Article

'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition

Catherine Jenkins
cj3@soas.ac.uk

'Who are we? We are those who listen
To the application that drones on
With the weight of grain silos
Through the middle of a thumping
Summer afternoon.'[1]

Abstract

The conditional amnesty process administered by the Truth and Reconciliation Commission was an innovative feature of the transition to democracy in South Africa, yet it remains relatively under-analysed in comparison with other aspects of the TRC's work. Moreover, although the South African TRC has inspired a new generation of truth commissions in Africa and around the world, the amnesty process has never been repeated. This paper examines the context of the use of amnesty in South Africa and offers some critical reflections on the South African amnesty process, particularly in the context of the rise of international criminal law and the creation of the International Criminal Court. Noting that the demand for 'amnesties for peace' has not diminished, it argues that, although the South African amnesty process was in some respects flawed both in its conception and implementation, it merits consideration by other countries in transition and offers valuable lessons for the development of international legal policy.

Introduction

One of the well-known features of the transition to democracy in South Africa was the offer of amnesty to those on all sides of the conflicts of the past who had committed politically-motivated crimes during the final decades of the apartheid era. The commitment to the granting of amnesty was

incorporated into the negotiated Interim Constitution of 1993. Subsequently, a detailed legislative scheme setting up a Truth and Reconciliation Commission (TRC) with power to grant amnesty was passed by the democratically-elected South African Parliament in the form of The Promotion of National Unity and Reconciliation Act (34 of 1995). Although the TRC was the first truth commission in the world to wield such a significant power, the work of its Amnesty Committee has remained relatively under-analysed, particularly in comparison with other aspects of the TRC's work.[2]

I was one of those who, in the words of Cronin's poem, listened to amnesty applications through the thumping heat of South African afternoons, in township sports halls, churches, conference centres and any other premises willing to accommodate the Amnesty Committee.[3] Although I had originally intended to address the limited question of whether the granting of amnesty for torture was compatible with international law, I quickly became drawn into the wider moral, ethical, political and legal questions raised by the granting of amnesty for political crimes in the context of conflict resolution and democratic transition After many years of observation and reflection, I still see these questions as some of the most important and difficult I have ever considered. Thinking and writing about them is complicated still further by the emotional impact of the TRC. Being little more than an observer, a fly on the wall, to the recounting of a small part of South Africa's hidden past was more poignant, affecting and disturbing than I had expected. My own observations of the amnesty process and my conversations with those most closely involved in it – victims and survivors of political violence and their families, amnesty applicants, lawyers, members of the Committee and other staff of the TRC – caused my views on the use of amnesty to fluctuate severely. In this paper, I take the opportunity of some years of distance to reflect on some aspects of the use of amnesty in South Africa and on its international implications.

South Africa was, of course, not the first state to offer amnesty for political crimes in the context of political transition. In the years leading up to the South African transition, numerous countries had begun transitions from repressive rule to democracy, notably in Latin America and Eastern Europe, but also in Africa. As Diane Orentlicher noted in 1991, many of the new governments 'replaced regimes responsible for brutal crimes – forced 'disappearances', political killings and torture – inflicted on a staggering scale and with wholesale impunity' (Orentlicher 1991: 2539). Whether these crimes should be prosecuted had 'loomed as one of the most urgent, and

agonising, issues confronting the nascent democracies'. As she observed, relatively few of the successor governments had attempted prosecutions, and amnesty laws or decrees had been adopted in such places as Argentina, Chile, Brazil, Uruguay, Guatemala, Nicaragua, El Salvador, Namibia and Suriname.

In the early 1990s, the United Nations too, felt free of legal constraints in endorsing amnesty-for-peace deals, some of which it actively helped to negotiate. In 1993, for example, the UN Security Council helped to negotiate the 'Governors Island Agreement', which allowed President Aristide to return to Haiti in return for an amnesty for the military leaders who had taken control of the country – an agreement which the Security Council, supported by the General Assembly, described as 'the only valid framework for resolving the crisis in Haiti'.[4]

Yet the decade of the 1990s was also a period in which attitudes towards the use of amnesty were in flux and the 'battle against impunity' was in full swing. In the same year that the UN helped to broker the Governors Island Agreement, the Security Council also created the first international criminal tribunal since Nuremberg – the International Criminal Tribunal for the former Yugoslavia – on the basis that 'in the particular circumstances of the former Yugoslavia', the creation of such a tribunal would put an end to the serious violations of humanitarian law occurring there and 'contribute to the restoration and maintenance of peace' (S/RES/808, adopted 22.02.93).

In the course of the 1990s, both the necessity for and the legitimacy of compromise on issues of justice in the context of peace negotiations or transition came to be increasingly challenged. Some of those seeking to promote greater accountability suggested that the need for amnesty was often exaggerated. Orentlicher (1991), for example, argued that, although many successor governments claimed that prosecutions were 'impossible', eg because of risks to the stability of the new democracy, this claim had 'typically been overstated'.[5] Moreover, she summarily dismissed the concern that 'a virtual certainty of punishment could deter some abusive regimes from voluntarily relinquishing power', for, she asserted, 'the prospect of facing prosecutions' was 'rarely, if ever, the decisive factor in determining whether a transition will occur'.[6]

Even those who accepted that amnesties might be useful or necessary in the short term questioned their impact in the longer term. The slogan 'No peace without justice' emerged as a pithy expression of the increasingly widespread opposition to the use of amnesty in both NGO and some inter-

governmental circles. This slogan encapsulated the view that lasting peace and democracy could not be achieved and sustained in transitional societies without a strong focus on retributive justice for the crimes of the past.

These challenges to the use of amnesty were contested by lawyers close to the process of transition in their own countries – notably by the constitutional lawyer and adviser to former Argentinian President Alfonsin, Professor Carlos Nino, and by the Chilean human rights lawyer, Jose Zalaquett (Nino 1991, Zalaquett 1992). They highlighted the complexities of the situations in which successor governments often found themselves and drew attention to the difficulties associated with the prosecution and punishment of past crimes in the particular circumstances of their own countries. Zalaquett (1992:1429) criticised the position of 'ideological purists', who suggested that it was 'preferable to suffer longer under tyranny, in the hope of a fully satisfactory political outcome, than to make progress through untidy compromises', for implicit in this position was 'the arrogant expectation that the future will comply with one's wishes and a disdain for the dreadful costs of such a gamble'. The position of Nino and Zalaquett was echoed in South Africa by Archbishop Desmond Tutu who contended that the offer of amnesty in 1993 was 'a crucial ingredient of the compromise which reversed the country's inevitable descent into a bloodbath' (*Sunday Times* December 4, 1996).

Moreover, the nature of the amnesty in post-apartheid South Africa promised to be distinctively different from its predecessors in other countries: not a blanket amnesty granted to categories of persons for undisclosed offences (as in El Salvador), nor a self-amnesty granted by an illegitimate regime to itself (as in Chile), but a conditional amnesty, granted only upon individual application, subject to compliance with legislative criteria, and administered impartially by a quasi-judicial committee headed by judges in a fair process which would give a voice to victims and survivors and ensure reparations for them. It was thus, a process which seemed to promise not secrecy, impunity, and frustration for victims – typical of so many amnesties – but disclosure and at least some form of accountability and redress. In his *No Future Without Forgiveness* (1999), Desmond Tutu, Chairperson of the TRC, defended the amnesty process of the TRC on the ground that it 'in fact encourages accountability rather than the opposite. It supports the new culture of respect for human rights and acknowledgment of responsibility and accountability by which the new democracy wishes to be characterised' (1999: 52).

Within South Africa itself, the use of amnesty was controversial and the work of the TRC's Amnesty Committee was often compared unfavourably with other aspects of the Commission's work. The Amnesty Committee, in its Formal Report of 2003, acknowledged that there were 'negative perceptions' about that part of the Commission's work that related to indemnifying offenders, and noted that 'the amnesty process was often the subject of scrutiny and criticism' (TRC 2003, vol6, s.1, ch5: 84, at paras 6 and 7).

Internationally, however, the policy of 'reconciliation' adopted in South Africa, of which the amnesty process is seen as part, has commanded considerable respect. The TRC has enjoyed a high reputation, and the amnesty component of its work has generally not undermined this, even in quarters which might have been expected to show marked disapproval. The quotation cited in the title of this paper is part of a comment made to me informally by Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, who spoke admiringly of the fact that South Africa had, in his view, successfully built a legal system without punishment (for past crimes) – an achievement he described as 'remarkable'.[7] He offered no criticism of the way South Africa had dealt with its past – despite the fact that the International Criminal Court represents the culmination of a long international campaign for the prosecution and punishment of those responsible for gross human rights violations and serious violations of international humanitarian law. Reed Brody of Human Rights Watch – an organisation at the forefront of condemning the use of amnesty in Latin America – argued in 2001 that 'prosecutions would have antagonised any hope of a peaceful transition' in South Africa and praised the 'ingenious solution' embodied by the TRC, which involved keeping open the option of prosecutions, whilst granting amnesty on an individual basis to 'those who came forward and told the truth about their crimes, in public and often on television' (*The Nation* Aril 30, 2004). Brody described the TRC as 'effective'. In his view, it 'brought all manner of perpetrators forward'; and, he contended, the TRC's 'quasi-penal' amnesty process 'encouraged confession and transparency'.

Interestingly, however, Brody and other commentators have tended to emphasise the purported uniqueness of the new South Africa and are clearly unhappy about a South African style amnesty process being repeated elsewhere. Thus, Aryeh Neier argued in 1999 that in the specific circumstances of South Africa, the conditional amnesty process served the country better than a process that would have relied solely on prosecutions (Neier 1999:18).

Brody argued that conditions in South Africa, particularly the 'credible threat of widespread prosecutions', were hard to replicate elsewhere, especially in the developing world (Brody 2001). He is frank in admitting that, for him, 'real' justice equals prosecution, and is an enthusiast for international criminal justice, which he sees as 'beginning to be a plausible backstop when national justice fails'.

The creation of the International Criminal Court (ICC) in 2002 does indeed raise serious questions about the viability of the use of amnesty as a tool in conflict resolution, at least for crimes within the jurisdiction of the Court. The question of 'amnesties for peace' was raised in the ICC negotiations but was not explicitly addressed in the Rome Statute, in the sense that no express prohibition on amnesties was included, nor were any particular types of amnesty, such as conditional amnesties, expressly stated to be acceptable as a bar to proceedings in the ICC (Gavron 2002). Whilst the dominant international rhetoric is currently that of retributive justice, and the ICC Statute reflects this, the attitude of the ICC towards a conditional amnesty process on the South African model has not yet been tested.[8] A better understanding of the South African amnesty process, therefore, has significance beyond the borders of the RSA. It is important for the development of the thinking of the international community, including that of states emerging from periods of conflict or repression and that of the ICC.

The possibility that South Africa might achieve lasting peace and democracy without a strong focus on the prosecution and punishment of past crimes has posed perhaps the most serious challenge to the 'no peace without justice' worldview. Yet, whilst the South African TRC has inspired a new generation of truth commissions, no other state has yet replicated the South African model in its entirety; the amnesty component has not been included in subsequent commissions. Does the South African process merit the flattery of imitation?

The use of amnesty in context

It is interesting first to examine what light the South African experience of amnesty sheds on the Orentlicher arguments outlined above, ie that the need for amnesties in political transitions has typically been overstated, that prosecutions are more often possible than is admitted, and that the prospect of facing prosecutions is rarely, if ever, the decisive factor in determining whether a transition will occur.

These arguments will find some resonance in South Africa, where the use of amnesty was, as I have noted, controversial. Yet few have sought seriously to challenge what has become the received wisdom in South Africa, that a peaceful transition could not have occurred without the 1993 amnesty deal. Well-known accounts of the transition in South Africa (see, Sparks 1997 and Waldheim 1997 as examples) barely discuss the issue and give no explanation as to how the amnesty came to be agreed in the eleventh hour of the negotiating process. Internationally, the justification proffered by Desmond Tutu (referred to above) has tended to be rather uncritically accepted, and South Africa has largely been spared the kind of criticism meted out to some of the Latin American countries which also used amnesty. This no doubt owes something to the integrity and reputation of Nelson Mandela, Desmond Tutu, Albie Sachs and other figures who have sought to explain and defend South Africa's choice – figures who, moreover, clearly and convincingly represent a break with South Africa's past human rights abuses.

Scholars writing on the TRC have for the most part focused on its contribution to truth and reconciliation in post-apartheid South Africa, failing to identify the institution as being a consequence of the amnesty deal and, therefore, failing to examine the success or failure of the TRC in terms of its (indirect) contribution to the transfer of power.

The reluctance within South Africa to ask hard questions about the necessity of the 1993 amnesty results, at least in part, from an intelligent appreciation of the extraordinary difficulty of successfully challenging the version of events promoted by the political elite. This became even more difficult after the necessity of the amnesty was given an official imprimatur by the Constitutional Court of South Africa in 1996, when the constitutionality of the legislation implementing the amnesty agreement was challenged. The late Ismail Mahomed, DP, upholding its constitutionality, referred to the Interim Constitution as creating an 'historic bridge' between the nation's deeply divided past and 'a future founded on the recognition of human rights', and suggested that:

> … but for a mechanism providing for amnesty, the 'historic bridge' itself might never have been created. For a successful negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a 'democratic society based on freedom and equality'. If the Constitution kept alive the possibility of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have

> been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, *ubuntu* over victimisation.[9]

Jody Kollapen, now the Chairperson of South Africa's Human Rights Commission, alluded to the difficulty of assessing the political necessity of the amnesty in my interview with him. He recalled that, in 1989, before the start of formal negotiations towards the ending of apartheid, no-one in the liberation movements seriously thought of amnesty. The expectation of many was of trials, not only of individual members of the security forces, but of the political leadership, and 'the ideal of a trial was still something we yearned for' (interview August 4, 2000). He recognised, however, that, by the end of 1993, after several years of negotiations and violence, the situation had changed. There was 'constantly doubt' about the viability of prosecutions. He added:

> I think there were the kind of political forces at the time that said, 'We need a settlement'… And with hindsight it's very difficult to challenge the politicians who tell us 'Well, we could have been sitting in Kempton Park for two years longer, had we not reached agreement on some of these issues; what is it that you wanted us to do?

Kollapen's comments illustrate the discomfort caused by the amnesty agreement, which was negotiated outside the committees involved in the Kempton Park talks. Indeed, the very last-minute nature of the agreement and the secrecy with which it was concluded obviously were, or should have been, a cause for concern. As part of my research, I was keen to talk to the people who were involved in negotiating the amnesty, to gain a better understanding of the motivations for agreeing to it and of role of amnesty in the transition. My interviews with three of the four principal negotiators of the amnesty suggest that the reasons for the last-minute agreement to amnesty were somewhat more complex than the Constitutional Court allows. My research has also, however, confirmed the great difficulty of making a sound assessment of the necessity or otherwise of the amnesty.

The issue of amnesty was certainly on the negotiating table in South Africa from the outset. The anxiety of the apartheid regime to ensure amnesty for its own people quickly became linked to the issue of the release of political prisoners of the liberation movements. Two statutes passed during the early period of negotiations made provision for temporary and permanent

'indemnity' to be granted – The Indemnity Act, 1990, and the Further Indemnity Act, 1992. The first of these statutes served the useful purpose of making it possible for members of the ANC in exile to return to South Africa with the benefit of temporary indemnity, to take part in formal negotiations, and many political prisoners were released under this statute between 1990 and 1992. The second statute, passed in 1992, was far more controversial. As a result of the secrecy surrounding the indemnity process it established, information is difficult to obtain about exactly who benefited from its provisions, but it is known that thousands of footsoldiers of apartheid applied for indemnity and that some loyal servants of the old regime benefited, as did some right-wing extremists (Keightley 1993, and Parker 1996).

For a number of reasons, however, the indemnities granted under these Acts were not considered sufficiently protective by the apartheid regime and the issue of a wider amnesty thus remained on the table at the Kempton Park talks until the very last moment. The attitude of the principal ANC negotiators, according to one of them, Mac Maharaj, was to push the issue away for as long as possible, since it was an issue they no longer considered central after the release of the majority of their political prisoners (interview October 21,1999). It was, however, repeatedly raised by the National Party. Ultimately, the pressures and horse-trading so characteristic of negotiated settlements resulted in the last-minute drafting of the post-amble to the Interim Constitution of 1993 (Act 200 of 1993). Under the heading 'The Promotion of National Unity and Reconciliation', the post-amble reads as follows:

> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the 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.
>
> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Could the agreement to amnesty have been avoided by the end of 1993, when the ANC negotiators had successfully managed to delay agreement to it for so long? Was there a self-serving element to the ANC's eventual acceptance of this arrangement? My interviews with the negotiators suggest differing perspectives on this. None of the negotiators told me that they agreed to the amnesty because there would otherwise have been a 'bloodbath', as Archbishop Tutu has suggested. From the perspective of Roelf Meyer, the National Party's chief negotiator, the amnesty was nevertheless 'an essential part of the settlement' (interview November 5, 1999). For Mac Maharaj, representing the ANC, the National Party's desire for an amnesty gave him and Cyril Ramaphosa important leverage in the final hours of negotiations, and conceding the amnesty assisted them to achieve a result favourable to the ANC on an issue they regarded as centrally important (interview October 21, 1999). The idea that the amnesty was actually conceded primarily for political advantage rather than political necessity would lend strength to Orentlicher's arguments. Maharaj did not suggest, however, that this was the only reason for conceding the amnesty. Other factors he took into account included the fact that agreement in November 1993 would allow South Africa's first democratic elections to go ahead as planned in February 1994. The motivation was thus complex. Moreover, when I put Maharaj's explanation to the others most closely involved in the negotiations, they could not confirm it, suggesting that perceptions of the need for amnesty and reasons for agreeing to it may not be the same for all negotiators involved in the same transaction.

Did the conclusion of the Interim Constitution with its post-amble represent 'progress through untidy compromise', to use Zalaquett's terminology? On the one hand, the rather simple explanations for the agreement to amnesty that have achieved such widespread currency seem to me to conceal a greater complexity of events and motives, some of which

might be construed as self-serving. On the other, there is no 'control experiment' in these matters. We cannot know what would have happened if the amnesty had not been agreed in principle in 1993, but it is clearly conceivable that it would at the very least have delayed the holding of the first democratic elections. The full implications of such a delay were potentially serious. Monthly statistics on the number of political fatalities indicate that a peak of 547 deaths was reached in the month of July 1993 alone, and had declined only slightly to 370 in the month of November 1993, when the Interim Constitution was finalised.[10] Apart from the appalling direct human cost, the violence had implications for investment and economic growth, social breakdown and political fragmentation. Against this background, making an 'untidy compromise' which would maintain momentum towards the elections was arguably very important. It is striking that after the elections, the numbers of political fatalities dropped sharply, to 119 deaths in the month of June 1994, and although political violence continued for some time mainly in one province, KwaZulu-Natal, figures for political fatalities in South Africa had declined to a monthly low of 45 by May 1996.

In retrospect, it seems to me that an argument can certainly be made that the amnesty agreed in 1993 was an 'amnesty for peace', necessary to the achievement of the transition in 1994, despite the undoubted complexity of the motives surrounding the eventual agreement to it. The South African experience does, however, seem to illustrate a reluctance on the part of politicians to take the public fully into their confidence concerning the factors influencing the choice to agree to amnesty, and to present instead a rather simplistic 'no choice' account. This approach, which attempts to contain criticism through lack of transparency, cannot be a healthy approach in a fledgling democracy. The ANC's early instinct to leave questions of amnesty to be dealt with by a democratically-elected Parliament was to its credit; having deviated from this commitment, it would have been desirable to give the public a full account of why it had done so, in all its complexity. There is no reason to believe that a politically sophisticated and largely supportive public would have condemned the choice ultimately made.

The South African approach: a new way of dealing with amnesty?

The negotiators of the Interim Constitution had neither the time nor the inclination to settle the detail of the way in which their agreement to amnesty would be implemented. For Roelf Meyer, the important thing was that 'the principle was fixed', since this gave an assurance to the security forces that the matter would be dealt with (interview November 5, 1999). In drafting the

wording of the post-amble to the Interim Constitution, Mac Maharaj insisted that 'the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with' should be decided by Parliament. It should be noted that the post-amble did not specifically make provision for amnesty to be dealt with through a truth and reconciliation commission. In Maharaj's own mind, however, he was determined that, if there was going to be amnesty for state agents and the white right wing, there must also be 'disclosure' (interview October 21, 1999). Interestingly, in his mind, this was important as a practical security matter, to assist the new government to prevent possible counter-revolutionary activity, rather than purely as an issue of providing 'closure' for victims of past abuses or information for a wider public.[11]

A lengthy and sometimes heated public debate preceded the passing of The Promotion of National Unity and Reconciliation Act in 1995, which put flesh on the bones of the post-amble. This Act established the TRC, the fundamental objective of which was stated to be to 'promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past' (s.3(1)). The Act listed a number of specific ways in which the TRC was to do this.

First, the TRC was required to 'establish as complete a picture as possible of the causes, nature and extent of the gross violations of human rights committed between 1 March 1960[12] and 10 May 1994'.[13] The term 'gross violation' was defined in the Act as meaning 'the violation of human rights through the killing, abduction, torture or severe ill-treatment of any person ... which emanated from conflicts of the past and which was committed [during the relevant period] 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'.[14] In establishing this picture, the TRC was required to include the 'antecedents, circumstances, factors and context' of the violations, as well as 'the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations'. The Act required the TRC to conduct investigations and hold hearings in order to establish the picture of gross violations in all its complexity.

The second specific way in which the TRC was to promote national unity and reconciliation was by 'facilitating the grant of amnesty' to persons who made 'full disclosure of all the relevant facts relating to acts associated with a political objective' (s.3(1)(b)) and who complied with the other requirements

laid down in the Act. South Africa thus became the first country to combine the investigatory and recommendatory functions of a truth commission with the function of granting amnesty. The task was devolved to the Committee on Amnesty, which, unlike the other TRC Committees, did not consist solely of Commissioners. The Act required the Chairperson of the Amnesty Committee to be a serving or retired judge and the members of the Committee to be 'fit and proper persons, appropriately qualified, South African citizens and broadly representative of the South African community'.[15] In practice, 'appropriately qualified' seems to have been taken to mean 'legally qualified', as all members appointed to the Amnesty Committee had a legal background.

Instead of conferring a 'blanket' amnesty, the Act required individual applications to be made for amnesty and provided for public hearings to be held in cases concerning gross violations of human rights. Victims were to be notified of amnesty applications and hearings and would be entitled to make representations. No-one could be compelled to apply for amnesty under the Act; however, the Act provided for a cut-off date, after which no further applications could be made. Amnesty could be sought both by those who had already been convicted of offences and by those who believed they had committed offences or delicts for which they might be prosecuted or sued. Anyone who had not applied for amnesty by the cut-off date, or who was not granted amnesty, would remain liable to prosecution and/or civil suit, assuming this had not already occurred.

The Act allowed applications to be made for amnesty in respect of any act, omission or offence associated with a political objective. Amnesty might therefore be sought for gross violations of human rights; no type of act was excluded in principle.

Before amnesty could be granted, the Act required the Amnesty Committee to be satisfied that the act for which amnesty was sought was associated with a political objective. This was to be decided by reference to a number of factors laid down in s.20(3) of the Act. In addition to considering the motive, context, and objective of the act, the Committee would be required to examine whether the act was carried out in execution of an order or on behalf of, or with the approval of, the organisation or institution of which the applicant was a member. Perhaps the most difficult factor to be considered by the Committee was the question of the proportionality of the act committed to the political objective pursued. Acts committed for personal gain or out of personal malice, ill-will or spite could not be treated as acts associated with

a political objective. However, those who acted as informers and who received payment for their information were eligible to apply.

The effects of a grant of amnesty under the Act were comprehensive, according to the Constitutional Court in the AZAPO case.[16] It protected not only the perpetrator himself from both criminal and civil liability, but also any body or organisation which might have been behind him, including the State itself. It would result in any existing criminal conviction being expunged.

A third specific way in which the Act required the TRC to promote national unity and reconciliation was by 'establishing and making known the fate and whereabouts of victims' and by 'restoring the human and civil dignity' of surviving victims by giving them an opportunity to relate their own accounts of the violations they suffered (s.3(1)(c)). Further, the Committee on Reparation and Rehabilitation of the TRC was required by the Act to make recommendations for reparation measures for victims. The term 'victims', as defined by the Act, did not include all those who were undoubtedly victims of the apartheid past, but was limited to victims of gross violations as defined by the Act, and to victims of any acts for which amnesty was sought by the perpetrator. Included in the definition of victims were the relatives or dependants of direct victims.

The fourth specific means by which the Act required the TRC to promote national unity and reconciliation was by requiring it to compile a report of its activities and findings, with 'recommendations of measures to prevent the future violation of human rights' (s.3(1)(d)).

Potential strengths of the system established by the Act

In theory, the system established by the Promotion of National Unity and Reconciliation Act had the potential to avoid many of the criticisms directed towards the use of amnesty in other countries. For example, the requirement of 'full disclosure' by amnesty applicants held out the promise that the amnesty process would be a major source of information for the TRC in its task of establishing 'as complete a picture as possible of the causes, nature and extent of the gross violations of human rights' within its mandate. Whereas amnesties in Latin America had allowed details of secret crimes committed by state agents to remain shrouded in mystery, leaving individual victims frustrated and wider society in the dark, many hoped that amnesty in South Africa would help to provide greatly desired information for individual victims. The public nature of amnesty hearings and the publication of the TRC's report offered the hope that awareness of the violations which

had been committed during the apartheid era, and of responsibility for them, would be greatly increased, particularly in that part of South African society which claimed it 'did not know'. This would reduce the capacity for later revisionism, and might encourage debate about responsibility for what had occurred.

The inclusion of the test of proportionality amongst the factors to be taken into account by the Amnesty Committee implied that amnesty might not be available for atrocious acts which could not be shown to have been required by the political aim to be achieved. It raised the possibility that acts such as torture would not be amnestied. It also suggested that some of the violations committed during the period of negotiations – as late as 1993 – such as the murder of Chris Hani and the killing of civilians in a church, a golf club and a discotheque, might not be amnestied.

Whilst amnesties in other countries had been criticised for contributing to a climate of impunity, the requirements of individual application, full disclosure, public hearings in cases of applications for amnesty for gross human rights violations, publication of details of grants of amnesty and the TRC's power to 'name names' in its report suggested that, in South Africa, impunity might be avoided. Moral and social accountability, if not legal accountability, was achievable, even in cases where applicants applied for amnesty for gross violations of human rights for which they had not yet been tried and punished. Applicants would not 'get off scot-free'; they could not obtain amnesty if they refused to acknowledge the commission of an illegal act, and the publicity surrounding amnesty hearings might amount to a form of punishment – a public shaming.

Whilst the forms of amnesty used in Latin America had given no opportunity for victims affected by the acts amnestied to have any say in the matter, the South African system promised victim participation in the amnesty process, through the provisions entitling victims to be notified of amnesty hearings, to be present and to 'testify, adduce evidence and submit any article to be taken into consideration' (s.19(4)(b)). Moreover, the Act required the TRC as a whole to attach importance to the respectful, fair and compassionate treatment of victims (s.11). Victim participation in amnesty hearings could also present opportunities for encounters between victims and perpetrators at amnesty hearings, and – together with the requirement that the TRC attempt to establish the motives and perspectives of perpetrators – seemed to have the potential to lead to greater mutual understanding and a possibility of reconciliation on an individual basis in some cases. A greater

public awareness and understanding of what had taken place during the apartheid era might also encourage efforts at reconciliation amongst a wider public.

Whereas other amnesties had been criticised for prejudicing victims' rights to redress, the provision for the TRC Reparation and Rehabilitation Committee to make recommendations on reparations for victims – including for victims of acts for which amnesty was granted – promised that the suffering and loss of victims would be acknowledged and as far as possible repaired. This could in turn contribute to the restoration of the dignity of victims and to the prospects of reconciliation.

Finally, the TRC's power to make recommendations concerning the prevention of future abuses held out the prospect that real progress could be made in building a culture of human rights. The TRC was required to propose recommendations to the President 'with regard to the creation of institutions conducive to a stable and fair society and the institutional, administrative and legislative measures which should be taken or introduced in order to prevent the commission of violations of human rights' (s.4(h)). Under this provision, the TRC could, if it wished, recommend the introduction of a system of lustration, under which individuals responsible for human rights violations might be prevented or disqualified from holding public office or from serving in the security forces.

Some reflections on the successes and failures of the system

For all the reasons set out above, the TRC and its amnesty process seemed to promise much that had not been achieved by transitional justice processes in other countries. Assessing the extent to which it 'delivered' on these promises and averted the potentially negative longer term consequences of amnesty is a complex and difficult exercise, which cannot be fully covered in this article. In this and the following sections, however, I offer some reflections on the outcome of the process, with a particular focus on the contribution of the amnesty process to the establishment of the picture of the causes, nature and extent of the gross human rights violations committed during the mandate period.

The work of the TRC's Amnesty Committee continued long after the work of the other TRC Committees had been concluded. Whilst the TRC's inaptly named 'Final Report' was published in 1998, the Amnesty Committee continued hearing applications until 2002. In 2003, two additional volumes – six and seven – of the TRC Report were published. Volume six contains the

Formal Report of the Amnesty Committee, as well as six chapters analysing the amnesty applications received by the TRC from members of different political groupings and the information obtained from them.

The work of the Amnesty Committee has been the subject of 'negative perceptions' in South Africa, as the Committee itself has acknowledged (TRC 2003, Vol6, s.1, ch5:84 at paras 6 and 7). A range of interlinked criticisms has been levelled at the amnesty process, including complaints that the process failed to bring out 'the truth', that the Committee was too 'perpetrator-friendly', that it treated victims poorly, and that the process did not contribute to reconciliation (Biko in Villa-Vicencio and Verwoerd (eds) 2000; Lyster in Villa-Vicencio and Verwoerd (eds) 2000; Pigou 2002; Fullard and Rousseau in Villa-Vicencio and Doxtader (eds) 2003). There seems to me to be a fairly widespread perception of a gap between the theory of conditional amnesty in South Africa and the practice of the Amnesty Committee.

The Amnesty Committee has accepted that there are 'lessons to be learnt from the South African experience' (TRC 2003, Vol6, s.1, ch5:83). Nevertheless, it has sought largely to deflect criticism from itself and its own practice, suggesting that much of the criticism flowed inexorably from the scheme established by the Promotion of National Unity and Reconciliation Act.

Thus, for example, in response to the particularly stinging criticism that it was 'perpetrator-friendly', the Amnesty Committee pointed the finger of blame at the politicians who had passed the Act:

> Although the Committee was a creature of statute, some critics saw its work as being at odds with that of the Commission's other committees. While the Human Rights Violations Committee (HRVC) was perceived to be devoting its time and energy to acknowledging the painful experiences of victims of gross violations of human rights, the Amnesty Committee, it was argued, was indemnifying many of the perpetrators of such violations against prosecution and the legal consequences of their actions. These perceptions were, of course, the result of the statutory scheme created by the provisions of the Act. Moreover, while the Amnesty Committee had the powers to implement its decisions, the Reparation and Rehabilitation Committee (RRC), for example, could only make recommendations for reparations for victims. Thus, while perpetrators were granted immediate indemnification if their amnesty applications succeeded, victims were required to wait until Parliament took a final decision on implementing reparations. The resultant view that the Committee was 'perpetrator-friendly' was thus to an extent understandable and even unavoidable. (TRC 2003, Vol6, s.1, ch5, p84 at paras 6 and 8)

In my view, the Amnesty Committee was correct in saying that some criticism of its work was inevitable, and that some criticism resulted from the scheme established by the Act. In the first place, some criticism was to be expected from those who were, from the outset, hostile to the principle that the state should grant amnesty for serious offences committed against members of their family. Nkosinathi Biko, the son of the late Steve Biko, 'noted that some South Africans were content with the granting of amnesty to those who maimed or killed their family members', but made clear that his own family and a significant number of others were 'adamant that they would like to have their day in court in order to confront the perpetrators of evil deeds' (Biko in Villa-Vicencio and Verwoerd 2000: 194). Similarly, Chris Ribeiro, one of the sons of the murdered Dr and Mrs. Ribeiro, made his heartfelt opposition to the principle of amnesty clear in 1994, stating that 'If my parents' killers get amnesty, it will be like having my parents killed for the second time … if the killers are not going to face the music, then I am not interested in the Truth and Reconciliation Commission' (Coetzee 1994: 17).

In addition, as the Amnesty Committee noted, it was indeed the statutory scheme that in some important respects provoked public criticism. As the Committee correctly noted, the fact that the Amnesty Committee was empowered to grant amnesty to applicants whilst the Reparations Committee was not empowered to grant reparations to victims was a part of the statutory scheme. Moreover, criticism of the amnesty process has been linked to other factors outside the control of the Amnesty Committee, such as disappointment over the poor handling of the reparations issue by the government (Kollapen interview August 4, 2000). A policy on reparations for victims identified by the TRC was only announced by the South African President in 2003. Since then, the policy has slowly been implemented by the payment of a flat figure of R30,000 in financial 'compensation' to individual victims – a figure very significantly less than the reparation recommended by the TRC, and, of course, completely outside the control of the Amnesty Committee.

Criticism of the amnesty process has also been occasioned by disappointment over the post-TRC failure to follow through on the 'carrot and stick' scheme of the Act. Policy guidelines on the prosecution of those who did not seek or obtain amnesty from the TRC for apartheid-era offences were finally published in 2006 by the National Prosecutions Authority, but, to date, no prosecutions have been commenced. The lack of sanctions was compounded by the TRC's decision not to recommend lustration. According to its Chairperson, the Commission 'considered this question carefully and

finally decided not to recommend that this step be pursued' (TRC 1998, Vol1, ch1, p3, para 11). Neither decisions on post-TRC prosecutions nor decisions on lustration were within the control of the Amnesty Committee.

From my perspective, attempting to assess whether the South African amnesty process merits the flattery of imitation, it is important to try to understand not only how far the criticisms and disappointments are justified, but also the reasons behind them and the extent to which they could be averted in any future conditional amnesty process. Insofar as criticisms emanate from the statutory scheme, that scheme can, of course, be reviewed and framed differently in any future conditional amnesty process. Problems emanating from specific decisions made by the South African government or prosecuting authorities may also be avoidable in future processes. Finally, future truth commissions may also be able to improve on the performance of the TRC.

I have already indicated the wide range of criticisms levelled at the amnesty process. In the following part of the paper I will focus on the truth-related criticisms of the amnesty process, and then offer some brief comments on other criticisms.

(a) Truth

I have set out above the ways in which it was hoped that the TRC amnesty process would be better than forms of amnesty used in other countries. It seems to me that, in relation to truth, it unquestionably was better. No other amnesty and no other TRC has succeeded in securing significant information and admissions from former members of the security forces. No other form of amnesty has succeeded in bringing forward security policemen willing to talk about and even demonstrate the methods of torture used by them in their interrogations of political activists.[17] No other amnesty has produced members of secret police death squads willing to describe their work in terrible detail.[18] No other form of amnesty has resulted in young members of the armed wing of a liberation movement stepping forward to talk about why they did what they did and how they feel about it in retrospect.[19] No other amnesty has resulted in a former cabinet minister admitting responsibility for ordering the blowing up of premises on the orders of the then state president.[20] No other amnesty has resulted in the remains of murdered young political activists being located and given an appropriate burial.[21]

Dr John Daniel. a senior member of the TRC's Research Department, considers that 'possibly the greatest contribution' of the TRC was that it accumulated 'a sufficient body of evidence so that the case against the

National Party was undeniable. It was no longer for them possible to say, for example, that "we didn't kill political opponents"' (interview September 27, 2004). In his view, the TRC 'exposed their lies for being lies'. Of course, by the time the TRC started its work, the breaching of the wall of silence about the secret crimes of the apartheid regime had begun; there had been leaks, journalistic exposes (eg Jacques Pauw's 1992 book *In the Heart of the Whore: the story of apartheid's death squads*), a number of commissions of enquiry (eg the Harms and Goldstone Commissions) and even a few trials, including in 1995 the start of trial of Colonel Eugene de Kock. But the TRC provided an officially-sanctioned, very public and comprehensive attempt to uncover the past, brought to the nation regularly on TV and radio, and I accept Daniel's view that it had a significant political impact. The amnesty process in my view played a major part in this achievement, through the public confessions of involvement in serious secret crimes by senior members of the security forces and a National Party cabinet minister. My view is shared by Schalk Hugo, attorney to Eugene de Kock. When I asked him towards the end of the amnesty process whether he felt that the process had had an impact on the National Party, he replied:

> Oh yes, I have no doubt about it. I think they to a very great extent have been discredited by this whole process…and I think a lot of people were disillusioned with them and sort of shocked, you know. People were gullible initially – I mean, well, gullible…I suppose they…it suited them to believe what they believed at that time, but somehow deep down they must have had some sort of suspicion, and now all of a sudden it came out, and , I mean, people like Vlok [former cabinet minister] actually sort of conceded and admitted and confessed they were involved in all these things…I mean, I think that, you know, deep down, from a Christian morality point of view, they…people didn't like that at all. And I mean, things like the Cosatu House [bombing] and the Khotso House [bombing] and whatever… these were – look, they weren't church buildings but I mean very similar to that and it's not palatable, I think, and I think it damaged very… to a very large extent. (interview March 23, 2000)

It is easy now to forget the level of denial and deceit concerning secret state crimes that was still prevalent in South Africa when the TRC started work. Turning at least some of this denial into confession, and at least some of the suspicion into knowledge, was a real achievement.

Moreover, I share Dr Daniel's view that the outcome of the TRC in general was less rich and vivid in relation to issues on which it did not receive many amnesty applications: examples include the early period of its mandate

(especially the 1960s), and South Africa's involvement in Angola, Namibia and Mozambique.

These significant achievements suggest that a conditional amnesty process could have value for other countries in transition. In the next section I will consider some of the problems and criticisms of the amnesty process in relation to 'truth' and the possible lessons to be learnt from the South African experience.

(a.i) Problems surrounding who applied for amnesty and for what acts.
The Amnesty Committee received over 7000 applications for amnesty, some of which concerned more than one act, omission or offence for which amnesty was sought. This figure was apparently far higher than had been expected and posed real workload problems for the Amnesty Committee. However, despite the unexpectedly large number of applications, which seemed to promise much in terms of truth recovery, the figure was disappointing in a number of respects.

First, in comparison with the number of human rights violations brought to the attention of the TRC by victims, the number of amnesty applications was small. The TRC received some 21,000 victims' statements. The vast majority of victims who complained of human rights violations to the TRC wanted 'the truth' about injuries or deaths caused to themselves or their relatives in clashes with the security forces in the townships. These incidents did not, however, form the subject matter of many amnesty applications. Thus, as the Amnesty Committee noted, 'In general, there was only a limited overlap between victims' statements and amnesty applications. In other words, in many cases perpetrators applied for amnesty in respect of cases for which no victims' statements had been made' (TRC 2003, Vol7, p3).

This limited overlap meant that one of the purposes of combining the granting of amnesty with the other functions of the Commission could not be fully realised, for in the majority of cases, the amnesty process proved unable to assist the Commission with the resolution of cases brought to it by victims.

Second, not all amnesty applications related to gross violations of human rights. Although *victims* were only allowed to report gross violations, as defined by the Act, to the Commission, *perpetrators* could apply for amnesty for any act, omission or offence associated with a political objective, however trivial.

Third, over 65 per cent of those who applied for amnesty were in custody at the time that they made their amnesty application (TRC 2003 Vol6, s.1, ch2:34). Of the remaining 35 per cent, an (unspecified) proportion had already completed a sentence. The fact that these applicants had already been tried and convicted meant that at least some factual information about the acts concerned was already publicly known. Thus, in contrast to the criticism that the Amnesty Committee was the part of the TRC that allowed heinous perpetrators to 'get off scot-free', it in fact spent a very considerable part of its time acting as a kind of special parole board for thousands of prisoners who had already served part of their sentences for acts which they claimed had been associated with a political objective. Perhaps not surprisingly, given the large numbers of political prisoners released during the constitutional negotiations, the vast majority of these applications were rejected as unmeritorious.

Fourth, whilst Reed Brody was broadly correct in his assessment (2001, above) that the amnesty process 'brought all manner of perpetrators forward', the majority of amnesty applications were made by members of the liberation movements, rather than by the security forces or apartheid-era cabinet ministers. Only two apartheid-era cabinet ministers applied for amnesty: former minister of police, Adriaan Vlok, and Piet Koornhof. Vlok, who undoubtedly had a wealth of useful information to disclose, applied for amnesty only for a small number of offences that conspicuously did not involve personal injury or loss of life. According to the TRC, a total of 293 amnesty applications were received from serving or former members of the South African security forces (TRC 2003, Vol6, s3, ch1:182) Of these, 256 applied for offences committed while they were members of the South African Police; only 31 applied for offences committed while they were SADF members.[22] Thus, the relative numbers of amnesty applications from different groupings, if taken at face value, would tend to suggest that the crimes of the apartheid era were committed predominantly by the liberation movements – a picture the TRC itself rejected, and one which would be widely considered absurd. Whilst those from the security forces who did apply for amnesty came from all ranks, including former police commissioners and generals, there was still a widely held view that others who could have applied did not do so. The truth of this was demonstrated in the trial of Dr Wouter Basson in 2000, in which former security force members who had not applied for amnesty emerged as state witnesses with considerable information about apartheid-era crimes.

It is obviously undesirable for conditional amnesty processes to be overwhelmed with applications that are inherently unpromising in terms of building a picture of the secret crimes of the past. It is also undesirable for victims and the general public to be left with the feeling that people with valuable information about the past did not come forward and reveal it. Could anything have been done to avert any of these problems in South Africa, and could such problems be averted in future conditional amnesty processes?

One avenue worth considering is the exclusion of convicted prisoners from a conditional amnesty process. There are other means by which the release of prisoners can be dealt with: for example, by the use of presidential pardons, or by the establishment of an early release scheme, as in Northern Ireland. I doubt whether there will usually be sufficient justification for subjecting convicted prisoners, who have already gone through a public process of trial and who have served at least a part of their sentence, to the same procedures and conditions as may be thought appropriate for those applying for amnesty who have never been prosecuted. Although I accept that a process requiring prisoners to make full disclosure may produce additional information beyond that disclosed at trial, there are other ways of obtaining this information: for example, by a truth commission using a *sub poena* power to call any individuals thought to have particularly useful information to testify to it, or by treating a prisoner's level of cooperation with the prosecuting authorities and/or truth commission as a factor to be taken into account in deciding on early release or the grant of a presidential pardon. Equally, subjecting prisoners to a conditional amnesty process is not the only possible way of encouraging reconciliation: informal processes, perhaps facilitated by religious groups or NGOs, in which prisoners (or former prisoners) and victims or communities who wish to meet are brought together, may be equally if not more successful.

There is clearly a much stronger case for requiring those seeking amnesty who have not yet been prosecuted to go through public hearings (in lieu of a trial), to make full disclosure, and to satisfy the Amnesty Committee on a range of other factors and conditions. Nevertheless, it must be recognised that conditional amnesty processes contain a number of risks and uncertainties for perpetrators who have not yet been called to account. Those already in jail have nothing to lose; but for others, the decision to apply will involved a weighing or balancing of risks and benefits, made in some cases on the advice of lawyers. These risks and benefits can be reduced or increased by

the statutory framework adopted, and by the pressures applied, for example, by political parties, the prosecuting authorities and victims with civil claims.

During the drafting of the Act, and throughout the life of the TRC, there was a tension in South Africa between those who, like Desmond Tutu, wished to see perpetrators come forward for amnesty, and those who hoped to make the obtaining of amnesty difficult so that perpetrators – especially those from the former security forces and apartheid regime who had not yet been brought to justice – could be prosecuted. A tension of this kind is probably inevitable in any transitional society emerging from a period of a conflict and repression. It must be recognised and faced squarely. If the main objective is to encourage perpetrators who have never been prosecuted to come forward for amnesty, there are two principal ways of achieving this: either by frightening them into doing so, through active investigations and threats of prosecution or civil suit, or by tempting them into doing so, which involves making the amnesty process sufficiently attractive. With the benefit of hindsight**,** it does seem that, in South Africa, the risks of applying for amnesty were considered too high by some potential applicants, whilst the risks of *not* applying were considered too small. This would merit careful reconsideration in any future conditional amnesty process.

The likely reluctance of the security forces in particular to come forward and apply for amnesty for acts for which they had not been prosecuted was foreseen in early discussions about a possible truth commission in 1994 by Justice Richard Goldstone, who cautioned:

> I would urge … that expectations should not be raised too high. I bear a terrible conscience when I hear Albie Sachs expressing more faith in human nature than I would be capable of because if anybody has reason to question the goodness of people it is he. Yet I do not think people will be lining up to bare their souls and depart feeling better. I hope I am wrong, but I do not think the process will be easy. (Boraine and Levy (eds) 1995:126)

In early 1996 when the TRC started work, many members of the old security forces were reportedly still 'waiting to see if someone [from among their ranks] is going to come forward and what this person is going to say. For the time being they are saying "*bly op die bus*" [stay on the bus] and let's see who gets off' (*Mail & Guardian* April 12, 1996). The conviction of Colonel Eugene de Kock in August 1996 and his subsequent sentencing to two concurrent life terms is often pointed to as a significant factor in encouraging some other members of the security forces to apply. Schalk Hugo, de Kock's

attorney, told me that de Kock's lodging of his amnesty application shortly before the cut-off date for the making of amnesty applications 'created a lot of panic amongst the other ones' (interview March 23, 2000). 'I can't tell you', he said, 'how many phone calls I had from policemen and lawyers, etc., that wanted to have a copy of his application' – including from police force generals and their legal teams. Hugo in fact refused to supply copies of the application. When I asked him whether he would tend to agree with me that without one significant trial like de Kock's, people (from the security forces) wouldn't have bothered to apply for amnesty at all, he replied, 'I hate to concede that but I think you are right there, ja.' And so far as de Kock himself was concerned, Hugo commented – speculatively, of course - that 'had he not been prosecuted, I wonder how many things he would have applied for and what his attitude would have been. I don't know…I suppose I can guess' (Interview March 23, 2000).

Other security force applicants, such as the Northern Transvaal group, though claiming to be acting on higher motives, were presumably at least partly influenced to apply for amnesty by the knowledge that the Attorney General was actively preparing legal proceedings against them. (Amnesty applications of Cronje, Hechter, Van Vuuren and Mentz, heard in Johannesburg from October 21, 1996 to November 1, 1996).

Schalk Hugo also cited civil claims as a pressure that had influenced some security force members to apply for amnesty. Although he felt it did not influence de Kock, who was in prison, he thought that it had had some influence on some senior, solvent, members of the security forces who could be ruined financially by civil claims if they did not obtain amnesty. My experience was that that relatively little use was made of this potential pressure point in South Africa, for a number of reasons, and I suggest it would merit closer attention in a future amnesty process.

Whilst successful prosecutions may be valuable in flushing out amnesty applicants, unsuccessful prosecutions may be troublesome. The acquittal of former Defence Minister Magnus Malan and police defendants in October 1996 in connection with the KwaMakutha massacre of 1987 must have given encouragement to some members of the security forces and the IFP to bide their time. Moreover, in order to secure the conviction of de Kock, the state felt it necessary to allow an extraordinarily large number of his former colleagues to testify against him as state witnesses. As Schalk Hugo observes, 'What they [the State] have really achieved is to get a lot of these

perpetrators indemnified…' (interview March 23, 2000). One of the state witnesses in the de Kock trial had 'actually killed more people than de Kock'.

In South Africa, the requirements for obtaining amnesty from the TRC were considerably more onerous than those then prevailing for obtaining immunity as a state witness. The latter required only that a state witness should answer all questions put to him 'frankly and honestly', in the opinion of the court (Criminal Procedure Act, 51 of 1977). Faced with a choice between applying for amnesty and waiting to see whether a prosecution might be brought, at which time he might be able to become a state witness, a potential amnesty applicant might well be advised by his lawyer to do nothing.[23] One lesson from the South African experience must surely be to consider very carefully what conditions are essential and to recognise those which will tend to deter applicants from coming forward, unless they are already in prison or facing a very immediate threat of prosecution. Uncertainties such as those caused by the introduction of the principle of proportionality make the process risky for those who have committed serious crimes for which they have not yet been prosecuted. As Justice Goldstone suspected, people do not generally line up to 'bare their souls and depart feeling better' (Boraine and Levy (eds) 1995:126).

In the trial of the SADF medical officer, Dr. Wouter Basson in 2000, several people came forward as state witnesses who could have applied for amnesty, but had decided not to do so. When asked by Counsel why he had chosen not to apply for amnesty, one such witness indicated that he was not interested in doing so because the process would be humiliating, especially with the media coverage.[24]

The importance of carefully considering priorities in drawing up the statutory framework cannot, therefore, be over-emphasised. If there is a desire to encourage applications, the statutory scheme needs to reflect this; and careful thought needs to be given to applying pressure strategically in different ways. I would add that although the South African process suggests that the security forces and members of the old regime generally needed to be convinced to apply by fear of prosecution or civil suit, it does also suggest that encouragement to apply from political parties can make a real difference to the numbers of applications received, including from those who have not been prosecuted. The ANC encouraged its members to apply, and they did so; as a result, the Amnesty Committee heard a number of very interesting applications from people involved, for example, in 'special operations', who had never been prosecuted and had no reason to believe

they would be. Thus, it would be misleading to suggest that amnesty applications can only ever be prompted by 'coercive' measures.

Committees dealing with conditional amnesty applications could also offer guidance about the way in which they intend to interpret the provisions of their mandate, so that potential amnesty applicants have clarity about those elements of the statutory framework that may give rise to concern about the risks of applying. The Amnesty Committee in South Africa failed to do this, for example, in relation to the principle of proportionality.

(a.ii) Problems surrounding 'full disclosure' by amnesty applicants

It has been argued that even those amnesty applicants who did come forward were 'less than forthcoming' (Biko in Villa-Vicencio and Verwoerd 2000: 194). Linked to this is the criticism that the Amnesty Committee interpreted the requirement of 'full disclosure' in the Act too narrowly, with the result that it required perpetrators to make more limited disclosure than intended by the Act (Pigou 2002:49). It has also been suggested that the Amnesty Committee was neither equipped nor alert enough to distinguish truth from lies, or to detect economy with the truth in amnesty hearings (2002:47). As a consequence, it is suggested that amnesty was granted to applicants who had not in fact made 'full disclosure'.

Criticisms of this nature are particularly disturbing because they go to the heart of the accountability framework established by the Promotion of National Unity and Reconciliation Act. In South Africa, the amnesty process of the TRC was promoted as amnesty for truth, with truth being 'the road to reconciliation'. A failure (or perception of failure) to require amnesty applicants to make full disclosure was therefore potentially disappointing both to victims directly affected by the amnesty process and to a wider public. A sense that the Amnesty Committee had not sufficiently insisted on full disclosure was a contributing factor to the negative perception that the Amnesty Committee was inappropriately 'perpetrator-friendly'. As I shall explain, I do not fully accept these criticisms of the Amnesty Committee, but I do accept that there were some problems around full disclosure.

The roots of them seem to me to go back to the earliest days of the TRC. The Commission sought to encourage amnesty applications; Archbishop Tutu made a personal appeal to people to come forward. In his view, the amnesty process promised a great deal, both for individuals and for South African society, that could not realistically be obtained through criminal prosecutions. The Commission's desire for perpetrators to come forward

resulted in pressure on the Amnesty Committee to commence public amnesty hearings, despite, in the Committee's own words, 'an obvious lack of preparedness' in terms of staff, including investigative capacity, and despite the fact that the deadline for applying for amnesty had not yet passed' (TRC 2003 Vol6, s1, ch5). In fact, the Amnesty Committee admits, it had done 'no proactive investigations by the time the initial hearings began'. This was clearly inappropriate in a process designed to use investigators to test the truth of the 'full disclosure' made by applicants.

The purpose of pressuring the Amnesty Committee to start hearings under these difficult circumstances may have been partly due to the short length of the TRC's time mandate. At the time, however, there was considerable speculation that the pressure on the Amnesty Committee was not simply pressure to commence hearings, but also pressure to make some speedy grants of amnesty, to encourage applicants – particularly from the security forces – to come forward. In his memoir of his experience as deputy chairperson of the TRC, Alex Boraine recalls that although the Promotion of National Unity and Reconciliation Act required the Amnesty Committee to give priority to dealing with applicants who were in prison, 'the Commission decided that a number of "window cases" should also be heard, from perpetrators who had not been charged, in order to encourage applications from all who had been involved in human rights violations' (Boraine 2000: 122). In legal terms, this was an extraordinary decision by the Commission, and Boraine does not explain how this course of action would be likely to encourage applications, unless, of course, amnesty were to be granted generously. It must have been difficult for the Amnesty Committee to deal with this kind of interference with its mandate. Its early decision to grant amnesty to former police Captain Brian Mitchell for his role in the Trust Feed massacre understandably fuelled speculation that the Committee was under pressure to be lenient to members of the security forces (Amnesty Decision AC/96/0011).

The problem of inadequate investigative capacity remained with the Amnesty Committee throughout its life. This was partly an aspect of the TRC's general infra-structure problem, resulting from budgetary constraints and the temporary contracts on offer, which made it difficult to attract skilled and experienced staff, particularly after the delivery of the 1998 Report (TRC 2003, Vol6, s1, ch1:33-35). Also, as the Committee noted, some of the incidents mentioned by amnesty applicants had never previously been investigated by the police or dealt with at a trial. 'Consequently, the

Committee had to investigate these incidents long after the event had taken place' (TRC 2003, Vol6, s1, ch1:35). Moreover, the lawyers of those applicants who had had the luxury of a legal representative to help them complete their amnesty application forms 'usually divulged as little as possible' (TRC 2003, Vol6, s1, ch1:34). Investigators had to travel all over the country, 'in many cases to remote and inaccessible areas', and 'often had to contend with uncooperative victims and implicated persons' (TRC 2003, Vol1, s1, ch1:35).

In South Africa, during the life of the TRC, it became a commonplace observation that security force applicants were 'economical with the truth'. The issue even became the subject of a popular Zapiro cartoon, showing security force applicants routinely attributing responsibility for serious criminal acts to generals and politicians who were already dead (Verwoerd and Mabizela (eds) 2000). Van Zyl Slabbert cites the example of Steve Biko's murderers, who he describes as 'pathetic in their evasive admissions' to the Amnesty Committee (in Villa-Vicencio and Verwoerd 2003:323). I discussed the reasons for this evasiveness with Schalk Hugo, attorney to de Kock, who participated in many of the security force amnesty hearings. His own client had acquired a reputation for forthrightness. Why had others not done so? One suggestion he offered was that it was simply the result of human nature:

> People, they shy away from these dirty things; they…it's just in the nature of a human being that they don't want to tell things as they were. I mean, I've seen it time and time again with these amnesty things…If they shoot somebody, they'd rather say 'ell, you know, he was lying there, he was unconscious when I shot him', that sort of thing. They wouldn't say, "Look, he was staring me in the face and then I shot him in cold blood'. They just…they shy away and they shirk away from that. (interview March 23, 2000)

He thought that some of the security force applicants themselves had a 'mental barrier', and found it very difficult to understand why they had taken the actions they did, and because they could not explain their actions, they tended to shy away from it. He also felt that some of the more conservative legal teams representing security force applicants 'misunderstood the whole process', in that they applied for amnesty but tried to justify the acts concerned.

When I asked Hugo whether a less confrontational process might have encouraged security force applicants to be more forthcoming, his view (though he admitted that he might be 'totally wrong') was that if it were to less confrontational, 'you would have had a situation where they would

have just laughed it off'. He suggested that there had already been a negative change in attitude on the part of some applicants, who no longer believed they were going to be prosecuted and might end up in prison with de Kock:

> Now they know it's not going to happen… they think it's not going to happen…so they really…they've adopted this sort of laissez-faire approach and attitude now, you can see it, some of them are so cocky and cheeky now, and they wouldn't have been like that two years ago. But now they know they're not going to get prosecuted…Everybody says the country doesn't have the money, they can't afford some further trials and I'm sure it's going to be like that. You're not going to have prosecutions again. (interview March 23, 2000)

All of Hugo's comments seem to me be perceptive and accurate.

Security force applicants were sometimes refused amnesty, wholly or partly for lack of full disclosure. For example, the Amnesty Committee refused amnesty to the applicants for Steve Biko's murder (Amnesty Decisions AC/98/0114 and AC/99/0020) and to most of the security force applicants for involvement in the murder of the Pebco 3, partly for lack of full disclosure (Amnesty Decision AC/99/0223). In another case, security force applicants claimed that Ms. Khubeka had died of natural causes under interrogation, but post-mortem evidence concerning the body believed to be hers indicated a bullet to her head. The amnesty applications of the relevant applicants were refused for lack of full disclosure (Amnesty Decision AC/2001/124). Another group of security force applicants were refused amnesty because they had not made full disclosure about 'the duration and extent of Ms. Simelane's torture' (Amnesty Decision AC/2001/185). SADF/CCB applicants were refused amnesty for lack of full disclosure for most of the (relatively minor) incidents for which they applied (Amnesty Decision AC/2001/232).

Although, regrettably, no statistics are available from the Amnesty Committee concerning the reasons for its refusal of amnesty, my own careful study does not support the idea that the Committee neglected the issue of full disclosure in relation to applicants of any political persuasion. First, the Amnesty Committee rejected in chambers over 5,000 amnesty applications which it considered did not disclose the commission of acts associated with a political objective; many of these applications would by definition have involved untruthfulness. In relation to those applications that passed the threshold and proceeded to a public hearing, amnesty decisions are littered with comments on the issue of full disclosure: in addition to the security

force decisions referred to above, one APLA applicant was described as 'a very poor and remarkably creative witness who avoided clear and simple questions' and who 'consistently tried to mislead the Committee' (Amnesty Decision AC/2001/256); an IFP applicant was described as 'not an honest witness' (Amnesty Decision AC/2001/258); a Security Branch informer who was refused amnesty was described as an 'inveterate liar' (AC/2000/239 and AC/2001/278); the evidence of a UDF applicant was described as 'riddled with contradictions and inconsistencies' (AC/2001/143); a number of applicants claiming to be ANC supporters were criticised as not being good witnesses (see eg Amnesty Decision AC/2001/056). These comments support my impression from attending amnesty hearings that the Amnesty Committee was concerned about full disclosure, even if it did not always succeed in extracting it.

In the context of the continuing political contestation over the events of South Africa's past and of the deliberate obfuscation of secret crimes over many years, it is not surprising that the testimony of some amnesty applicants, particularly those from the former security forces, was received with scepticism by victims or members of the public. Equally, given the importance of the decisions it was empowered to make and the legal background of members of the Amnesty Committee, it is not surprising that the Amnesty Committee sought to assure applicants from all political backgrounds that it was impartial, fair and reasonable in its procedure and decision making. This was particularly important given the possibility that the decisions of the Amnesty Committee would be reviewed by the courts.

Inevitably, some applicants in conditional amnesty processes will attempt to conceal or forget to disclose certain information. It is also probably an inherent feature of conditional amnesty processes that some amnesty applicants will 'tailor' their applications in an attempt to meet the conditions for obtaining amnesty. Detecting all such concealments and oversights is an extremely difficult task. My own view is that although these problems did occur in the South African amnesty process, they do not make the entire process unworthy of imitation, particularly because the South African experience suggests some useful pointers towards minimising these risks.

The importance of an experienced and skilled Investigative Unit, which can provide adequate information to enable the versions of events put forward by amnesty applicants to be challenged, is clear. The assignment of good lawyers to the Committee, both as members and as advisers, is also valuable. Victims with good legal representation can also conduct enquiries

and investigations helpful to the Committee.[25] It must be acknowledged, however, that in some cases, where only the amnesty applicants were present at the scene of the crime, and especially where the body of the victim has been covertly disposed of without a post mortem examination, it is likely to be severely difficult for anybody to challenge the applicant's version of events.

It may be valuable in future conditional amnesty processes to ensure that amnesty panels do not consist entirely of lawyers. The inclusion of historians and political scientists, for example, could be useful in ensuring that, so far as possible, full disclosure is made. The inclusion of psychologists and doctors on amnesty panels might lead to more interesting questioning than occurred in South Africa about the 'motives and perspectives' of perpetrators.

Finally, Schalk Hugo's comments suggest that it may well be important, at least in relation to some amnesty applicants, to try to maintain for the entire duration of the process the perception that there is a real risk of prosecution if amnesty is not obtained. This need not necessarily be a risk of prosecution at the national level; a risk of prosecution in other jurisdictions, including at the ICC, would surely serve the same purpose.

(b) Other criticisms of the amnesty process

Other significant criticisms of the amnesty process have been that victims were often treated poorly by the Amnesty Committee and that the amnesty process failed to contribute to reconciliation, both at the individual level and more widely in South African society. These are both major concerns that cannot be dealt with fully within the confines of this paper. I would, however, like to make some observations about the treatment of victims in the amnesty process.

If a conditional amnesty process is to have any hope of promoting respect for human rights in a transitional society, it is, of course, essential that victims should be treated with respect and care in conditional amnesty processes, and their dignity protected. It was clear to me from the amnesty hearings I attended that many people affected by process had suffered considerable trauma, and some were still vulnerable, sensitive and angry. I felt that the amnesty process did not sufficiently acknowledge the sacrifice being required from victims in the interest of wider South African society. It was clear that amnesty applicants had something to gain from the process; but unless the Amnesty Committee worked hard to create an appropriate atmosphere and to take account of the needs and wishes of victims, there

was a real risk that the process could become simply a painful burden for victims, resulting in the loss of their legal rights with no benefit to them and even the possibility of further trauma.

If victim participation is to be part of the process, it should be full and genuine, and victims should not be marginalised. Ultimately, the responsibility for ensuring this had to lie with the Amnesty Committee. It alone had the power to instruct its staff and the lawyers appearing before the Committee on how to deal with victims appropriately. There is no doubt in my mind that these aspects could and should have been better handled in South Africa.

I do not regard the flaws in the treatment of victims in South Africa as inherent in conditional amnesty processes. The South African experience offers valuable lessons from which any future such processes can learn. Although I would not wish to see these aspects of the South African process replicated in future, I do not interpret them as making future conditional amnesty processes undesirable.

Conclusion

Demands for 'amnesties for peace' have not disappeared from the international political landscape, despite the increasingly strong disapproval of the UN and international human rights groups.[26] South Africa pioneered a new way of dealing with past human rights abuses which responded to the constraints and demands of negotiated peacemaking, whilst at the same time attempting to ensure that the subsequent conditional amnesty process, located within the TRC, averted the worst consequences of other forms of amnesty. The experiment was not entirely successful; indeed in some respects, as I have indicated, it was flawed either in its conception or in its implementation. Nevertheless, as I have argued, it made significant achievements, and I have certainly found no compelling reason to believe that it has caused lasting damage to South African society, nor seen any evidence that those amnestied by the TRC have gone on to commit new crimes.

The perception of the Chief Prosecutor of the ICC that South Africa has achieved something remarkable in having rebuilt its legal system without a strong reliance on the punishment of past abuses is, in my view, largely justified. This achievement has, however, depended on the good faith of the new democratic government and the existence of a genuine commitment to the promotion of human rights and to the making of a clean break with the human rights abuses of the past. It also reflects the creation of new

institutions, such as the Human Rights Commission, the Independent Complaints Directorate and the Constitutional Court. It depends further on the considerable efforts of South African civil society, not least in maintaining a vigilant eye on the activities and performance of state agents. Whether a conditional amnesty process would be equally successful in the absence of such good faith, commitment, institution-building and effort requires careful consideration.

Given the range of criticisms made of the amnesty process, I think it is important to acknowledge that the Amnesty Committee in South Africa had a peculiarly difficult task in comparison with the TRC as a whole. As the Amnesty Committee has observed, because the South African amnesty process was unique, the Committee was obliged to 'set sail in uncharted waters, with no international or local precedents to guide it' (TRC 2003, Vol6, s1, ch5, p83). It also had a lengthy and gruelling task. The Committee has described this with valiant understatement: 'Dealing with the past on a daily basis over a period of almost five and a half years was never easy. Equally difficult were the many days spent on the road, visiting venues all over the country and listening to and adjudicating upon reprehensible acts of severe gross human rights violations' (TRC 2003, Vol6, s1, ch1, p2).

This difficult task was not made easier by criticism and pressure from colleagues on other committees of the TRC and from government, anxious to see the TRC process draw to a close as soon as possible. Some of these pressures and problems would no doubt be repeated in any future conditional amnesty processes, but the task of other amnesty committees should be made at least to some degree easier by the experience of the Amnesty Committee of South Africa.

Whilst maintaining an opposition to amnesty for international crimes such as torture and genocide, the Secretary-General of the UN has acknowledged that, in transitional societies, the vast majority of the often numerous abuses of the past will never be dealt with by the criminal justice system. If he is correct, it seems to me unwise to 'write off' conditional processes as a possible way of providing some form of accounting and some measure of accountability in relation to at least some of those past crimes. I would suggest that in future conditional amnesty processes, the focus should be on dealing with applications from those who have not already gone through a process of public scrutiny and accountability. In transitional societies, those who benefited from the impunity of the past will usually be those from whom the public most wants to hear. When the public did hear

from former apartheid operatives in South Africa through the TRC amnesty process, the impact was powerful.

Finding some way of calling to account those who have benefited from the secrecy and impunity of the past, whether through a criminal justice process or a conditional amnesty process requiring full disclosure, can help bring relief to at least some victims, though it cannot provide 'the whole truth' for each and every individual. It can also inform a wider public and stimulate discussion about important questions of responsibility for repairing the past and ways of preventing future abuses.

The attitude of the International Criminal Court to conditional amnesties will probably influence at least to some extent the success of future such processes. The Chief Prosecutor informed me in our recent conversation that the ICC would not be developing a policy on conditional amnesties; he felt that this was something which, as a prosecuting authority, it could not do. Formulating such a policy would undoubtedly be extremely difficult, even if the ICC were prepared to attempt it. The absence of any indication from the ICC that it might be disposed to respect conditional amnesties at least under certain conditions is, however, problematic; it is likely to encourage perpetrators of serious abuses to conceal their actions. Nevertheless, given the limited capacity of the ICC, it may well be disposed to respect conditional amnesty arrangements, even if the delicacy of the issue precludes it from saying so in advance; and there are many crimes outside the jurisdiction of the ICC for which conditional amnesties might still be granted.

Postscript

On July 16, 2007, the South African National Prosecuting Authority announced that it had commenced criminal proceedings against Adriaan Vlok, former Minister of Police in the late apartheid era, Gen Johan van der Merwe, former Police Commissioner, and three former members of the security police, Major-Gen Christoffel Smith, Col Johannes van Staden and Col Gert Otto. The attorney representing all five men, Jan Wagener, confirmed that they had been charged with the attempted murder in 1989 of Frank Chikane, now Director General in the Presidency, as well as with an 'umbrella' charge of conspiracy to murder persons unknown. The matter will be heard by the Pretoria High Court on August 17, 2007.

Notes

1. From 'The letter bomber seeks amnesty', in Jeremy Cronin (2006).
2. Sarkin (2004) is currently the only published book-length study of this aspect of the TRC's work. See also Villa-Vicencio and Doxtader (2003).

3. I began following the work of the TRC in 1996, with a special focus on the Amnesty Committee from 1997. From July 1998 to September 2000, I was able to follow the Committee's work full-time, as a result of special funding from the Airey Neave Trust and with support from the Law School of the University of the Witwatersrand. My thanks to both.
4. Statement of the President of the Security Council of 15 July 1993, Resolutions and Decisions of the Security Council, 1993, 48 SCOR, at 126, UN Doc. S/26633 (1993). Paragraph 6 of the Governors Island Agreement granted full amnesty to the leaders and supporters of the military coup for 'political human rights violations'. The compatibility of the agreement to grant amnesty with international law was examined in Scharf (1996).
5. In support of this contention she cited her own opinion that the government of President Corazon Aquino in the Philippines could have done more to hold the military to account, and that its failure to do so had not in any event assured stability. She also cited 'experts on Uruguay' who believed that President Sanguinetti 'could have insisted upon some prosecutions of the military for past human rights violations without derailing his country's transition to democracy.'
6. In support of this claim she cited only the case of Argentina.
7. Comment made to the author on 2 March 2007 at the London School of Economics, after a speech by the Chief Prosecutor on the subject 'Justice in Conflict? War, Peace and Impunity in Africa'.
8. It should be noted that the ICC has no jurisdiction over the events which occurred in South Africa during the apartheid era.
9. *AZAPO and Others v The President of the Republic of South Africa and Others* (1996), judgment of the Constitutional Court of South Africa of July 25, 1996, reported at 8 BCLR 1015, para 19.
10. These statistics, which originate from the *South Africa Survey* of the South African Institute for Race Relations, are quoted and discussed by Adrian Guelke (2000).
11. Maharaj's practical concerns were strongly reflected in the ANC's August 1996 Statement to the Truth and Reconciliation Commission. Under the heading 'Some of the Questions which Require the Attention of the Commission', the ANC argued that there were many questions which needed to be answered, and that these were 'relevant not only to ensure that the country is fully appraised of past developments, but also to uncover any of the networks that may still be operational today and which are therefore a danger to the fledgling democracy' (ANC 1996: 82).
12. The year of the Sharpeville massacre and the banning of the ANC.
13. The date of President Mandela's inauguration.
14. The term 'gross violation' also included 'any attempt, conspiracy, incitement, command or procurement' to commit the killing, abduction, torture or severe ill-treatment of any person.

15. Judge Hassan Mall was appointed first Chairperson of the Amnesty Committee, with Judge Andrew Wilson as his deputy.
16. Note 9 above.
17. See, for example, the hearing of the amnesty application of Captain Jeffrey Benzien, former member of the South African Police, in Cape Town, July 14, 1997.
18. See, for example, the hearing of the amnesty applications of Brigadier Cronje, Colonel Venter, Captain Hechter, Captain Mentz and Warrant Officer van Vuuren, former members of the South African Police, Johannesburg, 21 October to 1 November 1996; and the many hearings of the amnesty application of Colonel Eugene de Kock, former head of the now notorious 'Vlakplaas' unit of the South African Police.
19. See for example, the amnesty hearing of the applications of former APLA members G Makoma, BM Mkhumbuzi, and T Mlambisa in respect of the St James' Church Massacre, in Cape Town, July 9, 1997.
20. See the hearing of the amnesty application of Adriaan Vlok for ordering a bomb explosion at Khotso House, Johannesburg, July 21, 1998.
21. See for example, the case of Phila Portia Ndwandwe. On exhumations conducted by the TRC, see the TRC Report Vol6, s4, ch2. The Report notes, for example, that Kwa-Zulu Natal exhumations unit 'relied to a large extent on the pointing out of grave sites by amnesty applicants' (p557). The work of locating missing persons and exhuming bodies is continuing.
22. As in endnote 21.
23. There are, of course, risks attached to this approach, not least that the court may decide that the state witness has not answered 'frankly and honestly'. This was in fact the (controversial) decision of the court in the Basson case, in relation to the state witnesses in that case.
24. Interestingly, the Amnesty Committee originally opposed television coverage of its proceedings, but was over-ruled by the TRC as a whole.
25. The quality of legal representation assigned to victims was much criticised in South Africa. This was related in part to the fact that the rate of legal aid available to victims' lawyers was low in comparison to that provided to lawyers representing former state agents.
26. The Ugandan peace process provides a topical example.

References

The Promotion of National Unity and Reconciliation Act (34 of 1995), the decisions of the Amnesty Committee and transcripts of the public amnesty hearings, as well as the Reports of the TRC, are available at http://www.doj.org.za/trc.

African National Congress (1996) Statement to the Truth and Reconciliation Commission (ANC Dept of Information and Publicity, Marshalltown; also available at http://www.anc.org.za)

Boraine, A and J Levy (eds) (1995) *The Healing of a Nation?* Cape Town: Justice in Transition.

Boraine, A (2000) *A Country Unmasked*. London: Oxford University Press.

Brody, R (2001) 'Justice – the first casualty of truth?', in *The Nation*, April 30, available at www.hrw.org/editorials/2001/justice0430.htm

Coetzee, A (1994) 'Voice of Grief', *Democracy in Action* 8(7).

Cronin, J (2006) *More than a Casual Contact*. Cape Town: Umuzi Publishers.

Gavron, J (2002) 'Amnesties in the light of developments in international law and the establishment of the international criminal court', *International and Comparative Law Journal* vol 51.

Guelke, A (2000) 'Interpretations of political violence in South Africa's transition', *Politikon* vol 27(2).

Keightley, R (1993) 'Political offences and indemnity in South Africa', *SA Journal of Human Rights* 9(3).

Maharaj, Mac (1997) 'Justice or reconciliation: the situation in South Africa today', Address delivered to the 'Justice or Reconciliation' Conference, Chicago University.

Neier, A (1999) 'Review of Truth Commission of South Africa Report', *New York Review of Books*, November 18.

Nino, CS (1991) 'The duty to punish past abuses of human rights put into context: the case of Argentina', *Yale Law Journa* 100(8).

Orentlicher, D (1991) 'Settling accounts: the duty to punish human rights violations of a prior regime', *Yale Law Journal* 100(8).

Parker, P (1996) 'The politics of indemnities, truth-telling and reconciliation in South Africa: ending apartheid without forgetting', *Human Rights Law* Journal 17(1/2).

Pigou, P (2001) 'The apartheid state and violence: what has the truth and reconciliation commission found?', *Politikon* vol 28(2).

——— (2002), 'False promises and wasted opportunities: inside South Africa's truth and reconciliation commission', in D Posel and G Simpson (eds) *Commissioning the Past: understanding South Africa's truth and reconciliation commission*. Johannesburg: Witwatersrand University Press.

Sarkin, J (2004) *Carrots and Sticks: the TRC and the South African amnesty process*. Antwerp: Intersentia.

Scharf, MP (1996) 'Swapping amnesty for peace: was there a duty to prosecute international crimes in Haiti?', *Texas International Law Journal* vol 31.

Sparks, A (1997) *Tomorrow is Another Country: the inside story of South Africa's negotiated revolution*. London: Arrow Books.

Truth and Reconciliation Commission of South Africa (1998) *Report*, Volumes 1-5. Cape Town.

——— (2003) *Report*, Volumes 6-7. Cape Town.

Tutu, D (1999) *No Future without Forgiveness*. London: Rider.

Verwoerd, W and M Mabizela (eds) (2000) *Truths in Jest: commentary on the Truth and Reconciliation Commission through cartoons*. Cape Town: David Philip Publishers.

Villa-Vicencio, C and E Doxtader (eds) (2003) *The Provocations of Amnesty: memory, justice and impunity*. Cape Town: David Philip.

Villa-Vicencio, C and W Verwoerd (eds) (2000) *Looking Back, Reaching Forward: reflections on the Truth and Reconciliation Commission of South Africa*. Cape Town: University of Cape Town Press.

Waldmeir, P (1997) *Anatomy of a Miracle: the end of apartheid and the birth of a new South Africa*. London: Viking.

Zalaquett, J (1992) 'Balancing ethical imperatives and political constraints: the dilemma of new democracies confronting past human rights violations', *Hastings Law Journal* 43(6).

Interviews

Roelf Meyer, Johannesburg, November 5, 1999

Mac Maharaj, Johannesburg, October 21, 1999

Schalk Hugo, Pretoria, March 23, 2000

Jody Kollapen, Human Rights Commission, Johannesburg, August 4, 2000

John Daniel, Durban (by telephone), September 27, 2004