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# AMNESTY AND JUSTICE IN POST APARTHEID SOUTH AFRICA
## How not to construct a democratic normative framework[1]

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**Introduction**

There is a great temptation to seek particular contexts within which heinous crimes may have been committed so that these may serve as both explanations and justifications for such crimes. The context thus becomes responsible for human rights abuses and the individual authors of these crimes are denied both agency and culpability.[2] This paper tries to demonstrate that it is necessary to avoid such temptations if a normative framework based on the rule of law is to be developed n South Africa.

At the heart of the search for a durable democratic order in South Africa lies the question of how to deal with the violence committed in defence of and in opposition to Apartheid. This question formed a critical part of the negotiations leading to the demise of the former authoritarian regime since the risk of punishment for human rights abuses made apartheid leaders reluctant to surrender power without protection against prosecution and other assurances.[3] While the question was partially addressed in the provisions for pardoning the perpetrators of violence in the final clause of the interim constitution[4] which ensued from the negotiations, it remains vitally important in contemporary South Africa. The manner in which we confront it has far reaching consequences for the possibilities of establishing a normative framework based on the rule of law and for safeguarding democracy. This paper deals with some of these implications. In general it is concerned with the constraints and possibilities of the negotiated settlement in South Africa in relation to questions of justice. In particular, it deals with the relationship between an unreformed criminal justice system and the process of granting amnesty to the perpetrators of violence both in defence of apartheid and in the struggle against it. The paper highlights the various dimensions of these separate processes and examines where they overlap, how they strain at each other and what efforts have been made to resolve the tensions. Institutionally, the paper deals with the Truth and Reconciliation Commission, (specifically its Amnesty Committee and its Investigative Unit), on the one hand, and the offices of the Attorneys General and the judiciary on the other. The objectives of the two are clearly contradictory. While the former seeks a basis for reconciliation in revealing as full a picture of past abuses as possible,[5] the latter is concerned with the daily administration of justice. The former tries to indemnify criminals and the latter tries to prosecute them.

The paper commences with a discussion of the political and social context which gave rise to the formation of the TRC and the compromises in the negotiated settlement around the granting of amnesty to the perpetrators of gross violations of human rights in defence of Apartheid. It goes on to explore the relation between the criminal justice system and the truth and reconciliation process by focussing on the contradictory objectives of the two in relation to how perpetrators should be treated. In short, should they be prosecuted and punished or pardoned for their abuses. It then assesses the broader significance of the police commander, Brian Mitchell, receiving amnesty for his role in a massacre of innocent civilians in Natal and discusses the manner in which the proportionality requirement for amnesty in terms of the legislation has been jettisoned. The paper highlights some of the institutional clashes between Attorneys General and the TRC on the use documents and witnesses in both trials and in amnesty hearings. It also comments on the particular trial of former Minister of Defence, Magnus Malan. Finally, the paper discusses the link between the rule of law and the maintenance of a democratic order and the challenge of impunity and political expediency in South Africa.

## A Context for Compromise

The Truth and Reconciliation Commission was born out of the compromises of the negotiations between the African National Congress and the apartheid government of the National Party. The National Party flatly refused to facilitate democratic elections and to relinquish power if amnesty was not part of the deal.[6] Pardoning the perpetrators of violence in defence of Apartheid formed a crucial part of these negotiations and was integral to the constitution which eventuated.[7] Ostensibly designed to promote reconciliation and national unity, the constitution provided for legislation to be passed to absolve state criminals and other gross violators of human rights. The Promotion of National Unity and Reconciliation Act No. 34 of 1995 was signed into law by President Nelson Mandela on 19 July 1995.

Even though this Act repealed all previous legislation dealing with indemnity or amnesty, it indicated that previous decisions regarding the granting of indemnity would remain in force. The Truth and Reconciliation Commission, with Desmond Tutu as Chairperson, was established in terms of the provisions of this Act. Its stated purposes are, "...to promote national unity and reconciliation in a spirit which transcends the conflicts and divisions of the past". This would be done by: "(i)...establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights ...including the antecedents, circumstances, factors and contexts of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings; (ii) facilitating the granting of amnesty...; (iii) establishing and making known the fate or whereabouts of the victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims and by recommending reparation measures in respect of them ; (iv) compiling a report".[8] Three committees and an Investigative Unit were set up to give effect to the provisions of the act - the Committee on Amnesty, the Committee on Human Rights Violations and the Committee on Reparation and Rehabilitation. The powers and functions of each of these were clearly defined by the Act.

More than anything else, the question of how we are to deal with those guilty of committing heinous crimes in defence of and against apartheid has occupied the public mind now that the revelations of the Truth and Reconciliation Commission are compelled into our consciousness on a daily basis through television broadcasts of the hearings as well as extensive radio and newspaper coverage of its different aspects. While Minister of Justice, Dullah Omar has been at pains to insist that amnesty should be granted on a 'morally acceptable basis', others, like Amnesty Committee member, Wynand Malan, recognise the moral incoherence of granting amnesty to mass murderers they argue instead that, "..if we want to judge the past on the basis of superimposing present choices or moral frames...we have no chance of dealing with it - hence I have totally discarded a moral frame as a basis for reconciliation".[9]

The mechanisms and procedures for the granting of amnesty are contained in chapter four of the Act. It makes provision for the establishment of a committee on amnesty appointed by the state president and constituted by judges and other in legal profession. The committee enjoys a semi-autonomous relationship to the Truth and Reconciliation Commission in that it reports directly to the state president and though its two ordinary members are Truth Commissioners its three judges are not (Du Toit, 1997: 9). In terms of the act one may be granted amnesty only for a crime or offence which you admit that you committed and if it had a clear political objective.

Furthermore, the Act expects, but is not explicit in this regard, that the proportionality of the crime to the objective pursued should play a role in the determination as to whether a specific crime could be defined as having a political objective or not. Since there are no guidelines for the definition of what would reasonably constitute an act proportional to a political objective, the law is open to various interpretations in this regard. In terms of the Act, also, the crime should be specified so that a proper (truthful?) account of the history of the country can emerge. The Act insists on full disclosure of all the relevant facts to the case. If amnesty is granted the pardon is effective for both criminal and civil prosecution.

Arguments in favour of amnesty almost invariably emphasise pragmatic considerations concerning the nature of political compromises and the necessity for concessions in terms of the relative strengths of the contending parties.[10] Desmond Tutu (1996) for example avers that, "...amnesty was a crucial ingredient of the compromise which reversed the country's inevitable descent into a bloodbath. To repudiate amnesty now would be to tear up the Interim Constitution". Boraine (1996:7) agrees, "...amnesty is the price we had to pay for peace and stability...if negotiations politics had not succeeded the bitter conflict would have continued and many more human rights violations would have occurred...the alternative was, in my view, far less desirable and potentially more destructive". Wilhelm Verwoed (1997:7) virtually echoes these words, "Guaranteeing amnesty is the price we, unfortunately, have to pay for peace, the common good, for a negotiated settlement in 1994 which led to a democratic South Africa". The political compromise inherent in the negotiations process was encapsulated in the constitution. Above all, it provides the framework for a reconciliation of the antecedent conflicts. This kind of pragmatism accepts that there was a stalemate out of which neither party could emerge victorious. Under these conditions reconciliation implies that previously held expectations would be revoked in order to embrace the present in its own right, not merely as a step to a different order. The constitution lies at the heart of this kind of argument. It sets, from the perspective of this argument, the framework within which societal conflicts and tensions may be overcome in the quest for reconciliation and national unity (Hardimon, 1994:87-94). Following the theological logic characteristic of the TRC, the guilt of the perpetrators and the shame of the victims ought to be reconciled within a context of forgiveness and for the betterment of all (Patton, 1985: 39-62). On this view pardoning the criminals of Apartheid and condoning their crimes are necessary for the broader aims of peace and building a united South Africa.

This pragmatic position is fundamentally flawed for a number of reasons. It reifies the present as if there are no other possible outcomes. It conceptualises history as an ineluctable process which does not tolerate alternatives and proceeds somehow without any human agency. The democratic forces had no choice in the matter - they simply had to compromise on the violence of Apartheid for the sake of progress at the negotiating table. In the name of being realistic, this perspective attempts to marginalise the awkward questions about the viability of delivery within the context of the compromise. If the negotiations and the resultant constitution are taken at face value and as given, then of course, possibilities for critical evaluation of these processes will be truncated. In this manner, it is implied that the reality of the present is unchanging. This inference is then used in a circular fashion to justify the suspension of justice in the granting of amnesty. The reasoning is circular because it feeds off itself. Amnesty was necessary for the political compromise which facilitated the adoption of the constitution which in turn provides for amnesty. The position is normatively sealed to avoid questions about the long term possibilities for systemic reform. It necessarily sanctions the existing divisions in South African

society in the facile hope that forgiving wrongdoers will create conditions for legitimation of the new polity.

**Courts or Commissions**

Both the criminal justice system and the truth and reconciliation commission are ostensibly engaged in a search for the truth[11]. Their ways part immediately beyond this superficially common objective. While the TRC tries to reach the truth by promising the perpetrators amnesty in exchange for a public (or private) admission of their guilt, the criminal justice system seeks truth through the forensic mechanism of the courts, receiving evidence by means of investigation and cross-examination and passing sentences on the wrongdoers. The aim is clearly retributive rather than reconciliatory. Criminals have to be prosecuted for their offences in the hope that their punishment will somehow act as a deterrent and prevent future wrongdoing by both offenders in particular cases as well as other prospective offenders. Prosecution and punishment are legal processes. Amnesty, on the other hand, is an administrative procedure following a set of criteria as laid down by law, although the amnesty process may display all the trappings of a juristic process with incumbent judges to interpret the act. The legal process on the other hand is contested by a wide variety of actors, including police investigators, prosecutors, defence lawyers, magistrates and judges. In contrast, the Amnesty Committee takes weighty decisions on the basis of the evidence presented without the benefit of cross-examination and contestation, certainly not of the sort that would be needed to prosecute wrongdoers in a court of law. While these decisions may be legally challenged in a court of law, this only marginally affects the overall working of the amnesty committee.

In an adversarial legal system, such as we have in South Africa, a court case can be conducted without a word from the accused, as the defence may attempt to protect the suspect by invoking the right to silence. Yet, in amnesty applications the perpetrator is obliged to talk about the offences in as frank and open a manner as possible. While the amnesty applicant exposes criminal behaviour, the suspect in a court case may try to conceal guilt in order to lessen the sentence when it is imposed. Amnesty is only awarded to those who implicate themselves in the crimes of the past. If, in the opinion of the Amnesty Committee, an applicant does not provide a full disclosure of the particular episodes of human rights abuse outlining his/her specific involvement in it, amnesty will be denied. The truth, on the other hand, may be extremely harmful to an accused since the court's knowledge of the full nature of the crime may determine more severe sentences. The court has the obligation to piece together the evidence in an effort to reconstruct the past as accurately as possible. The Amnesty committee relies on the applicant to do this for them, with the help of some prompting from the committee members and some corroborating evidence emerging from research and investigation into the crime. This has resulted in widely divergent accounts presented by witnesses in court and before the Amnesty Committee.

There are other complicating factors in the contrast between the criminal justice system and the amnesty committee in contemporary South Africa. For one, we have to bear in mind that the legal system has been directly inherited from the previous regime. According to Varney and Sarkin (1997:142) there is a fundamental crisis in the criminal justice system, stemming from the lack of perceived legitimacy of the system and its role in maintaining authoritarianism. State prosecutors, investigators and even judges tolerated the manifestly unjust institutions of Apartheid. Many also actively colluded in the maintenance of the system, disregarding human

rights abuses and implementing Apartheid laws. Krish Govender of the National Association of Democratic Lawyers (NADEL) expressed this complicity in the following terms, "It was common knowledge among progressive lawyers that specific judges were selected to deal with political cases. Other judges that were at best neutral or could not be manipulated were conveniently bypassed"[12]. At the very least, Attorneys General lack the experience for securing prosecutions now that they do not have on their side a security establishment which could, under duress and torture, force confessions out of offenders.[13] Some judges implicitly condoned the underhand methods of the security police by allowing evidence extracted on this basis and by covering up cases of police brutality. In contrasting attorneys general and the judiciary with truth commissioners and amnesty committee members, it is thus instructive to remember the role of the former during Apartheid.

The ideal-typical contrast between the criminal justice system and the process of granting amnesty to perpetrators of violence must be seen against the background of complicity and in the context of the compromises which brought about a democratic South Africa.[14] As may be expected, while there have been some crucial institutional changes in South Africa in relation to human rights - the establishment of the constitutional court and the bill of rights - the judiciary itself has not changed in any fundamental way since 1994. The appointment of Justice Ismail as Chief Justice presiding over the Appeal Court created a furore as the overwhelming majority of judges indicated their support for a white colleague. Their support was in vain as the Judicial Service Commission went ahead and appointed Ismail as the first black Chief Justice in the country. The unreformed nature of the judiciary was far more pronounced in a similar case in Kwa-Zulu Natal where an executive member of the powerful secret organisation of Afrikanerdom, the Broederbond, Judge Willem Booysen, was in the running for the post of deputy judge president of the provincial judiciary against a black colleague, Judge Vuka Tshabalala. Fourteen judges of the provincial bench took the very unusual step of writing a letter indicating their support for the broederbonder Booysen, and making it very clear that Tshabalala would not, "...command the respect of the other judges in the division and morale would decline" (Rickard, 1998:12). The response to the apparent intransigence of the judiciary has been varied. On the one hand there are calls for the ANC to obtain the two-thirds majority in next year's election to enable it to rewrite the constitution and thus have the power to undermine the independence of the Judicial Service Commission. This will ensure the 'transformation' of the bench. Others argue for a more transparent process in which the judiciary has a far more public role, subject to popular scrutiny and criticism, but independent of the government of the day (Rickard, 1998:13). Finally, there may also be struggles over terrain as the TRC tries to exercise its many powers and the Attorneys General attempt to preserve the integrity (sic!) of the criminal justice system.

**Sentenced or Saved[15]**

On 30 April 1992 Brian Mitchell was sentenced to death on eleven counts of murder[16] and to imprisonment for three years on each of two counts of attempted murder. At the time of the offences he was the commander of the police station at New Hanover in the Natal province in South Africa. He was also secretary of the Joint Management Committee in Pietermaritzburg and appropriately trained in counter-insurgency methods. These committees had been set up throughout the country as part of the government's 'total strategy' to combat opposition to apartheid. They were responsible for the counter-revolutionary strategy of the apartheid

government, part of which included training 'special constables' who could be deployed in their own communities. Mitchell was involved in a security force operation against the United Democratic Front in which he had instructed a group of 'special constables' to attack a house in an area under his jurisdiction known as Trust Feeds. Shortly after the incident it surfaced that they had attacked the wrong house killing eleven people who had absolutely nothing to do with the ongoing battles. They were not the intended victims at all[17]. Despite frenetic attempts by Mitchell's superiors to cover up the blunder, he was eventually brought to justice together with the four 'special constables'. His death sentences were commuted to thirty-three years imprisonment on 24 April 1994 merely four days before the first national elections based on universal franchise in South Africa. In the second week of December 1996, he was granted amnesty in terms of the provisions of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 and pardoned for his crimes at both civil and criminal levels. He had not yet served five years of his sentence.

The Trust Feeds massacre, Mitchell's involvement in it and his subsequent amnesty raise critical questions about the nature of South Africa's political transition in relation to the administration of justice, the pursuance of reconciliation and the quest for unravelling the truth about the ugliness of South Africa's past. The massacre unambiguously demonstrated the collusion of the police in acts of heinous violence against opponents in the dying days of apartheid. Mitchell's amnesty highlights the enormous power of the amnesty committee - to decide whether a perpetrator will be pardoned or remain punished. It has the authority to undo the work of the criminal justice system by supposedly replacing retribution with reconciliation based on the truth[18] of full disclosure.

Pardoning Mitchell for his crimes was significant for the amnesty process in a variety of ways. It showed other similar criminals that amnesty might work for them as well. It is a moot point whether the result of Mitchell's amnesty was intended or not by the committee. Circumstantially though it could be argued that committee members were aware of the fact that the (then) closing date for amnesty applications was merely days away and that hardly any employees of the former state had applied for amnesty. The process had to appear to be working in order to attract other prospective applicants and so reveal the truth about other abuses. Mitchell was the first member the security forces of the apartheid government to be granted amnesty for crimes committed in the course of his duties. It represented a turning point for many policeman and other state operatives who had been reluctant to apply for amnesty because they were uncertain about the way in which amnesty would be interpreted by the committee. Former commissioner of police, General Johan van der Merwe expressed this apprehension in the following terms:

> You take a big risk if you ask for amnesty now, and then you are charged. After that you can hardly exercise your rights in terms of the Criminal Procedure Act ...to exercise your right of silence, or to plead not guilty, or to wait and see the evidence.[19]

**The Politics of Proportionality**

The evidence before the amnesty committee is not admissible in future prosecutions[20] in the event of amnesty being refused. It would, however, be extremely difficult for a perpetrator to plead not guilty after having incriminated himself in his evidence before the Amnesty Committee or the Investigative Unit of the TRC? Perpetrators were especially unsure about how the Amnesty Committee would apply the 'proportionality principle' of the Act according to which

the seriousness of the crime has to be related to the nature of the political objective pursued. As van der Merwe outlined above, they were also troubled by the possibility that full disclosure of their crimes, as required for amnesty, would ruin their chances in the courts of law if their amnesty applications did not succeed. Indeed, even human rights lawyers, like Brian Currin, were advising their clients (many of whom are perpetrators) not to apply for amnesty.[21] Kwa-Zulu Natal Attorney General Tim McNally indicted Dirk Coetzee and several of his colleagues in the former security police despite the fact that they had lodged amnesty applications. Ironically, Tim McNally, had earlier discredited Coetzee as an unreliable witness in his internal investigation and before the Harms Commission into police death squads. Coetzee was indicted for something that he had already admitted he had done.[22]

The legal process of prosecutions and the administrative procedure of granting amnesty crossed paths at a number of different points with varying consequences for the accused and the victims. The acquittal of former Minister of Defence, Magnus Malan, and others accused of the brutal massacre of 13 people at the home of United Democratic Front (UDF) activist Victor Ntuli at KwaMakhutu in Kwa-Zulu Natal, acted as a disincentive to perpetrators, especially those in the military, to apply for amnesty (Varney and Sarkin, 1997:141). Mitchell's amnesty had the directly opposite effect. It certainly sped up the process encouraging other state criminals to apply for amnesty. Effectively, it meant that the 'proportionality principle' of the Act would be very leniently applied or not applied at all. After all, how were the amnesty committee members to decide on questions of proportionality? If a mass murderer, like Mitchell, was merely carrying out orders how were they to establish the various levels of culpability? No doubt, the work of the Amnesty committee is complicated by the fact that responsibility for human rights abuses was so thoroughly diffused through the entire system, and dispersed over a wide range of state functionaries. Also, there are no objective measurements for proportionality - it depends very largely on moral intuition. It is thus unsurprising that there is very little evidence that proportionality or proximity are being considered at all as important factors in the granting of amnesty.[23] In considering the amnesty applications of three APLA operatives responsible for the brutal attack on the Heidelberg Tavern, a favourite spot for local Cape Town students, the Amnesty Committee found that the applicants complied with the requirements of the act in that: (i) they were acting on the explicit orders of a publicly known political organisation, (ii) they did not act for personal gain and (iii) they had no personal knowledge of the victims. The decision does not mention the condition of proportionality at all.[24]

**Evidence, Truth and Justice**

In his judgement in the case of AZAPO and Others v The President of the Republic of South Africa and Others, deputy president of the Constitutional Court, Justice Mahomed made the following statement:[25]

> Central to the justification of amnesty in respect of criminal prosecution for offences committed during the prescribed period with political objectives, is the appreciation that truth will not effectively be revealed by the wrongdoers if they are to be prosecuted for such acts. That justification must necessarily and unavoidably apply to the need to indemnify such wrongdoers against civil claims for payment of damages. Without that incentive the wrongdoer cannot be encouraged to reveal the whole truth which might inherently be against his or her material or proprietary interests.

The decisions of the committee do not involve a great deal of detailed evidence at all - certainly not of the sort that usually accompanies criminal prosecution in a court of law. This is not surprising. Amnesty has been used as an incentive for the perpetrators to tell the truth, to reveal the full horror of past violations of human rights. It does not make much sense to offer such an inducement to political criminals only to remove it if they do not meet the further requirements of the Act. This would defeat the initial purpose of the incentive. It is far more expedient to simply apply amnesty by the line of least resistance, and in so doing, deviate from the Act itself.[26] Amnesty has to appear to be working, if is to act as an incentive to perpetrators. The only sure way in which it would appear to be working is if state criminals and other perpetrators are actually allowed to (literally) get away with murder. Cynically stated, since we are incapable of administering justice, of prosecuting the criminals, we should rather attempt to lure them into revealing their crimes and exposing what their roles were in the violence of the past. These very same perpetrators may then walk free without even showing remorse for their actions. Bishop Desmond Tutu (1996) thus appealed to perpetrators to apply for amnesty, "(T)he law doesn't require that they should express remorse: they can come to the Amnesty Committee and say, for example, that they fought a noble struggle for liberation, but that because they opened themselves to prosecution or civil actions as a result, they are asking for amnesty." This is cynical because remorse is supposedly one of the imperatives for genuine reconciliation. If remorse is jettisoned, what manner of reconciliation can be accomplished?

Those perpetrators who were not persuaded by Mitchell's amnesty to approach the TRC voluntarily were compelled do so by the threat of subpoena to appear before the TRC. There were two further catalysts encouraging eligible applicants to apply for amnesty. Firstly, the cut off point covered by the amnesty provisions was extended to 10 May 1994. Secondly, the fact that the Constitutional Court ruled in favour of the Truth and Reconciliation Commission and against AZAPO and others on the constitutionality of the granting of amnesty. However, as the process gained momentum, the Truth and Reconciliation Commission came into direct conflict with Attorneys General who were in the process of investigating criminal cases against the applicants. In some cases like that of Hechter, Cronje, van Vuuren and Mentz, the Transvaal Attorney General, Dr J D'Oliviera, had already issued warrants of arrest for their roles in 27 cases of murder, attempted murder and malicious damage to property, when they approached the Amnesty Committee with their applications. They have appeared before both the Supreme Court as well as the Amnesty Committee. In terms of the Act, the matter has been postponed by the Supreme Court pending the outcome of their amnesty application[27].

The cases of Hechter, Cronje, Van Vuuren and Mentz bear testimony to the tensions between the offices of the Attorneys General and the Truth and Reconciliation Commission. After extensive investigations, indeed at about the time that the investigations against them were finalised, Dr D'Oliviera,[28] claims that he was on the verge of prosecuting these men when they "...like skelms ran to the TRC to save their own skins". The Act recommends that the Committee on Amnesty may request a prosecutional authority to suspend proceeding against a suspect pending the outcome of the amnesty application[29]. The vague wording of the legislation has allowed Attorneys General considerable discretionary powers. It is also the source of much friction between the TRC and the criminal justice system as they struggle over the various interpretations of the Act. Attorneys General complain that the TRC process undermines their work in a variety of ways. The Truth Commission has the power to subpoena any witness and to get access to any document which may be necessary in its investigation of a particular case. The disclosure of such information may hinder the case of the state if defence lawyers are alerted by the premature

exposure of evidence when witnesses appear before the amnesty committees. Prosecutions under such circumstances are deleteriously affected.[30] Yet are we in a position to prosecute? What evidence exists against the perpetrators?[31]

In his judgement against AZAPO and Others Justice Mahomed makes a sweeping statement about a lack of evidence in respect of all cases, "(A)ll that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corrobarative evidence which could survive the rigours of the law".[32] Amnesty Committee member, Wynand Malan, however argues that the police were on the verge of prosecutions in many of the cases anyway and that the amnesty application have not revealed a great deal about the atrocities of the past.[33] In reality the situation is more uneven for the courts and for the Amnesty Committee. There have been some spectacular convictions (De Kock, Barnard) and some dismal failures (Malan, Nkabinde).[34] Similarly, there have been some dramatic revelations (PEBCO three) in the amnesty applications and some responses from perpetrators designed to obscure or conceal their roles in the killings. By and large the latter have come from the defence force rather than the police. They have proven to be a much harder nut to crack even if their sinister experiments in chemical and biological warfare and some aspects of the role of the Civil Cooperation Bureau (CCB) have now been exposed. Yet, the narratives remain contested as the memories of perpetrators fade and as they try to retain some sense of moral worth by not disclosing the full horror of their deeds. There are still many unanswered questions relating mostly to the link between the politicians and the security operatives, between those who made the policies and those who pulled the triggers.

While the Attorneys General complain about interference in their work, the gripe of the Investigative Unit of the TRC on the other hand, is that their work of reconciliation is hampered when Attorneys General refuse to hand over witnesses or documents.[35] The equivalent to amnesty in the course of the administration of justice is an indemnity offered in terms of section 204 of the Criminal Procedure Act. This involves suspects who are prepared to become state witnesses against their accomplices in exchange for not being prosecuted in specific cases. Indemnity, however differs from amnesty in one extremely important respect. While amnesty pardons the perpetrator at both civil and criminal levels, indemnity only pardons the perpetrator at a criminal level. The human right of the victims and survivors to launch civil claims against the perpetrator remains intact. The notorious askari[36] Joe Mamasela is one such state witness. He has not applied for amnesty but has given evidence against other members of the security establishment. In a case like this the TRC petitions the relevant prosecutional authority for the release of the state witness in order that he/she may testify in an amnesty application. Upon completion of the hearing, the state witness is returned to the prosecutional authority. This is especially required when it is considered that the evidence of the state witness may differ fundamentally with that of the amnesty applicants.

Most recently, the Attorney General for the Transvaal, Dr Jan D'Oliviera, released Joe Mamasela to give evidence before the Amnesty Committee in the case of five former security policemen.[37] They are applying for amnesty for the murder of the PEBCO three.[38] Mamasela's version of events has contradicted their version in a number of important respects. While admitting that they killed the three civic activists, the policemen deny having tortured them. In contrast, Mamasela insists that they were severely tortured, going into the most gruesome details of their suffering before they were killed. One may ask why these security policemen would risk

prosecution by not providing a full disclosure of their abuses. Would it not be in their interests to simply bare all and get freedom in exchange for the truth? There are a variety of ways in which we may speculate about their reasons for emerging with a polished 'story' which they have obviously rehearsed over and over. This ploy may have worked if there is balance of probability in their favour. However with an eye witness contradicting their version of the violations their story appears improbable and certainly not a full disclosure. I would be surprised if they get amnesty. While the Amnesty committee may have unconsciously (or consciously- who knows?) decided to abandon proportionality and proximity they appear to have applied the requirement of full disclosure very consistently. If there is even a hint that part of the story has been distorted or hidden, the Amnesty Committee has not granted amnesty.

The clash between the justice system and the TRC process does not only involve criminal cases. Craig Williamson, spy for the former regime who penetrated the ANC hierarchy in exile, admitted that he and his colleagues killed Jeanette and Katherine Schoon with a parcel bomb in Southern Angola. Soon after this admission was published in the popular media in 1995, Marius Schoon, the bereaved husband and father, launched civil proceedings against Williamson. In response, the latter has applied for amnesty in order to dodge the civil suit against him. These instances prompted Transvaal Attorney General to assert, "(O)bviously, the Truth Commission already interferes with our work, so any extensions will have far-reaching implications".[39] In contrast to this interpretation, Minister of Justice, Dullah Omar, argues, that, "(T)he role of South Africa's courts of law and prosecutional authority remains firmly in place...The role of the criminal justice system is unaffected by the bill".[40]

Besides the obvious acrimony involved when the work of these two institutions so clearly clashes, there are instances of sound cooperation as well. The Attorneys General may call on the TRC not to exercise its powers in cases where prosecutions are imminent and the TRC can likewise request the Attorneys General refrain from proceeding with prosecutions while they dispose of an amnesty application. Dr D'Oliviera did not execute the warrant of arrest for Katisa Cebekulu to allow him to enter the country from England in order to testify in the TRC hearing regarding the human rights violations of the Mandela United Football team.[41]

The institutional conflict between the criminal justice system and the Truth and Reconciliation Commission raises broader questions about the nature of democracy and the possibilities for establishing the rule of law in South Africa. The episodes outlined above suggest that there are ample opportunities for perpetrators to avoid civil or criminal prosecution by simply applying for amnesty. On the face of it, the deal appears ludicrous. Criminals simply need to tell the truth before the Amnesty Committee in order for justice not take its course.[42] The wider social implications of not prosecuting criminals needs to be seriously considered in relation to the impact of impunity on the fragile democratic order in South Africa. Amnesty sends a message to future state criminals that there is the chance that they may be exonerated especially if they remain in power long enough to ensure that they are not easily dislodged, or that some compromise may be necessary to remove them from power. Needless to say, it is a message with grave consequences for democracy.[43]

**Victims and Violators**

It could be argued that the major accomplishments of the Truth and Reconciliation Commission

in South Africa (TRC) are twofold. Firstly, it has achieved a widespread public exposure of the human rights abuses of the Apartheid regime. Secondly, it has given ordinary people the opportunity to voice their suffering. No longer can anybody deny knowledge of these atrocities. Simultaneously, victims and survivors have had some sense of human dignity restored. No doubt, the effect of these achievements has been far-reaching. The manner in which the perpetrators should be dealt with has elicited a variety of different responses from the survivors and the families of the victims. Some have asked for nothing more than the names of the perpetrators in order to know who they should forgive, others have demanded that justice should be done and that the perpetrators should be criminally convicted and prosecuted for civil redress, some have wanted revenge, others have asked for bursaries for their children, for a proper burial for the slain and for tombstones to mark the graves.[44]

Hidden in the wide variety of responses of the victims and survivors are broader concerns about how to forge a normative framework with respect for human rights and, at the same time, deal with the perpetrators of crimes both in defence of Apartheid as well as in the struggle against it. There are always difficulties when an authoritarian regime makes way for a democratic order based on universal franchise with a bill of rights. One of the gravest of these in South Africa is how to initiate respect for the legislative process, the rule of law and the institutions responsible for implementing these laws. Extensive state inspired violence has undermined the very basis of a democratic order. The Apartheid state had a monopoly over the use of force and its instruments of repression were systematically used against the mass of the population so as to maintain their disfranchisement. This is not to suggest that Apartheid was distinguished by violence only. There were a variety of other mechanisms of subjection which allowed a white minority to rule over a subordinate black majority[45]. Yet, despite the very broad precincts of Apartheid rule, crimes of violence were committed by its functionaries. Over and above the 'violence of normal times' (Barrington-Moore, 1966) apartheid also spawned a security system which acted with impunity against the mass of the population.

The TRC has shoved this simple reality, obviously known by only those immediately affected by it, to the centre stage of public attention. However, it has concentrated on isolating cases of specific abuse and treated them on an individual basis rather than presenting an analysis of the generalised impact of apartheid on the mass of the population as a context for these abuses. I think there is a possibility for doing both. We should distinguish the direct subjects of human rights violations from the disenfranchised majority who have suffered, in very tangible ways, as a result of the ordinary working of the system of Apartheid - forced removals, pass laws, influx control, educational discrimination, residential segregation and a battery of other measures for the control over the subject population. They are very clearly victims too? Mamdani (1996) makes the telling point that there were relatively few perpetrators of state violence in South Africa, yet there were very many beneficiaries of the system of apartheid. Similarly, there are relatively few victims of direct state crimes but a whole population who suffered under apartheid. It is thus imperative that the metaphor of victims and violators should be placed in the context of the 'violence of normal times'. What made these abuses possible? How can we prevent them from happening in the future? It is necessary to examine both the dynamics of apartheid generally as well as the specific episodes of human rights violations so that we can appreciate the need for both the systemic reform as well as individual empathy for the direct victims of apartheid atrocities. Yet, guilt has to be individualised. Criminals, and especially state criminals have to bear responsibility for specific crimes and be held accountable for these in order to preserve the integrity of the criminal justice system. It is a major argument of this paper that

democracy cannot be realised without such accountability.

**Contemporary Challenges and Crises**
(instead of a conclusion)

According to Nino (1996:146-147) following Shklar, there are a number of advantages of the criminal justice system over truth commissions. It would assist our understanding to list these and then try to assess their relevance to the South African situation.

Firstly, truth commissions cannot replicate the "quality of narration" of an adversarial trial. I would argue that this would depend on the quality of cross-examination in court or the depth of the confession before the Amnesty Committee. I do not think that our narratives of the past will necessarily be enriched by criminal tribunals in the South African case where attorneys general and state prosecutors are usually no match for sophisticated defence lawyers. Secondly, trials further the rule of law, especially when the meticulous attention to court detail and procedure is counterposed with the lawlessness of the authoritarian predecessors who may now be suspects, accused or defendants. Yet, the assumption here is that the courts are impartial. Where we have a criminal justice system inherited so entirely from the previous regime, this is not the case. Instead, hidden agendas, the political history of some Attorneys General and judges, their cosy existence with the authoritarianism of Apartheid do make this point stick in contemporary South Africa. Thirdly, trials replace the impulse towards private revenge, since there is a public perception that justice is being done. Finally, trials assist victims to recover their self-worth and respect as the story of their suffering is given public exposure and official sanction. In South Africa, I would argue that the statements before the Committee on Human Rights Violations have gone a long way towards realising this aim. However, they are blighted by the absence of perpetrators at the hearings. Altogether 7 124 amnesty applications have been received by the Committee on Amnesty. As at December last this year, 5 111 of these have been dealt with and of these only 216 applications have been successful.[46]

Cynics may ask whether it is worth all the trouble - the enormous public interest, the media exposure, the state expenditure, the endless debates - for merely 216 amnesties. According to the Human Rights Commission's submission to the Truth and Reconciliation Commission, about 15 000 people died in politically-inspired violence between 1990 and 1994 - hardly a peaceful transition. Nyanisile Jack, a formerTRC researcher, takes this argument somewhat further in suggesting that the underlying reason for the conception of a peaceful transition is the fact that relatively few whites died in the conflict. On this perspective, it is quite easy to erase these deaths as irrelevant to the democratisation of the country, in order to arrive at the blithe conclusion that the transition was "...relatively peaceful ... and miraculous" (Verwoed, 1997:1).

In Kwa Zulu-Natal alone, Ari Sitas, points out that nearly 17 00 people lost their lives in political violence. If so very few people have been officially pardoned for these murders does this imply that the rest have been prosecuted. Sadly not. Especially in KwaZulu-Natal, the TRC has been spectacularly unsuccessful[47] in getting people to come forward to testify before the Committee on Human Rights Violations or to apply for amnesty. Similarly, the criminal justice system has left thousands of cases unsolved. How is democracy to survive in a situation of such monumental impunity? There is no respect for the rule of law and the three agencies of the criminal justice system, the police, the courts and the prisons, are simply incapable of coping

with the crisis, themselves fraught with problems of legitimacy, being so firmly rooted in the past. Needless to say, there is no respect there for the TRC process of reconciliation either. Neither justice no reconciliation is on the immediate political agenda of this province. A whole host of questions and challenges are posed by this situation. These revolve around the main issue of exceptionalism. Is KwaZulu-Natal a special case worthy of a special amnesty? If a special peace is brokered in the province it would mean the most severe test for the TRC process and, of course, it will have far-reaching consequences for the administration of justice as truth commissioner Richard Lyster comments "(I)t sends a completely wrong message about what happens when you kill people. It sends a fundamentally bad message about the notion of justice in this province when you have police, magistrates and judges who are pushed aside, and politicians essentially decide whom to prosecute and whom to giver amnesty to".[48] Exceptionalism is anathema to the notion of the rule of law, one of the cornerstones of any democratic order. Indeed, the constitution guarantees that everybody should be treated equally before the law. Thus, if a separate peace or special amnesty is brokered in KwaZulu-Natal there would be nothing stopping anybody else from demanding the same blanket pardon. The result would turn the entire TRC process into a fiasco. It is thus far more likely that inertia will simply set in and that the least possible will be done about the situation.

There are other challenges and crises to the legitimacy of the TRC process. Not least of these relates to the partiality of the committee in granting amnesty to 37 ANC members, including Thabo Mbeki. Although the applications were individual in the sense that each member submitted a separate application form, they did not conform to the requirement of the act for full disclosure of specific acts or omissions for which amnesty was being sought. Instead, the applications provided no detail on the identity of those involved nor the particular offences. Mr Wally Serote, for example had been granted amnesty for "...acts unknown to me unless stated otherwise by individual amnesty applicants". Peter Mokaba asked for and was granted amnesty for offences "...as detailed by individual applicants who may implicate me".[49] The successful challenge to the legality of these amnesties came from the TRC itself, the Democratic Party and the National Party. Since the Committee on Amnesty is autonomous, the TRC had no option but to challenge the amnesties in court. Although the ANC initially opposed the TRC's application to have the amnesties overturned, it withdrew its opposition soon before the matter was to be heard at the High Court in Cape Town. The TRC was to have appointed a new panel to review the 37 amnesty applications. The applicants will be asked for full details on the offences and the new panel will then decide, in terms of the Act, whether these are hearable cases (gross violations of human rights) or whether they may be dealt with administratively (minor offences).

The gravest challenge to the process of reconciliation in South Africa remains the cleavages between the wealthy and the poor and the fact that these coincide, by and large, with the distinction between black and white. As long as the society is fractured by these same inequalities the chances for reconciliation are indeed very slim. Democracy has to mean something materially for the mass of people, mainly through a recognition of their second generation rights. This does not imply a certain entitlement, but that the opportunity for success should be equalised. This is the surest manner to broaden the basis of consent and to protect the democratic order.

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## Notes

1. An earlier version of this paper was presented at the International Sociological Association conference in Montreal, August, 1998.

2. In this regard, Thabo Mbeki attempts to morally exonerate Winnie Madikizela-Mandela for her crimes by insisted that they took place within a particular context in the same manner as the agents of Apartheid try to situate their crimes within the framework of a war mentality.

3. Minister of Justice Dullah Omar makes this point in the following manner, "The Nats simply refused to negotiate if they did not get amnesty. They were pushing for a blanket amnesty but we rejected this notion and argued instead for the kind of process as we now have in the TRC". Interview, Cape Town, 19 August 1997.

4. The Interim Constitution, Act No 200 of 1993 provides that, "...amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end Parliament under the constitution shall adopt a law determining a firm cut-off date...and providing mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed".

5. Reconciliation through Truth is the driving motto of the TRC.

6. Dullah Omar thus described the process, "Amnesty was a compromise position in negotiations to allow for the process of democratisation to continue. Even though we recognised that amnesty may be counter-productive to the establishment of the rule of law, the balance of forces compelled this compromise to allow elections to take place". Interview with Minister of Justice Dullah Omar, Cape Town, 19 August 1998.

7. South African history is punctuated with examples of indemnity being granted, or, at least, policies of leniency being observed, after instances of state violence. The turbulent conflicts in the Anglo-Boer War and the two world wars, the Bulhoek Massacre of 1921, the suppression of the White Miner's Strike of 1922, the Sharpeville massacre in 1960 and the political repression of the Soweto revolt were all followed by some or other form of official exemption from criminal or civil prosecution for the functionaries of the state and other sympathisers (Hendricks, 1997)

8. Promotion of National Unity and Reconciliation Act No. 34 of 1995, Chapter 2, (3).

9. Hansard, 17 May 1995, p1339. Interview with Wynand Malan, Johannesburg,

10. See Hendricks (1998: ) for a discussion of other arguments in favour of amnesty and against it.

11. The different ways in which the concept of truth is employed by the Truth and Reconciliation Commission and the criminal justice system in relation to the manner in which the concept has been philosophically treated is the subject of another paper.

12. Weekly Mail and Guardian, 9 May 1996.

13. Commenting on why McNally lost the Malan trial, The Weekly Mail and Guardian, October 18, 1996 suggest that, "It is far more likely that his failure to secure any convictions in the Malan trial resulted more from a lack of competence in the hard work of prosecution - digging for evidence, finding the proper witnesses, covering all elements of the offence and ensuring no gaps, and diligent and searching cross-examination".

14. See Dugard (1978:280) for a sustained analysis of the role of the judiciary during Apartheid. He questions the independence of the judiciary, especially after 1955 when the Appellate Division was expanded to reflect Afrikaner nationalist interests, and argues that the judges preferred interpreting legislation in such a way that it would facilitate the task of the executive rather than defend the freedoms (such as there were) of the individual and uphold the rule of law.

15. Besides literally saving his skin, Mitchell has also tried to 'save' his soul by joining a charismatic Christian sect.

16. The following are the names of the murdered: Mseleni Ntuli, Dudu Shangase, Zetha Shangase, Nkoyeni Shangase, Muzi Shangase, Filda Ntuli, Fukile Zondi, Maritz Xaba, Sara

rather than defend the freedoms (such as there were) of the individual and uphold the rule of law.

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16. The following are the names of the murdered: Mseleni Ntuli, Dudu Shangase, Zetha Shangase, Nkoyeni Shangase, Muzi Shangase, Filda Ntuli, Fukile Zondi, Maritz Xaba, Sara Nyoka, Alfred Zita and Sisedewu Sithole.

17. The blunder also reveals the monumental ineptitude of the security forces, but this is not central to our analysis.

18. The advertising slogan of the TRC is "reconciliation through truth".

19. Weekly Mail and Guardian, 26 July 1996.

20. Promotion of National unity and Reconciliation Act No.34 of 1995, Chapter 6, Clause 31 (3).

21. Weekly Mail and Guardian, 26 July 1996.

22. See Pauw (1991:142) for a detailed account of police death squads and the complicity of the political and legal establishment in cover-ups.

23. If I may allow my own subjectivity to creep in here. The APLA (military wing of the PAC) operatives who were responsible for the St James Church massacre in Cape Town were recently granted amnesty. Even if, by some obscure logic, killing people attending Sunday mass could be construed as a political act - the question remains - what proportionality exists between this massacre and the objective of political emancipation?

24. TRC-list@www.truth.org.za, 16 July 1998.

25. Constitutional Court of South Africa, case CCT 17/96.

26. Head of the Investigative Unit, Dumisa Ntsebeza, is of the opinion that nobody would be granted amnesty if the law is interpreted in the strictest sense. Interview, 12 June 1998.

27. Interview with Dr J D'Oliviera, 10 June 1998.

28. Interview with Dr J D'Oliviera, 10 June 1998

29. Promotion of National Unity and Reconciliation Act No. 34 of 1995, 19 (7).

30. Interview with Dr J D'Oliviera, 10 June 1998

31. There is compelling evidence to suggest that many official records, especially those of the security establishment guilty of direct human rights abuses, have been destroyed in order to conceal the truth. In their submission to the Department of Justice on the draft bill for the Promotion of National Unity and Reconciliation, the South African Society of Archivists suggested the establishment of a Committee on Official and Confiscated Records. It was felt that the lack of evidence would severely undermine the work of the Truth and Reconciliation

Commission and thus necessary for the Commission to investigate as precisely as possible, who was responsible for the shredding of documents who authorised this practice and how widespread was it. Unfortunately, this recommendation was not incorporated into the Act. Apparently, this critical issue has been removed from the operational side of the work of the TRC and despatched to its research division.

32. Constitutional Court of South Africa, case CCT 17/96.

33. Interview with Wynand Malan.

34. It may not be entirely incidental that the failures have been in KwaZulu-Natal where violence is on the upsurge and the convictions have been in Gauteng where political violence has declined, but this is the subject for another paper.

35. Interview with Commissioner Dumisa Ntsebeza, 12 June 1998.

36. Askari is a Swahili word meaning black soldier. It has taken on a rather different meaning in South Africa, where it now refers to ex-guerillas of the liberation movement who had, for a variety of reasons, abandoned their fellow combatants and the struggle generally to join the security forces of the state.

37. Niewoudt, Du Plessis, Lotz, van Zyl and Snyman.

38. Qaqawali Godolozi, Sipho Hashe and Champion Galela were respectively the president, secretary-general and organiser of the Port Elizabeth Black Civic Organisation (PEBCO). They were murdered after being lured by the security police to the Port Elizabeth airport under the pretext that they were to meet a British diplomat.

39. Interview with Dr J D'Oliviera, 10 June 1998.

40. Hansard Second Reading debate of The Promotion of National Unity and Reconciliation Bill, 17 May 1995 pg 1341.

41. Interview with Dr J D'Oliviera, 10 June 1998.

42. In an earlier paper I argued that amnesty amounted to justice being jettisoned, because criminals are not prosecuted but, more importantly, also because the constitutionally guaranteed human right of the victims to launch civil suits against the perpetrators has been annulled by the provisions for amnesty. (Hendricks, 1997)

43. It is not clear whether this applies to other criminals as well - not only those who are employed by the state. It would make a fascinating sociological study to investigate whether there is any significant association between absolving state criminals and the level of violent crime in South Africa.

44. An empirical analysis of public opinion in this regard based on solid survey data would shed much light on this issue. It begs to be done.

45. See Therborn (1985 ) for a perspicuous typology of such mechanisms in a discussion on the complexity of the relation between force and consent.

46. www.truth.org.za/amnesty.htm. 20 April 1999.

47. No doubt part of the reason for this is the fact that the Inkhata Freedom Party (IFP) has adopted a policy of non co-operation with the TRC.

48. Weekly Mail and Guardian, 14 January 1997.

49. Http://www.woza.co.za/dp90.htm, 4 December 1997.