reference was made in the chapter dealing with the ANC⁷⁷ to the fact that this Protocol was intended to deal with those situations where 'peoples are fighting

⁷⁵ See this section, Chapter Three, 'Holding the ANC Accountable'.

⁷⁶ See Appendix 2 to Chapter One of this section.

⁷⁷ Chapter Three of this section

against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination as enshrined in the Charter of the United Nations and the Declaration of Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'. These Conventions are designed to limit the brutality of war and the loss of civilian life and, in particular, to hold accountable those who wage war in an unacceptable fashion.

46. Common Article 3 defines what kinds of acts constitute violations. There are a total of four acts that, if committed in respect of 'persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause' constitute grave breaches. They include the following:
- a violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b taking of hostages;
 - c outrages upon personal dignity, in particular humiliating and degrading treatment, and
 - d the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
47. Given the provision of Common Article 3, it can be seen that this argument of the PAC is disingenuous and cannot be taken seriously. Whilst it is true that innocent people lose their lives, it is by no means acceptable that they should do so.

FINDINGS

Police officers as 'legitimate' targets

48. The PAC makes the assertion that they considered all police officers to be legitimate targets because they were the agents of apartheid and thus criminals. Their involvement with the apartheid government made them a legitimate target of the liberation movement.
49. An anomalous factor is that the vast majority of attacks against police officers took place at times when they were technically off duty. In most of these

instances, their houses were attacked and often their families were included in the attack.

50. In this regard, the PAC makes the point that one cannot draw a distinction between the period when police officers are at work and the period when they are off duty. It asserts further that, even when they were off duty, they were reporting to the state.
51. The main thrust of the PAC's argument is that police officers were considered by the vast majority of township residents to be agents of the state, and that in the eyes of the liberation movements they were regarded as collaborators and therefore constituted legitimate targets. The question of being on or off duty or in plain clothes or uniform was not at issue.
52. There is no doubt that police officers were perceived by ordinary people to be an extension of the state and thus legitimate targets of the liberation movements. In most of the townships, police were perceived to be the enemy and in many instances played the role of maintaining the apartheid government's power. This is not true of all police officers, but it is certainly true of the vast majority who became police officers during the apartheid era. One of the most painful experiences for most members of the community was the fact that police officers were an extension of apartheid authority and were responsible for carrying out many brutal acts against members of the community. In a number of instances, they were responsible for the arrest and detention of loved ones. In a vast number of cases, black policemen were responsible for the torture of activists in the townships.
53. In its submission, the PAC makes the point in vivid language:

When is a criminal not a criminal? Is he a criminal only when he commits a crime and stops being such when he retires to his bedroom at night? Would we say that the police must stop pursuing him simply because he is now with his family and enjoying a Sunday meal.
54. It goes on to make the point that the apartheid government did not make that distinction.

55. The PAC points out that, in terms of their own definitions, 'all police were the enemies of oppressed people because under that system they were obliged to work even when they were off duty'.
56. However, even if one accepts the argument that police officers were an extension of the apartheid system and thus legitimate targets, this does not remove from the PAC responsibility for attacks on police officers when they were *hors de combat* or when, unacceptably, innocent family members were killed or injured in these attacks.
57. Furthermore, it is not correct to assume that all police officers collaborated with the former state. In many instances, they joined the force because there was little opportunity for them to do anything else. Are they to be considered any more complicit in the apartheid system than magistrates or other persons who accepted jobs in the apartheid system?
58. If one accepts the argument that police officers were an extension of the apartheid apparatus, does this make a police station a legitimate target? In one case, applicants sought amnesty for an attack on a police vehicle in Diepkloof during which one policeman was killed and another injured.
59. In another incident, amnesty was sought for an attempted attack on the Yeoville police station. In this particular incident, the applicants were intercepted before they got to the police station. However, one SAP member was injured in the crossfire that ensued.
60. A question that must be considered is: Are all policemen who served in the apartheid force to be considered combatants and thus legitimate targets?
61. If one accepts the PAC's argument with regard to police officers, then neither the PAC nor ANC can be held responsible for the commission of gross human rights violations for these attacks. However, if one applies a strict interpretation of the Conventions, they would nevertheless be held accountable.

Traditional leaders as ‘legitimate’ targets

62. The PAC treated traditional leaders who co-operated with the state as an extension of the apartheid system and thus as legitimate targets.
63. In 1962, members of Poqo attacked representatives of traditional authority in the homelands, killing two headmen in the St Marks district of Cofimvaba, Transkei. These attacks were described by the PAC as being ‘aimed at those headmen and chiefs assisting the dispossession of African people through the rural dispossession scheme’.
64. On 12 December 1962, armed Poqo members were intercepted by police while on their way to assassinate Chief Kaiser Matanzima. An armed clash took place. In this encounter, seven Poqo members were killed and three policemen seriously injured. In its original report, the Commission considered this to be a combat situation.
65. The question these incidents raise is whether those who became part of the apartheid system became legitimate targets as identified by the PAC. The above situation relates to but one example of the iniquity of the apartheid system, which dispossessed people of their land, often violently, and frequently replaced hereditary leadership with chiefs of their own. Yet the targeting of traditional leaders and chiefs cannot be condoned and must constitute a gross human violation. Thus the motivation for the attacks can be understood but not condoned.

Civilians and farmers as ‘legitimate’ targets

66. In its second submission to the Commission, the PAC confirmed its earlier stance that whites under apartheid were beneficiaries of the system, that every white person was part of the defence lines of apartheid, and that the Commission had to accept that every white home during the apartheid era was some kind of garrison.
67. While the Commission did not deal conclusively with the notion of ‘beneficiaries’, there is no doubt that white people were the beneficiaries of apartheid and its largesse. White people cannot escape the fact that being white in South Africa enabled them to benefit from the system at the expense of the black majority. Having said that, the Commission cannot accept the argument that every white person must be considered part of the apartheid defence system

and that every white home must be considered to be a garrison. This is absurd and must be rejected. There were a large number of white people who not only opposed apartheid but who also fought against it in a variety of different ways, including the taking up of arms.

68. An analysis of the amnesty applications received from the PAC reveals that a total of thirty-two applications were received for attacks on civilians. In these incidents, twenty-four people were killed and 122 seriously injured.
69. These attacks formed part of the PAC's 'Operation Great Storm'.
70. A number of applicants claimed that the attacks were not motivated by racism. Rather, as whites were seen to be complicit in the government's policy of apartheid, they constituted a legitimate target.
71. Mr Letlapa Mphahlele, APLA director of operations, stated at a media briefing in Bloemfontein on 28 October 1997 that APLA offered no regret or apology for the lives lost during 'Operation Great Storm' in 1993. He said that his 'proudest moment was seeing whites dying in the killing fields'. He also accused the Amnesty Committee of being 'a farce and a sham' which sought to 'perpetuate white supremacy'.
72. Despite such spurious attacks on the Amnesty Committee, there is no doubt that the Committee considered the arguments of applicants very seriously – with the result that APLA members received amnesty for the most heinous of crimes on the basis that they complied with the requirements of the amnesty process. The Amnesty Committee has itself sustained serious criticism for some of these decisions, which many felt represented too generous an interpretation of 'proportionality'.

Attacks on civilians

73. Attacks on civilians included those made on the King William's Town Golf Club; Steaks restaurant in Claremont, Cape Town; Yellowwoods Hotel, Fort Beaufort; St James Church in Kenilworth, Cape Town; the Heidelberg Tavern in Observatory, Cape Town, and Amy Biehl in Guguletu, Cape Town.⁷⁸

⁷⁸ Amnesty applications for targeting white civilians are detailed in this volume, Section Three, Chapter Four.

74. A common feature of these attacks is the fact that they involved indiscriminate attacks on civilians. Whilst applicants have stated in their amnesty applications that the intended targets were military or security force personnel, no proper investigation was carried out to determine whether their perceptions were correct. In fact, in most of the incidents, their information or intelligence was incorrect and suspect.
75. In terms of the Geneva Conventions, civilians are protected by principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. There can be no justification for the choice of civilians as targets.
76. The amnesty decisions have supported the stance the Commission took with regard to attacks on civilians. No compelling evidence has been provided to the Commission to persuade it to change its findings in respect of the attacks on civilians. Indeed, the evidence that emerged from amnesty hearings supports the original findings. While the motive for the attacks are understood and, in most instances, the Commission can understand the rage that motivated them, motive cannot change the fact that the victims in most cases were innocent civilians who were unarmed.
77. The findings that the Commission made in respect of the PAC and APLA in regard to attacks on civilians must stand.

Farmers as 'legitimate' targets

78. The Commission made findings against the PAC and APLA for their indiscriminate attacks on farmers. The second submission made by the PAC is curious in this respect, suggesting that, in making this finding, the Commission is biased in favour of white people. The rest of the PAC's argument is fairly spurious.
79. The Commission received a total of twenty-seven applications from the PAC and APLA for attacks on farms, committed between the period 1990 and 1993. In these attacks, twelve people were killed and thirteen injured. The majority of these applications were granted.
80. APLA and PAC operatives testified that it was part of their strategy and policy in terms of 'Operation Great Storm' that farmers would be attacked in order to drive white farmers from their farms in order to get their land back.

81. These operations involved the deliberate targeting of white farmers and are quite unlike the ANC's landmine operations in farming areas. Whilst it is true that farmers in many of the border areas were trained and issued with weapons so that they could take part in commandos patrolling the area, not all of the farmers so targeted were an extension of the apartheid system.

Specific amnesty applications dealing with attacks on white farmers

82. One of the incidents for which amnesty was applied involved an attack on Mr RJ Fourie on the farm 'Stormberg'. Mr Fourie was attacked from behind, ambush style, and killed. A witness made a submission to the amnesty committee to the effect that the deceased was not interested in politics and was known to be a progressive farmer in the area. He had assisted his workers to improve their stock, housed them in brick houses with running hot and cold water and built a school for their children on the farm, as well as a soccer club.
83. In another incident, the amnesty application involved the killing of Mr John Bernard Smith, also a farmer. Mr Oliphant, one of the applicants, testified that it was the objective of the PAC to wage the struggle for the return of land to the African people, which was why he had become involved in that operation. Another applicant testified that it was part of PAC policy to intensify the armed struggle in order to strengthen the hands of the PAC in the negotiating process. He described the attacks on the farmers as one of the phases of the campaign. The PAC believed that the farming community had participated in the dispossession of the African people and that they were beneficiaries of the land taken away from the Africans.
84. None of the reasons advanced in any of the amnesty applications can condone the fact that, in most of the attacks, the farmers targeted and killed were ordinary civilians, in no way linked to different commando groups. They cannot therefore be seen as an extension of the security forces. In terms of the Conventions, they do not, therefore, constitute a legitimate target. Nor are they considered combatants.
85. The finding made in respect of findings of accountability for gross human rights violations committed against farmers by the PAC and APLA must therefore stand. They were responsible for the commission of gross human rights violations. In most instances the nature of the attack was almost that of an ambush.

PAC/ANC conflict

86. The Commission received four applications for offences committed in the course of the conflict between the PAC and the ANC. While the applicants received amnesty, the evidence led at the hearings cast doubt on whether they were dealing with each other in a combat situation. The evidence that was led spoke of the ongoing violence in the area, but the targeting of opponents often resulted in innocent people being killed. Nevertheless, the PAC must accept responsibility for these killings, which constitute gross human rights violations.

Applications refused

87. The Committee received a number of amnesty applications from persons in custody, which it refused either on the grounds that the incidents were not politically motivated or on grounds of lack of full disclosure. In most of these incidents, the applicants remain in custody serving sentences.
88. The leaders of the PAC maintain that a number of their cadres are languishing in apartheid jails and that special arrangements should be made to pardon them. At a parliamentary briefing after the debate on the Commission's report, Dr Stanley Mogoba, the President of the PAC, made a call to the State President to pardon 'the many freedom fighters who are still languishing in our prisons'.

Now that the TRC work is finished – or is about to be finished – it is time, perhaps, to call on our President, perhaps as a farewell gift or gesture, to give Presidential pardon to these prisoners from the liberation struggle. Many grieving families would be eternally grateful to our President for that. I also want to say that this argument and this discussion must be separated from the discussion on general amnesty. I am not talking about general amnesty.

DIFFICULTIES EXPERIENCED BY PAC APPLICANTS

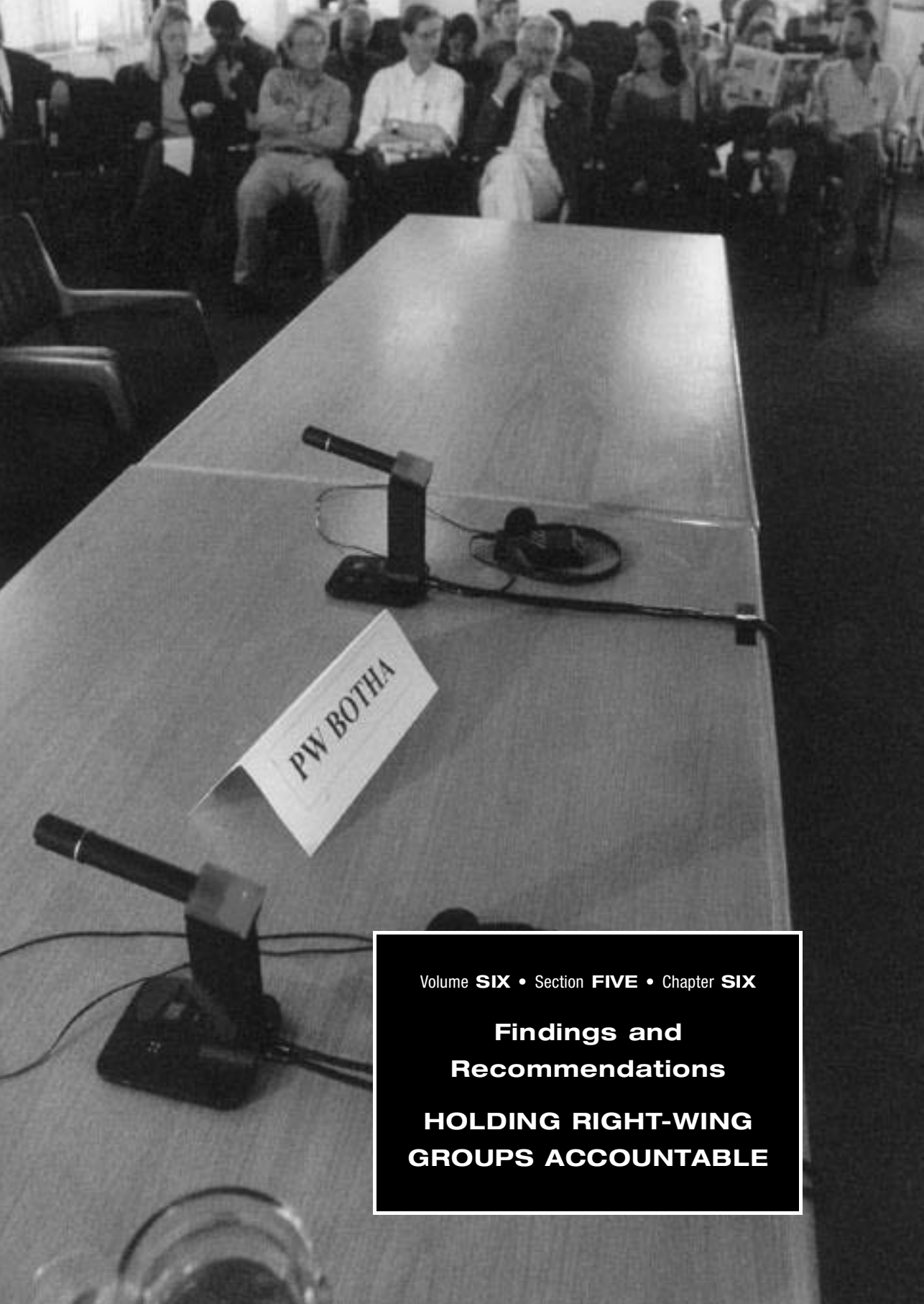
89. It is important for the Commission to acknowledge the great difficulty that the PAC/APLA cadres experienced in filing proper amnesty applications. They were hampered by the fact that, at the time, the Legal Aid Board appointed inadequate Counsel to assist them. In many instances, counsel did not bother to read the Commission's founding Act or endeavour to understand it. It was only after legal practitioners such as Mr Bandazaya were appointed that these applicants began to be properly represented.
90. There is no doubt that a number of people still in custody did not apply for amnesty for a variety of reasons, including the fact that they were not properly advised. The government will need to consider this issue from a humanitarian point of view. It is commendable that the President of the PAC does not consider that another amnesty deal should follow.

Pardons

91. Recently the President pardoned a number of PAC amnesty applicants who had been denied amnesty by the Committee. This decision was widely criticised by civil society and victims, as the pardons were perceived to be a ploy to grant amnesty using the 'presidential pardon' process. There has been a demand from civil society that the President explain why he took this decision, as the use of the presidential pardon to grant amnesty is seen as undermining the work of the Commission whose mandate it was to grant amnesty on an accountable basis.

CONCLUSION

92. The evidence that emerged from the hearings of the Amnesty Committee did not lead to any alteration in the findings of the Commission as recorded in the Final Report.



PW BOTHA

Volume **SIX** • Section **FIVE** • Chapter **SIX**

**Findings and
Recommendations
HOLDING RIGHT-WING
GROUPS ACCOUNTABLE**

Holding the Right-Wing Groups Accountable

■ INTRODUCTION

1. The Truth and Reconciliation Commission (the Commission) made findings against right-wing opposition groups in its Final Report.⁷⁹ These findings were based on the evidence and testimony it received. This included speeches that had been made by senior leaders inciting followers to commit acts of violence against those labelled 'the enemy', the arming of supporters in contravention of the law, and random racist attacks on black civilians.
2. The Commission noted that an important aspect of the insurrection was the clandestine collusion between right-wing forces, members of the security forces and the Inkatha Freedom Party (IFP). This led to the commission of gross human rights violations and the training of IFP paramilitary forces in the hope of preventing the ANC from coming to power.
3. In addition, particularly in the period leading to the holding of the first democratic elections, right-wing supporters embarked on a campaign to destabilise the country and to prevent the holding of elections. The storming of the World Trade Centre and the assistance rendered to the Bophuthatswana homeland by the right wing are examples of this. In terms of the leadership of the right wing, the Commission specifically held Generals Constand Viljoen and Peter Groenewald and Mr Eugene Terre'Blanche accountable for the reign of terror carried out by the various groups and their individual supporters.
4. At the time when the Commission made its findings on the right wing, a number of right-wing amnesty applications had already been heard. However, the Commission decided that findings would be revisited once all decisions of the Amnesty Committee became available.

⁷⁹ Volume Five.

SUMMARY OF FINDINGS

5. The Commission stated in its Final Report:

In the late 1980's and early 1990's, a number of Afrikaner right-wing groups became active in the political arena. They operated in a loose coalition intent on securing the political interests of conservative Afrikaners through a range of activities seemingly intent on disrupting the negotiations process then underway. Operating both within and outside the negotiations process, members of these groups undertook actions which constituted gross violations of human rights.

6. Specifically:

The Commission finds that the Afrikaner Volksfront and structures operating under its broad umbrella were responsible, between April 1993 and May 1994, for gross violations of human rights of persons perceived to be supporters and leaders of the ANC, SACP, UDF, PAC, National party and other groups perceived not to support the concept of Afrikaner self-determination or the establishment of a volkstaat, to that end, the movement's political leaders and military generals advocated the use of violence in pursuit of the movement's aims and/or in an attempt to mobilise for an insurrection.

REVIEW OF FINDINGS

7. It is important to review the findings in the light of evidence that has emerged from the amnesty process.

Membership of right-wing groups

8. The amnesty applications reveal that many amnesty applicants claimed membership of one or more right-wing groups. In total, 107 applications were received for amnesty, with 71 per cent of the applicants claiming membership of the Afrikaner Weerstandsbeweging (AWB), 10 per cent of the Conservative party and the remaining 19 per cent claiming membership of a variety of right-wing organisations. The most prominent group was the AWB, under the leadership of Eugene Terre'Blanche. More than forty of his supporters applied for amnesty. Of these, 68 per cent of applications were granted.

Nature of violations

9. Most amnesty applications pertaining to the period prior to 1990 relate to attacks that were intensely individualist, uncoordinated and extremely racist in nature. Amnesty applications for the period after February 1990 reveal a more co-ordinated plan, with better organised and more orchestrated attacks. Two of the best-known incidents were the occupation of the World Trade Centre in 1993 and the support by members of the AWB of the Bantustan administration in Bophuthatswana in 1994.
10. The Commission agreed to the request by President Mandela that it extend the period available for amnesty applications in the interests of reconciliation in order to accommodate the right wing and the Pan Africanist Congress (PAC), the majority of whose violations took place after the original date and during the run-up to elections. This decision proved fruitless as the Commission received no further applications, particularly for the two incidents described above. Thus the argument forwarded by General Viljoen that extending the date would promote reconciliation did not impact on the process.

CONFIRMATION OF FINDINGS

Collusion between the right wing and the security forces

11. Amnesty applications confirm that in a number of incidents, covert units within the security structures assisted in arming right-wing groups. The amnesty application of Mr Leonard Veenendal⁸⁰, a member of the Civil Co-operation Bureau (CCB), confirms this.

Collusion with the IFP

12. Right-wing amnesty applicants confirmed that they formalised their ties with the IFP. They were responsible for supplying the IFP with weapons and also worked very closely with IFP groups on the north and south coasts of KwaZulu-Natal. In at least two instances, joint attacks were planned and carried out – at the Flagstaff police station and on the Seychelles restaurant. Mr Walter Felgate, formerly a member of the IFP, testified at a section 29 hearing that the right wing had offered to procure weapons to the IFP. The amnesty applications of Messrs Gerrit Phillipus Anderson and Allan Nolte confirm this.

⁸⁰ See Veenendal case in Section Three, Chapter Six; [AM3675/96].

Links with international right-wing groups

13. Amnesty applications also confirm that right-wing groups had links with other international right-wing groups. However, deeply held suspicions regarding an international right-wing conspiracy in respect of the murder of Mr Chris Hani were not confirmed in the amnesty process, due to a number of factors.

Attacks on individuals

14. In their evidence, amnesty applicants confirmed that they had targeted and attacked those they regarded as the enemy. The attack by Mr Eugene Terre'Blanche and his supporters on Professor Floors van Jaarsveld⁸¹ is an example of such an attack. His children testified in the amnesty hearing that this attack had contributed to the humiliation of their father and his loss of standing in his community. While the expressed motive for the attack was that that they regarded the new direction that Van Jaarsveld had given to Afrikaner history as contrary to the then South African Constitution, which recognised God as the highest authority, it became quite clear during the hearing that the real motivation for the attack was his willingness to accommodate change.

Attacks on black people

15. The right wing carried out a number of racist attacks⁸². One of the worst of these was carried out by Mr Barend Strydom, a member of the Wit Wolwe ('White Wolves'). The attack was carried out indiscriminately against black people, eight of whom were killed. Strydom filed an amnesty application for this attack but later withdrew the application.
16. Members of the Orde Boerevolk attacked a bus full of black commuters in Durban in which seven people were killed. The motivation they expressed for the attack was an earlier Azanian People's Liberation Army (APLA) incident. In another incident, Mr George Mkomane was killed because he was in a so-called 'white' area at night without permission.⁸³ What is sickening is the random indiscriminate nature of the attacks on people simply because they were black. Despite attempts by amnesty applicants to justify the political nature of these attacks, their testimony reveal that, in most instances, their motives had been

81 See Section Three, Chapter Six in this volume.

82 Ibid.

83 Ibid.

purely racist. One of the worst attacks was carried out by the AWB on innocent civilians outside Ventersdorp, which led to the killing of four people, including two children.

Possession of arms, explosives and ammunition.

17. The Commission received thirty-one amnesty applications for the illegal possession of arms, explosives and ammunition – stolen, in a number of instances, from military bases.

Sabotage of the transitional process

18. The Commission received thirty-five applications for a range of violations involving attempts to sabotage the negotiations process. These consisted of attacks on individuals and included assassinations. A number of innocent individuals were killed for no apparent reason. The killing of Mr Chris Hani by Messrs Clive Derby Lewis and Janusz Walus threatened the stability of the country in the period leading up to the elections. The constraint shown in the ranks of Umkhonto we Sizwe (MK), the African National Congress (ANC) and the vast majority of the country in dealing with the killing is testament to how deeply people were committed to making peace work.

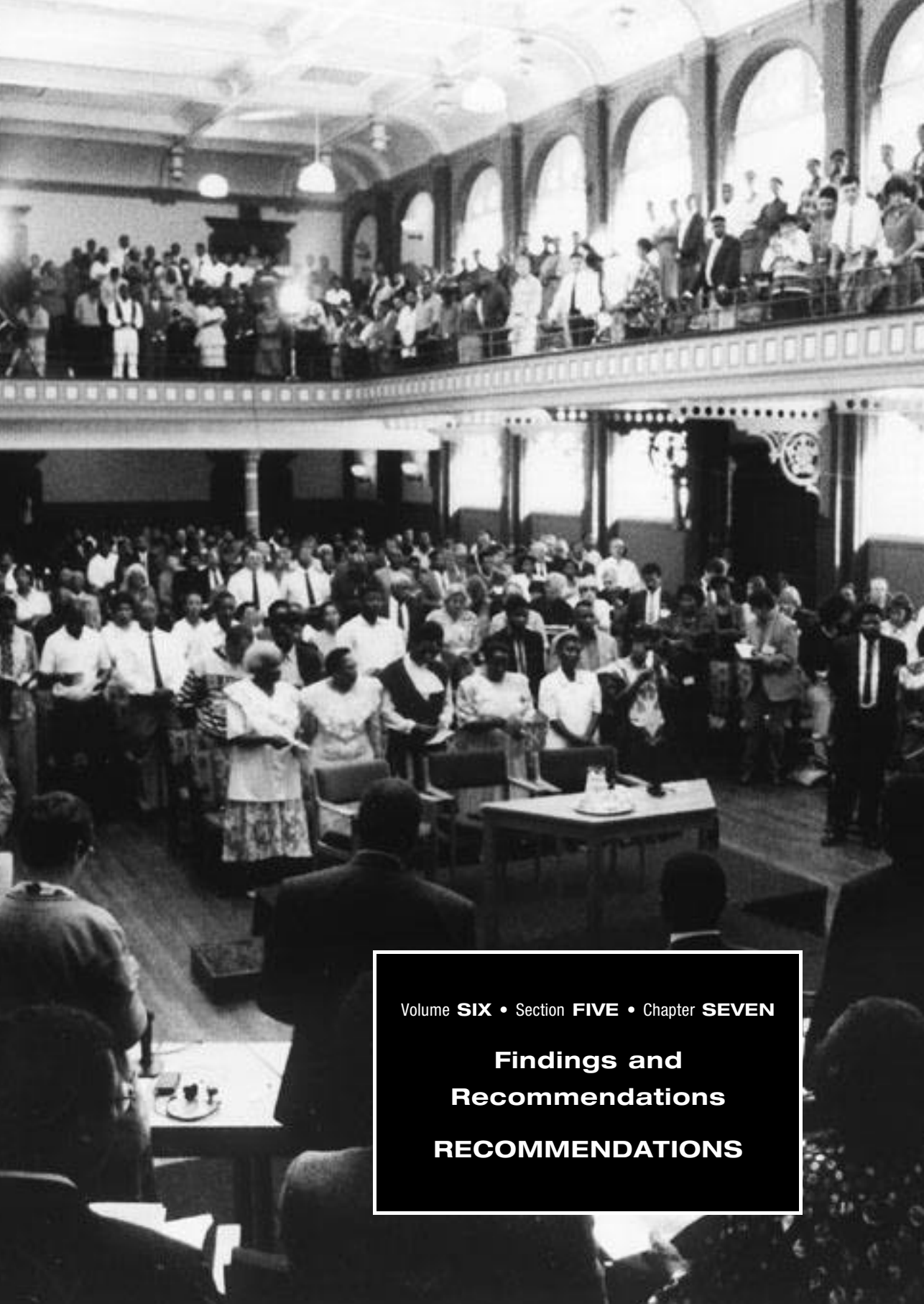
Bombings

19. The AWB, the Boereweerstandsbeweging (BWB) and the Afrikaner Volksfront (AVF) all engaged in bombing activities during the pre-election period. Much of the bombing was designed to sow terror and to destabilise the country in the period leading up to the elections. A number of offices belonging to the ANC, schools that admitted children of different race groups, and magistrates' courts were attacked. Businesses belonging to Indians were also targeted. The offices of the Independent Electoral Commission in a number of areas, as well as other institutions and offices associated with the election, were targeted and bombed, as were railway lines and power installations.

CONCLUSION

20. The evidence that emerged from the amnesty applications and hearings confirms the original findings made by the Commission in respect of right-wing groups. The testimonies of the applicants were tantamount to confessions that the right wing embarked on a campaign of terror and violence designed to destabilise the country at an extremely sensitive time. Right-wing groups were responsible for committing gross human rights violations as defined by international human rights law. In most instances, the victims were innocent civilians whose only 'sin' was the fact that they were black. The motive for these violations was that members of the various right-wing groups were opposed to majority rule and to a change in their way of life. There was no nobility or morality to their cause, despite their attempts to justify their actions.

21. Having considered the amnesty applications and hearings on the right-wing, the Commission has no reason to change the findings it made in its Final Report.



Volume **SIX** • Section **FIVE** • Chapter **SEVEN**

**Findings and
Recommendations
RECOMMENDATIONS**

Recommendations

RECONFIRMATION OF REPARATION AND REHABILITATION RECOMMENDATIONS IN FINAL REPORT

1. The Truth and Reconciliation Commission (the Commission) reconfirms the Reparation and Rehabilitation Committee's recommendations drawn up in terms of sections 25 and 26 of its founding Act⁸⁴ and set out in its Final Report.⁸⁵

RECONFIRMATION OF RECOMMENDATION FOR A SECRETARIAT TO OVERSEE IMPLEMENTATION

2. The Commission confirms and supports the recommendation in its Final Report that a Secretariat be established in the Presidency to oversee the implementation of the recommendations of the Commission. It is recommended that the Secretariat:
 - a be responsible for reporting on and publishing an annual report on the status of victims for a period of six years following the publication of this Codicil to the Commission's Final Report;
 - b establish a particular presence and visibility in rural areas;
 - c establish a Presidential Award for innovative and inclusive projects aimed at 'keeping the memory of the past alive' in schools, research centres and institutions of higher learning;
 - d focus on reparations and democracy-related capacity-building through the specialised training of development workers.

REPARATION TRUST FUND

3. The Commission recommends and urges that a Reparation Trust be set up and trustees appointed.
4. The Reparation Fund should be managed by government, organised local and international business and civil society.

⁸⁴ The Promotion of National Unity and Reconciliation Act No. 34 of 1995.

⁸⁵ Chapter Five of Volume Five.

5. The purpose of the trust will be to raise funds, to audit the budget for victim support and to be responsible for financial controls and accounting.

ONCE-OFF WEALTH TAX

6. The Commission recommends and urges that government impose a once-off wealth tax on South African business and industry.

BENEFICIARY CONTRIBUTION TO REPARATION FUND

7. The Commission recommends and urges that all beneficiaries of apartheid make a contribution to the Reparation Fund.

NATIONAL PROGRAMME OF ACTION

8. The Commission recommends and urges that government and civil society adopt the national programme of action proposed by the South African Human Rights Commission, and work towards a society free of racism, xenophobia and related intolerance.
9. It proposes further that government move urgently to implement related programmes, particularly amongst young people.

ANNUAL REPORTING DURING BUDGET VOTE

10. The Commission recommends and urges that all ministers with portfolios relating to issues affecting victims report annually on the status and circumstances of surviving victims during the budget vote in parliament for a period of six years following the publication of this Codicil to the Commission's Final Report.

SPECIAL ARRANGEMENTS FOR EDUCATION

11. The Commission recommends and urges that the Department of Education, the South African Qualifications Authority and institutions of higher learning make special arrangements for entry into tertiary educational institutions of those whose secondary and tertiary education was interrupted by the struggle, as was done for those whose studies were interrupted by World War II.

KEEPING THE PAST ALIVE

12. The Commission recommends and urges that the curriculum of the South African Human Rights Commission National Education Centre include projects that aim to encourage children to keep the past alive.

TASK TEAM TO DEAL WITH DISAPPEARANCES AND EXHUMATIONS

13. The Commission recommends and urges government to act on the recommendation of the Commission in regard to dealing with disappearances and exhumations and to establish a task team to deal with these matters.

‘HEALING THE MEMORY’ CONFERENCE

14. The Commission recommends and urges that government convene an urgent conference aimed at healing the memory in respect of those who did not return.

CONFERENCE DEDICATED TO THE FALLEN

15. The Commission recommends and urges that government convene a conference dedicated to the memories of those who were executed or killed in such circumstances that their honour and reputation and their loyalty to their organisations were deliberately slandered by others, often causing their families and friends great distress and sometimes leading to the death and torture of family members.

APOLOGY BY HEAD OF STATE ON BEHALF OF PERPETRATORS OF GROSS VIOLATIONS OF HUMAN RIGHTS

16. The Commission recommends and urges that, as head of state, the President of the Republic of South Africa apologises to all victims on behalf of those members of the security forces of the former state and those armed forces of the liberation movements who committed gross violations of human rights.

THE COMMISSION'S DATABASE

Preamble

17. The Commission created and maintained a database to manage the data requirements of the three Committees. The database was used to register human rights violations statements and amnesty applications as they were lodged with the Commission, after which teams of data processors stored the names of the victims, the violations they suffered and details of the alleged perpetrators. During the life of the Commission, the database was upgraded to assist with the management of the work of the Reparations and Rehabilitation Committee. It is still being used by the staff of the President's Fund today to record disbursements made.
18. By the time the Commission closed, the database had become a rich repository of information about the nature, scale, location, dates, types and consequences of violations of human rights suffered by South Africans. As such, it is an essential primary source of valuable historical material, which must be made accessible to future generations.

Data provision

19. The Commission recommends that the database be owned, managed and maintained by the National Archives and Records Service of South Africa, who must take responsibility for ensuring that the database:
 - a forms the cornerstone of an electronic repository of historical materials concerning the work of the Commission;
 - b is enriched by electronic multi-media facilities to support audio-visual and other graphic materials;
 - c is in a format that allows for distribution to schools, other educational institutions and the general public by means of CD-ROM or other portable electronic format, and
 - d uses language that is accessible to the majority of South Africans.

Data reconciliation

20. The work of the Amnesty Committee continued after that of the Human Rights Violations (HRV) Committee had been completed, so a process of data reconciliation is necessary to compare and contrast the victims and violations described in

Amnesty applications with those gathered by the HRV Committee. The Commission recommends that:

- a the database be updated with the victim and violation details from the transcripts of amnesty hearings which, for security reasons, were not always recorded on the database prior to the hearing, and
- b the details of the victims and violations mentioned in each amnesty application be reconciled with those recorded by the HRV Committee, to ensure that every victim in need of reparation and rehabilitation is identified and noted.

Database conversion

21. The Commission's database is a custom-built system whose functionality was designed primarily to record victims and violations to support the work of the three Committees. Its current format does not lend itself easily to use by researchers or the general public.
22. The Commission therefore recommends that the database:
 - a be converted to run on technology best suited for Internet-based, read-only access, using open-source software wherever possible;
 - b be web-enabled in a user-friendly, searchable format, and
 - c have facilities for extracting the data for further research and analysis.

WEBSITE

23. The Commission established a website, which became popular amongst researchers and scholars of transitional justice. The contents of that website currently appear in a section on the Department of Justice website.
24. The Commission recommends that custody of the website should be held by the National State Archives, who should manage it in a way that ensures maximum accessibility. The Commission recommends that the Archives, in consultation with the various stakeholders, should decide on the physical location of the site.

WITCHCRAFT

25. The Commission received statements from many victims as well as a number of amnesty applications regarding the use of witchcraft in the commission of gross

human rights violations. 'Witchcraft' and 'tradition and culture' were major factors cited in a number of cases as being the motivation for the commission of gross human rights violations.

26. The Commission, and in particular the Amnesty Committee, accepted 'witchcraft' as a political motive sufficient within the context of the founding Act to grant amnesty to those applicants who had satisfied the provisions of the amnesty legislation. The political context of the time warranted this approach.
27. However, the Commission notes that this problem is endemic particularly in many parts of Limpopo province. The Commission received hundreds of statements regarding this issue after the cut-off date.
28. The Commission recommends therefore that the authorities note this problem as a matter of urgency, and embark on an education program and take action to stop practices related to witchcraft that lead to the commission of gross human rights violations.

EXERCISE OF THE PRESIDENTIAL PARDON

29. The following comments and recommendation are made in the full knowledge that the Commission operated under enormous political and legal constraints and that it was not a holy cow that was not itself open to criticism:
30. With this in mind, the Commission notes:
 - a the recent pardons extended by the President and
 - b the President's constitutional discretion to pardon those who have committed crimes, and further,
 - c that it in no way wishes to impugn or intervene in this discretion.
31. The Commission is, however, of the view that this presidential discretion should not be used to subvert the rights of victims by framing blanket amnesties through a pardon process.
32. The Commission therefore recommends that in the event that the President is considering a further amnesty provision, the following should be taken into account:
 - a that the rationale for establishing the Commission should not be undermined and that the value of its work should not be compromised through such a process;

- b that real reconciliation comes from facing the demons of the past honestly and demanding truth and accountability, and
 - c that victims should not be 'revictimised' and that any amnesty should take into account their needs and their right to the truth and full disclosure and ultimately reparation.
33. The Commission is thus of the view that any amnesty and pardon must make provision for the rights of victims and maintain the constitutionality of our new state based on disclosure and a respect for the human rights of all.

POPULAR VERSION

34. The Commission will hand the Minister of Justice the completed popular version of the Truth and Reconciliation Commission's report.
35. The Commission recommends that the Minister has this printed, published and distributed to schools and tertiary institutions in conjunction with the Ministry of Education.

'CLOSED LIST' POLICY

36. The Commission, anxious not to impose a huge burden on the government, adopted a 'closed list' policy. Effectively this limited the payment of reparation only to those victims who made statements to the Commission before 15 December 1997. In the period between December 1997 and January 2002, victims' groups confirmed to the Commission that they had collected more than 8000 statements from victims who, for a variety of reasons, were unable to access the Commission. The consequence of ignoring this group of people has potentially dangerous implications for South Africa, as communities may become divided if some receive reparation that is not accessible to others who have had similar experiences.
37. The Commission is of the view that the 'closed list' policy should be reviewed by government, in order to ensure justice and equity. It needs to be noted that, in many other countries which have gone through similar processes, victims have been able to access reparation many years after the truth commission process has been completed.