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VIOLENCE, AMNESTY AND TRANSITIONAL LAW: “PRIVATE” ACTS AND “PUBLIC” TRUTH IN SOUTH AFRICA

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ABSTRACT

Whereas amnesty is generally associated with impunity and denial, in South Africa, amnesty was pulled into the reach of justice and reconciliation. This article assesses the extent to which South Africa's amnesty fulfilled these normative goals. It centers on the difficulty of differentiating between “private” acts and “political” crimes deserving of amnesty. It argues that the determination of political crimes obfuscated the full extent of apartheid violence and responsibility for it. Consequently, the amnesty process produced a truncated “truth” about apartheid violence that was insufficient to the task of overcoming the past. This is in part an intractable problem embedded in the conflicting tasks of transitional law. The lesson of hope that South Africa offers to other transitional nations is that amnesty should be wound into the promises of democracy without creating false expectations of reconciliation or simplistic truths about the past.

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I. INTRODUCTION

The pursuit of justice and reconciliation in the wake of violent conflict is frequently constrained by brokered agreements that grant amnesty to the outgoing regime's assassins, torturers, and war criminals. Or, where outgoing regimes give themselves amnesty, it would be political suicide for the nascent democracy to overturn it. While the maxim may be peace first, justice later, it has too often been the case that amnesty results in impunity and denial. In South Africa, however, amnesty did not only result in a relatively peaceful transition to democracy but was also pulled into the reach of justice and reconciliation. As Africa's transitional "success story," South Africa is seen to offer lessons of hope to a conflict-weary continent.

Unlike anywhere else in the world, South Africa's amnesty provisions were individualized and contingent upon full disclosure of the act and the determination of political objective. This starkly contrasts with the general practice of granting blanket amnesty to unnamed perpetrators. South African perpetrators had to apply to the Amnesty Committee of the Truth and Reconciliation Commission (TRC) in order to obtain a quasi-judicial amnesty hearing. Public exposure in the amnesty hearings delivered a measure of accountability. Perpetrators who did not apply for amnesty faced threats of prosecution and of being named by other amnesty applicants. Moreover, by forcing apartheid's past into the open, it was said that victims and their families were afforded some closure, that perpetrators were given the opportunity to ease their hearts and register remorse, and that national reconciliation would be forged through collective acknowledgement and condemnation of past violence.

Amnesty in South Africa was a compromise, the result of threats of violence and instability in a negotiated transition.¹ Yet, despite the glaring denial of justice for victims, amnesty has been defended in terms far beyond political expediency: truth, reconciliation, and the reconstruction of society. The moral ambition² of South Africa's amnesty makes it a compelling model for other transitional democracies. International praise has been heaped upon

¹ For accounts of the transition, see M.E. Bennun and M.D.D. Newitt, ed., *Negotiating Justice: A New Constitution for South Africa* (Exeter: University of Exeter Press, 1995); Penelope Andrews and Stephen Ellman, ed., *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Johannesburg, Witwatersrand University Press, 2001).

² This phrase is borrowed from Elizabeth Kiss, "Moral Ambition within Political Constraints: Reflections on Restorative Justice," in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson (Princeton, N.J.: Princeton University Press, 2000).

South Africa's truth commission but often uncritically or without sufficient appreciation of the far more ambiguous reception it has had at home. While I am in general agreement that South Africa's highly creative approach to the problem of amnesty is more legitimate than any other, it is also necessary to assess the extent to which South Africa's amnesty fulfilled its normative, justificatory goals.

Specifically, did the grant of amnesty produce sufficient "truth" for understanding and overcoming the violence of the past? I will argue that it did not - at least insofar as the TRC's determination of "political" crimes deserving of amnesty obfuscated the full extent of apartheid violence and responsibility for it. This analysis centres on the problem of differentiating between the "personal" and the "political," for, as feminists have long argued, these are not impermeable categories.³ Under apartheid, individual acts were rooted in collective conflicts; "private" violations were located within "public," systemic violence. And, in transition, the national commitment to never again repeat the past is partly dependent upon citizens' "personal" transformation: critical introspection regarding indifference to the suffering of others⁴ and a change in one's self-understanding vis-à-vis the other.⁵ While South Africa's amnesty provisions were ostensibly set up in recognition of this dynamic, in practice, the Amnesty Committee cleaved between private and political acts, thereby producing a truncated "truth" about the past.

In part, this is an intractable problem embedded in the conflicting tasks of transitional law and, in part, it has to do with specifics of the South African case. In the following, I first outline the paradox rooted in the dual objectives of South Africa's amnesty law. I then sketch the contours of apartheid violence so as to provide background for assessing the amnesty process. The discussion of several "window" cases will be used to illustrate some of the

³ For a discussion of the personal/political interrelationship in domestic violence under apartheid, see Graeme Simpson, "Women and Children in Violent South African Townships," in *Women and Children's Rights in a Violent South Africa*, ed. Motshekga, M. & Delpont, E. (Pretoria West: Institute for Public Interest, Law and Research, 1993), online: <<http://www.csvr.org.za/papers/papwo&ch.htm>> (date accessed: 1 February 2004).

⁴ See Rosemary Nagy, "Through the Public/Private Lens: Reconciliation, Responsibility and Democratization in South Africa" (Ph.D. diss., University of Toronto, 2003); Jonathan Allen, "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission," *University of Toronto Law Journal* 49 (1999): 335-338.

⁵ Hugo van der Merwe, "The Truth and Reconciliation Commission and Community Reconciliation: An Analysis of Competing Strategies and Conceptualizations" (Ph.D. diss., George Mason University, 1999), ch. 2.

problems in the amnesty process.⁶ These cases have not been empirically and statistically tested. Rather, these acts and decisions captured public attention at the time of violation and during the TRC. They are controversially connected to public conceptions of past violence, responsibility, and reconciliation. It is hoped that the questions raised here will initiate or guide further empirical research. A final caveat pertains to parameters. Space constraints mean that other productions of “truth” during the TRC, such as the “victim” or institutional hearings, and other transitional initiatives, such as land reform, will not be addressed.

II. DUAL TASK OF TRANSITIONAL LAW: BOUNDARY AND TRANSFORMATION

Ruti Teitel, in her formidable study, suggests that law’s function during transitional periods is “deeply and inherently paradoxical . . . Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective.”⁷ Whereas conventional law provides predictability and continuity, transitional law seeks discontinuity with the old order of institutionalized and often “legal” injustice. Transitional legal responses to the past are not conventional, both because of *realpolitik* considerations deriving from historic balances of power and due to law’s “constructive” role in transition.

For instance, conventional understandings of punishment and individual accountability are eclipsed in transitional circumstances. Teitel shows how this creates multiple dilemmas. Although the systemic nature of the prior regime’s violence necessitates some measure of collective accountability, the criminalization of an entire regime is constrained by (liberal) legal norms of non-retroactivity, due process and individual accountability.⁸ Punishment is mitigated by values of peace and reconciliation, resulting in selective prosecution, amnesty or pardon. Moreover, although limited criminal

⁶ Many thanks to Ron Slye for sharing his comprehensive overview of problematic or “window” decisions over the five years of the work of the Amnesty Committee. Ronald C. Slye, “Summary of the Jurisprudence of the South African Amnesty Committee,” (unpublished manuscript, n.d., received from author in Spring 2002).

⁷ Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 6.

⁸ A good example of this is lustration or de-communization. Many post-communist countries have purged their bureaucracies on the basis of collective guilt. Lustration has been highly criticized for denying due process, for relying upon faulty records, and for denying liberal principles of individual accountability. See Teitel, *Transitional Justice*, ch. 3.

sanctions (including South Africa's amnesty) are forward-looking in a manner that retribution is not, traditional goals of specific and general deterrence are inapt because the regime that enabled specific violations has collapsed.⁹ Nonetheless, the articulation of *individual* accountability helps to re-assert individual human rights over collective "goods" such as national security.¹⁰ At the same time, transitional law instigates a collective normative shift –"never again."

In short, transitional law must function simultaneously as *boundary* and as *transformative* intervention. It must, on the one hand, (re)establish the legitimate bounds of state coercion and dissidence by ensuring a measure of accountability for past violations. On the other hand, it must also (re)construct the ethical-political landscape for the future strengthening of rights, the rule of law, and democracy. South Africa's amnesty provisions undertook this dual task of transitional law. In its first aspect, transitional law is primarily backward-looking, narrowing on individual perpetrators. Perpetrators must publicly confess their unlawful acts in accordance with Parliamentary requirements set out in the TRC's founding legislation.¹¹ This forces them to observe the new democratic rules and rulers. On the stand, full disclosure amounts to formal recognition of the illegitimacy and illegality of past misdeeds. Individual accountability arises in the form of admission and public shaming.

In its second aspect, transitional law is primarily forward-looking, with diffuse goals of collective acknowledgement of past wrongdoing, restoring the dignity of victims, and ethical-political transformation. The transformative aspiration of the amnesty process is especially evident in the Constitutional Court's decision to uphold the validity of amnesty. In *Azanian People's Organization v. President of the Republic of South Africa*, a group of prominent victims argued that amnesty violated the constitutional right to have "justiciable

⁹ Teitel, *Transitional Justice*, 217.

¹⁰ Teitel explicitly offers a liberal analysis and she does not consider customary law or the possibility that transitional regimes may not select her prescription for liberal democracy. She narrowly seems to understand individual rights as the best response to persecutory logic on basis of racial or ethnic identities (225-226). Nonetheless, Teitel's insightful overview of transitional justice is not incommensurate with liberal principles articulated in the South African Constitution. I address the fact that apartheid was not just a violation of individual rights but also of group rights in following sections of this paper.

¹¹ *Promotion of National Unity and Reconciliation Act*, No 34 of 1995. Hereafter cited as *TRC Act*. Amnesty is also guaranteed in the 1993 Interim Constitution, signed during the final negotiations to transition.

disputes settled by a court of law.”¹² The Court justified amnesty first on the promise of reparations to victims and secondly on the basis of truth. The Court reasoned that the “carrot and stick” approach of amnesty and prosecution provided an important incentive to admit past violations which might otherwise remain unknown:

With that incentive, what might unfold are objectives fundamental to the *ethos* of a new constitutional order. The families of those unlawfully tortured, maimed or traumatized become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and *creating the emotional and structural climate essential for reconciliation and reconstruction*.¹³

In this passage, we see that transitional legal processes are not simply aimed at the formal reconstruction of institutions. In constructing the shift to democracy, transitional law also seeks more broadly to build behavioural and ethical commitments to rights and the rule of law. “Paper” rights are by themselves insufficient; there must be general willingness among citizens to abide by democratic rules and values.¹⁴ What is needed, writes the TRC in its report, “is a moral and spiritual renaissance capable of transforming moral indifference, denial, paralysing guilt and unacknowledged shame into personal and social responsibility.”¹⁵ This passage is directed primarily at apartheid beneficiaries; indeed, their “overarching sense of denial”¹⁶ comprises an important concern in this paper. Of equal concern are ruptures in communal

¹² *Azanian People’s Organization v. President of the Republic of South Africa*, 1996 (8) BCLR 1015 (CC). Hereafter cited as *Azapo*.

¹³ *Ibid.*, par. 17 (emphasis added).

¹⁴ Guillermo O’Donnell, “Illusions about Consolidation,” *Journal of Democracy* 7 (1996): 34-51.

¹⁵ South Africa, Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report* (Cape Town: Juta & Co., 1998; 2003), Volume 6, section 5, chapter 1, 592. Hereafter cited as *Report*. In 2003, Volumes 6 and 7 were issued as a “codicil” to the 1998 five-volume report. This is because the Amnesty Committee continued its work for two years after the rest of the TRC.

¹⁶ *Ibid.*, vol. 5, ch. 6, par. 15.

and inter-personal solidarity that resulted in and from the dire pairing of violence and politics in the Bantustans and townships.

Singular condemnation of individual perpetrators cuts short the transformative task of transitional law by overlooking the endemic violence and dehumanization of apartheid South Africa. In order to account for the general climate of violence, the amnesty provisions conjoin individual acts of abuse with broader political objectives.¹⁷ By insisting that only “political” crimes be given amnesty, individual perpetrator accountability was to be embedded in the political accountability of leaders, which was to be embedded in the moral responsibility of the beneficiaries of apartheid and members of local communities caught up in so-called “black-on-black” violence. Consequently, as the TRC put it, through this contextualized truth, individual South Africans were supposed to examine the “little perpetrator in each one of us.”¹⁸ And truth, so the TRC slogan goes, is the “road to reconciliation.”

If amnesty is justified on the basis of truth and reconciliation, then clearly its moral and political success must be evaluated on the basis of the “truth” that is produced. In the following, I will show how the legal process of amnesty decisions produced too narrow a definition of the “political” and as a consequence fell short of its broader transformative goals. There are two reasons for this. First, the normative reach of transitional law is constrained by prior injustice. Prevailing interpretations of the past explicitly shape the construction of a democratic ethos.¹⁹ Second, although setting boundaries and constructing transformation are equally crucial tasks of transitional law, they are paradoxically entwined. Despite the intention to mediate between the individual and the systemic, or between the personal (“the little perpetrator in each one of us”) and the political (system, culture, or organization), the two tend to pull apart. I will elaborate upon these interrelated problems by first delineating the nature of apartheid violence and then turning to the amnesty process.

¹⁷ Ronald C. Slye, “Justice and Amnesty,” in *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 180.

¹⁸ TRC, *Report*, vol. 1, ch. 5, par. 108.

¹⁹ See Teitel, *Transitional Justice*, 19.

III. APARTHEID VIOLENCE

Apartheid violence, broadly defined, operated on a continuum from the *ordinary* violence of *legal* racial oppression to the *extraordinary* violence of *illegal* torture and killings.²⁰ A full enumeration of the injustices perpetrated under and outside apartheid law cannot be presented here.²¹ Rather, my purpose in this sketch is to establish the intrinsic connection between the extraordinary and ordinary forms of violence. In so doing, I will argue that “political” or systemic violence cannot always be clearly divided from criminal acts or moral abdication on the part of “private” individual citizens. Most plainly, the majority of whites explicitly supported a system deemed a crime against humanity; their complicity in state terror consisted of indifference, evasion and denial. With respect to so-called “black-on-black” violence, questions are raised about the blurring of crime and politics and how this was framed within divide-and-rule strategies of apartheid.

This is not to deny individual agency and accountability but, rather, to paint the larger picture of violence. In this respect, I note that gross human rights violations were perpetrated by actors on all sides of the conflict for and against apartheid: by state agents, by armed wings of liberation groups, by white right-wing extremists, by members or adherents of the African National Congress (ANC), the Inkatha Freedom Party (IFP), the Pan-Africanist Congress (PAC) and other political organizations, and by ordinary people caught up in a “people’s war.” Length constraints preclude detailed analysis of each group. Rather, the key point to pursue is that, contrary to former President F.W. de Klerk’s claim that state torture and killings were the (private) “mala fides” of a few “over-zealous” agents,²² the extraordinary violence of apartheid was *inscribed* within the structural, “public” violence of basic apartheid law.

In the first place, extra-legal violence was perpetrated to maintain white domination and it was facilitated by apartheid’s implicit claim that blacks were less than human. Secondly, state terror was facilitated by *publicly* enacted

²⁰ I borrow the phrasing of this distinction from David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998).

²¹ For full accounts, see John Dugard, *Human Rights and the South African Legal Order*, (Princeton, N.J.: Princeton University Press, 1978); Max Coleman, ed., *A Crime Against Humanity: Analysing the Repression of the Apartheid State*, (South Africa: David Philip Publishers / Mayibuye Books / Human Rights Committee, 1998).

²² See Transcript of “National Party” Party Political Recall in Cape Town, 14 May 1997, online: <http://www.doj.gov.za/trc/trc_frameset.htm> (date accessed: 30 April 2004).

repressive legislation that granted virtual impunity through ouster clauses,²³ police indemnity and broad discretionary powers. The blurring of the line between legal and illegal violence is particularly evident in executive and judicial sanctioning of solitary confinement, which is considered a form of torture.²⁴ Thirdly, counterinsurgency tactics used to co-opt and undermine resistance followed the basic logic of apartheid: dehumanization, stratification, and differential privilege.

To expand, apartheid was a complex divide-and-rule strategy that ran along racial, ethnic and class lines.²⁵ Colonial tribal reserves were transformed into independent homelands, or Bantustans, which were despotic structures of “self-government.” Indians and “Coloureds” had also to live in specially designated areas. Urban Africans were controlled through the ethnic-based migrant hostel system and by stringent regulations for township residence. The everyday violence of racial oppression consisted of routine pass checks, the separation of families, the destruction of homes and forced relocation, the absence of electricity, sewage or running water, the lack of access to healthcare, policing and education, high unemployment, artificially repressed wages, consignment to manual labour -- and the denial of political rights to redress this treatment.

Political resistance to apartheid was met with a battery of security laws. Repressive legislation included the suppression of communism, the criminalization of civil disobedience, the banning and/or censorship of publications, the banning or banishment of individuals, and the banning of political organizations and political gatherings. The resort to armed force in 1961 by the ANC and PAC eventually expanded to a much broader “people’s war” of ungovernability by the 1980s. Permanent emergency powers (annually renewed from 1986 to 1990) included the ability to impose curfews and to deploy troops in the townships. Government officials were given broad discretionary powers to detain without trial anyone suspected of being a communist or a terrorist. Indiscriminate force was used in public order

²³ Ouster clauses restricted the jurisdiction of courts to review certain regulations. See Nicholas Haysom, “Legal Intervention and the State of Emergency,” in *Developments in Emergency Law*, ed. N. Haysom and C. Plasket (Johannesburg: Centre for Applied Legal Studies, 1989), 1-9.

²⁴ A.S. Mathews and R.C. Albino, “The Permanence of the Temporary – An Examination of the 90- and 180-Day Detention Laws,” *South African Law Journal* 83 (1966): 16-43.

²⁵ See Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, N.J.: Princeton University Press, 1996).

policing; the torture of detainees was systematic; political opponents were increasingly subject to assassination or judicial execution.

In the 1980s, the state embarked on a “total strategy” to destabilize political opposition through brutal acts of covert violence, the use of informers, and select reform initiatives. As state and popular violence reached a peak, material and political reforms were also put in place. But “reform apartheid,” as Newitt puts it, never strayed from the long-term objectives of cheap labour, white control of land, and white political power through divide-and-rule strategies.²⁶ For example, the introduction of a Tricameral Parliament sought to co-opt Indians and Coloureds but excluded Africans. Changes to labour and influx control legislation sought to foster an “insider-outsider” split between urban and rural Africans by excluding migrant workers from the newly allowed multi-racial unions and by “repatriating” squatters.

The lack of “normal” and egalitarian contact between the races contributed to indifference, facile ignorance, and negative stereotypes. Abel correctly remarks: “South Africa created urban township councils and rural homeland governments partly to be able to blame blacks for the illegality, corruption, and violence indispensable to white rule.”²⁷ The fallacy of self-government implied that no one but blacks themselves were responsible for dictatorial rule in the Bantustans or corruption in township councils. This kind of moral distancing was further facilitated through the use of subordinate black officers to conduct torture and the appointment of black *kitskonstabels*²⁸ for brutal township policing. The dramatic rise in “black-on-black” violence in the final years of apartheid (1990-1994)²⁹ appeared to confirm whites’ worst fears. The seemingly random nature of attacks targeted at people with no political affiliation, such as the Boipatong and Sebokeng massacres and the gruesome necklacing of alleged informers or state collaborators, were taken as ample evidence that only apartheid could preserve peace. Censored media coverage typically reported “faction” incidents as “mindless,” “savage” or “primitive.”

²⁶ Malyn Newitt, “Introduction,” in *Negotiating Justice: A New Constitution for South Africa*, ed. Mervyn Bennun and Malyn D.D. Newitt (Exeter: University of Exeter Press, 1995), 3-4.

²⁷ Richard L. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (New York: Routledge, 1995), 539.

²⁸ “Instant” constables deputized with minimal training.

²⁹ See Brandon Hamber, “Have no doubt it is fear in the land: An exploration of the continuing cycles of violence in South Africa,” Seminar No. 3, 1999, Centre for Studies of Violence and Reconciliation, online: <<http://www.csvr.org.za/papers/papfearb.htm>> (date accessed: 1 February 2004).

This helped legitimate police and military intervention as protective and defensive action by the bearers of “civilized order.”³⁰

But the apparent irrationality of “wild” tribal rivalry was in fact deeply political, located in the social structures created by apartheid and in the dynamics of unavoidable political transition. “Black-on-black” violence was not simply a case of people responding to common misery through mutual victimization. There is more than enough evidence of a “third force”-- state complicity in “ethnic” violence through the provision of arms and training to the IFP and criminal gangs, through participation in carrying out massacres, and in apathetic, inefficient policing.³¹ Even where political and ethnic violence had “independent momentum,” it was nonetheless rooted in the structures of apartheid, albeit in complex and resistant ways.³² Political mobilization was usually based upon intertwining apartheid divisions: for example, the split between urban township dwellers and migrant hostel workers encompassed class differences (rising unemployment among hostel workers and their exclusion from unions) and divisions in social status (urban scorn for country bumpkins). These splits also typically aligned with ethnic and political distinctions: Zulu Inkatha supporters in the hostels against Xhosa ANC township residents.

³⁰ Deborah Posel, “Symbolizing Violence: State and Media Discourse in TV Coverage of Township Protest, 1985-7,” in *Political Violence and the Struggle in South Africa*, ed. N. Chabani Manganyi and André du Toit (London: Macmillan, 1990), 161-2.

³¹ The strong argument regarding the “third force” is that it was part of a coherent destabilization strategy emanating from the highest levels of office in an effort to destabilize transitional negotiations and with a view to creating an alliance between Inkatha and the National Party in order to electorally defeat the ANC. See Mervyn E. Bennun, “Understanding the Nightmare: Politics and Violence in South Africa,” in *Negotiating Justice: A New Constitution for South Africa*, ed. Mervyn Bennun and Malyn D.D. Newitt (Exeter: University of Exeter Press, 1995), 26-61; Stephen Ellis, “The Historical Significance of South Africa’s Third Force,” *Journal of Southern African Studies* 24, no. 2 (1998): 261-299; Rupert Taylor and Mark Shaw, “The Dying Days of Apartheid,” in *South Africa in Transition: New Theoretical Perspectives*, ed. David R. Howarth and Aletta J. Norval (London: Macmillan, 1998), 13-31. For a contrasting and in my view incorrect account that “black-on-black” violence was simply a people’s war out of control, see Anthea Jeffrey, *The Truth about the Truth Commission*, (Johannesburg: South African Institute of Race Relations, 1999).

³² I follow Anthony Marx’s articulation of the “vicissitudes of struggle:” ascriptive definitions of race, nation and class are “subjective mental constructs” that “encapsulate ideology as it is lived through ... The opposition functions both as subject and object; it challenges and is shaped by material conditions and values.” Anthony Marx, *Lessons of Struggle: South African Internal Opposition, 1960-1990* (New York: Oxford University Press, 1992), 8; 27.

Certainly, as Simpson and Rauch point out, political affiliation or ethnic identity could at times be fairly peripheral to conflict, used as a pretext or camouflage.³³ Their analysis looks at increased material expectations and the “deregulation of social control” in the context of political transformation and economic recession. All these factors fuelled conflict, either between township communities or between permanent urban residents, squatters, and hostel dwellers. There was an increasingly blurred line between criminally-motivated and politically-motivated violence, spurred by an active culture of violence and the decline in repressive policing. Ostensibly political organizations, such as the ANC-aligned Self Defense Units (SDUs), often seemed little more than bands of thugs. Although social disintegration and increased violence are a feature of many transitional societies, in South Africa this was heightened by the terrible poverty imposed by apartheid and by the historical politicization of “bread and butter” issues.

In light of the apartheid framing of “black-on-black” violence, it was highly disingenuous when incidents were used to reinforce beliefs that blacks weren’t ready for democracy or to manipulate white fears to the advantage of right-wing forces.³⁴ “Wild” and “savage” ethnic rivalries, when taken as a whole, were neither random nor irrational. And, I will suggest, this ought to be taken into account when thinking about how to define a political crime. This does not preclude allocating responsibility to individual perpetrators, whether state agents, political activists, or ordinary people. But it does insist that structural violence cannot be dissociated from extraordinary acts of violence. In the following section, however, we see that the TRC’s uneven accounting of past violence produced a truncated transformative “truth.”

IV. AMNESTY: DETERMINING “POLITICAL” CRIMES

The *TRC Act* mandates the Commission to establish “as clear a picture as possible of the nature, causes and extent of gross violations of human rights.”³⁵ Proponents of truth commissions argue that their advantage over trials is that the socio-political *context* of torture and killing is acknowledged. However, as

³³ Graeme Simpson and Janine Rauch, “Political Violence: 1991,” in *Human Rights Yearbook 1992*, ed. N. Boister and K. Ferguson-Brown (Cape Town: Oxford University Press, 1993), 212-239.

³⁴ This is not to deny fear. There was cause, particularly insofar as the PAC did not drop its official commitment to armed struggle until 1993.

³⁵ *TRC Act*, Preamble, par. 1.

Mahmood Mamdani has persuasively argued, the truth commission's mandate misidentified the main victims and perpetrators of apartheid by narrowly focussing on individual acts of extraordinary violence. Insofar as the system of apartheid factored into the TRC's account, it was as the wider *context* of violations, rather than as *the crime* itself.³⁶ Despite affirming that apartheid was a crime against humanity, the TRC felt itself unable to treat institutionalized racism, which affected some 32 million people *as groups*, as a gross violation. In short, the legally narrow definition of victimhood was to limit the scope of amnesty's transformative aspiration.

The TRC was undoubtedly constrained by its mandated definition of gross violations as "killing, abduction, torture and severe ill-treatment."³⁷ Moreover, the TRC did go some way to acknowledge and remedy this shortcoming by holding public hearings on the apartheid role of civil society, as well as clearly stating that acts within its mandate "were not the only serious human rights violations" under apartheid.³⁸ Be that as it may, the emphasis on individual perpetrators and individual victims effectively suggested that social transformation consisted of reckoning with the former, restoring the dignity of the latter, and collectively condemning the "evil" of apartheid.³⁹ By and large, the TRC could not or did not address the complexities of wrongdoing within and between communities.⁴⁰ The priority of the individual is especially evident in the TRC's decision to treat arson as an act of severe ill-treatment. Whereas the destruction of a person's home through an individual act of arson was seen to fit within the mandate, the TRC did not include the loss of home through forced removals, which affected some 3.5 million people *as groups*. As the TRC

³⁶ Mahmood Mamdani, "Reconciliation without Justice," *South African Review of Books* 46 (1996), online: <<http://www.uni-ulm.de/~rturrell/antho3html/Mamdani.html>> (date accessed: 30 January 2004). See also Mahmood Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa" (paper presented at Yale University, Department of Political Science conference, "Identities, Affiliations and Allegiances," Oct. 3-4, 2003), online: <<http://www.yale.edu/polisci/info/conferences/mamdani1.doc>>

³⁷ *TRC Act*, 1(ix)(a).

³⁸ TRC, *Report*, vol. 1, ch. 4, par. 54.

³⁹ See Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), ch. 2.

⁴⁰ See Van der Merwe, "The TRC and Community Reconciliation."

explained, its main role was not to impugn apartheid laws and policies, however morally offensive they may have been.⁴¹

Nonetheless, the explicit intent within the amnesty provisions was at least to link individual violations to the broader context of violence. To recall, the grant of amnesty for any “act, omission or offence” committed in the course of the conflicts of the past was contingent upon full disclosure and the determination of political objective. This latter provision was intended to inscribe individual violations within the broader political conflict, thereby allocating responsibility -- and transformative acknowledgement of said responsibility -- on multiple levels. But even within its own terms, the amnesty process seems to have fallen short of its transformative aspiration. One obstacle to “truth” -- that relatively few state operatives bothered to apply for amnesty -- was largely out of the TRC's control. Out of the 7115 applications for amnesty only 293 were from state agents.⁴² The bulk of applications came from ANC-allied persons and as many as 5000 applicants were already in jail or under investigation.⁴³ Out of the 7115 applications, about 850 amnesties were granted.⁴⁴

Of those applications that came forward and met the criteria of gross violation, the determination of political objective was subject to the following major requirements:

- the motive of the person who committed the act;
- the context of the act, in particular, whether it was “committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;”
- the legal or factual nature of the act, including the gravity of the offense;

⁴¹ TRC, *Report*, vol. 1, ch. 4, par. 55. Note, however, that volume 7 of the report lists Nolwandle Esther Makiwane as a victim of forced removal.

⁴² *Ibid.*, vol. 6, section 3, ch. 1, par. 9.

⁴³ Former TRC investigator Piers Pigou estimates that over 5,000 applicants were already in jail. Personal interview, 18 June 2001; email communication Oct. 2, 2002.

⁴⁴ The exact number of amnesties granted is unclear. A summary of total number of amnesties granted simply is not available in volumes 6 and 7 of the report. This figure is based on a count from the Truth and Reconciliation Commission, Amnesty Hearings and Decisions Index, which only goes up to January 11, 2000 with some applications to be still processed. Online: <<http://www.doj.gov.za/trc/amntrans/index.htm>> (date accessed: 1 February 2004).

- whether the act was directed at a political opponent or State property or personnel or against private property or individuals;
- whether the act, omission or offence was committed “in the execution of an order of, on behalf of, or with the approval of, the organisation, institution, liberation movement or body” of which the perpetrator was “a member, an agent or supporter;”
- whether the act, omission or offence was proportional to the objective.

Abuses committed for personal gain -- except in the case of informants -- or out of personal malice, ill-will, or spite toward the victim would not be granted amnesty.⁴⁵

Membership or strong affiliation with a political organisation or movement became a major determinant of political objective, as did proof by the applicant that he or she was acting under the orders or authority of the State or political organisation. This was problematic for a number of reasons: the proportionality requirement was largely ignored; the focus on following orders created serious difficulties around questions of accountability; and legalistic decisions produced too narrow a definition of the political.

Roht-Arriaza and Gibson suggest that the proportionality requirement should have been used to limit the scope of amnesty for the most egregious violations and crimes against humanity.⁴⁶ To consider proportionality, however, raises difficult questions about when and why torture and murder *ever* constitute a proportional means to a political objective, and how to measure proportionality. Slye notes in his overview of the amnesty jurisprudence that when the requirement was used, the proportionality of the act was determined on the basis of the stated objective.⁴⁷ Thus, for example, murder was deemed disproportionate to the objective of driving someone out of office or out of

⁴⁵ All requirements from *TRC Act*, sec. 20(2)(a)-(f).

⁴⁶ Naomi Roht-Arriaza and Lauren Gibson, “The Developing Jurisprudence on Amnesty,” *Human Rights Quarterly* 20 (1998): 883.

⁴⁷ Slye, “Summary of Amnesty Jurisprudence.”

town.⁴⁸ Torture was disproportionate where there was no reasonable hope of gaining information.⁴⁹

Yet it is not clear, for example, how the brutal murder of attorney Griffiths Mxenge met the proportionality requirement.⁵⁰ Mxenge was stabbed 45 times, he was disembowelled, his face was mutilated and his ears were practically cut off. Mxenge was not an MK cadre;⁵¹ he was killed for practicing law in defence of political activists. Although the amnesty panel harshly criticizes the police in this respect, the question of proportionality is not even raised in the amnesty decision.⁵² Mxenge's murderers were granted amnesty because, like many other successful applicants, they were following orders.

The determination of political objective on the basis of following orders marks a fundamental departure from Nuremberg precedents. In the Nuremberg trials, "due obedience" was disallowed as a valid defence and the principle of individual accountability was established. In the amnesty process, the requirement of following orders appears once again to mitigate individual accountability. Applicants might have been held accountable in terms of amnesty's procedural requirements, but the emphasis on following orders functioned to exonerate them substantively.⁵³ As Bhargava says, given that Mxenge's killers recognized the manifest illegality and moral depravity of their acts, amnesty should not have been granted solely under the guise of following orders.⁵⁴ The disproportionate nature of their crime could have been used to deny amnesty.

⁴⁸ AC decision 1997/0028 (Ntsikeleo Don Jonson [AM 0037/96]); AC decision 1997/0069 (Hendrik Johannes Slippers [AM 1002/97]). All citations for amnesty decisions follow their organization as listed and stored on the TRC's website <http://www.doj.gov.za/trc/trc_frameset.htm> (date accessed: 30 April 2004). Decisions are numbered according to year and decision number. "AC" refers to the Amnesty Committee. In brackets are name of perpetrator and amnesty application number.

⁴⁹ AC Decision 1997/0025 (Kwanele Enough Thoba [AM0077/96]).

⁵⁰ See Nkosinathi Biko, "Amnesty and Denial," in *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 195.

⁵¹ UnKhonto we Sizwe, armed wing of the ANC.

⁵² AC Decision 1997/0041 (Dirk Coetzee and others).

⁵³ See Slye, "Justice and Amnesty," 181.

⁵⁴ Anurima Bhargava, "Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission," *Columbia Law Review* 102 (2002): 1328.

To be sure, the insistence on following orders countered the tendency among political leaders to hang individual perpetrators out to dry. Covert and illegal state violence is specifically set up to operate on the basis of plausible deniability. During the TRC, this denial continued to run through the highest echelons of the apartheid government, including former presidents Botha and de Klerk. And, for instance, IFP leader, Mangosuthu Buthelezi, claimed that neither he nor the IFP had authorized the use of violence for political purposes. The TRC flatly rejected these positions, noting that individual applications have implicated party and state officials.⁵⁵ So the emphasis on following orders sought to mediate between the individual and the collective in order to avoid scapegoating individuals. Yet, the converse risk in trying to issue a broadly transformative message about command responsibility was to exculpate direct perpetrators.

The potential conflict between the narrow legal requirements of the amnesty provisions and broader ethical-political messages was acutely manifest in the ANC leadership's application for amnesty. In 1997, thirty-seven high-ranking members of the ANC filed for amnesty under Section 19(5)(b) of the *TRC Act*, which allows individual applications to be heard jointly. A "Declaration of Responsibility" accompanied the individual applications. In the Declaration, the applicants assumed collective political responsibility for *any* actions that may have resulted in gross human rights violations either by the ANC's military operations (MK) or by Self-Defense Units (SDUs) in the townships.⁵⁶ The Amnesty Committee, in direct contravention of its mandate, granted amnesty for unspecified acts. Consequently, the full Commission took the Amnesty Committee to court for a declaratory order on the illegality of the amnesties. While internal divisions within the TRC may have boded ill for national reconciliation, the dispute was at least resolved by democratic checks that affirmed the rule of law.⁵⁷ Eventually, the decision was revisited and amnesty was refused.

This strange episode pitted the "under-legalistic" desire to recognize the embedded nature of violence and responsibility against the "over-legalistic" bounds of accountability.⁵⁸ The ANC took responsibility for everything and,

⁵⁵ See TRC, *Report*, vol. 6, sec. 3, ch. 3, par. 4-5.

⁵⁶ AC Decision 1999/0046 (Maharaj and others). See also TRC, *Report*, vol. 6, sec. 3, ch. 2, par. 29-31. The initial number of applications was twenty-nine, with later additions which also relied upon the Declaration.

⁵⁷ Lorna McGregor, "Individual Accountability in South Africa: Cultural Optimum or Political Façade?", *American Journal of International Law* 95 (2001): 40-42.

⁵⁸ This distinction borrowed from Wilson, *Politics of Truth and Reconciliation*, 92.

consequently, nothing. Moreover, the application and initial decision to grant amnesty implied that the unspecified victims of ANC-sponsored attacks were of lesser moral worth than victims who were identified through the proper amnesty process.⁵⁹ Yet, in terms of acknowledging overarching responsibility, the ANC Declaration went quite far. Nonetheless, amnesty simply was not designed for this sort of reckoning. Several amnesty applications from ordinary citizens for apathy and complicity were likewise rejected. The transformative aspiration of transitional law was paradoxically bound by the legal requirement of specific acts.

At the level of individual perpetrators, the insistence upon the presence of orders or authority led to some intuitively bizarre decisions. For example, the assassination of South African Communist Party leader Chris Hani was determined to have no political objective because his murderers, Clive Derby-Lewis and Janusz Wallus, acted outside the express authorization or policies of the Conservative Party.⁶⁰ Contra the amnesty decision that this was a crime of personal initiative, one might question how the murder of a top party leader could be anything but “political.” Certainly, Hani’s family and the SACP vigorously opposed amnesty. Yet, the irony of this decision is that although Derby-Lewis and Wallus were held accountable through punishment, rather than amnesty, the decidedly political nature of their crime -- to derail transitional negotiations -- is sidelined in the official account, which focuses on issues surrounding full disclosure and orders.⁶¹

In other cases, the determination of political objective was also narrowed so as to exclude the broader climate of violence. For example, in Mdantsane Township (near East London), a gang called the “Killer Boys” had been terrorizing the community through harassment, stabbing and rape. Several complaints to the police had resulted in inaction. Residents believed that the Killer Boys were agents of the security forces sent to destabilize the community and to assassinate MK soldiers who frequented the local *shebeen* (bar). Residents reached consensus that the Street Committee had to deal with

⁵⁹ McGregor, “Individual Accountability in South Africa,” 40-42.

⁶⁰ AC Decision 1999/0172 (Janusz Wallus [AM 270/96] and Clive Derby-Lewis [AM 271/96]). Amnesty was also denied due to lack of disclosure.

⁶¹ The TRC does refer to Hani’s murder as an assassination. But, for example, the TRC writes, “The Committee accepted that the applicants clearly and subjectively believed that they were acting against a political opponent. The objective facts supported this belief, in particular the fact that Mr. Hani was regarded as such by the CP and the right wing. However, this factor, while relevant, was insufficient on its own to render the application successful.” TRC, *Report*, vol. 6, sec. 3, ch. 6, par.169. See in general vol. 6, pages 66-74; pages 469-482.

the gang, and so a group was sent to fetch some of the gang members. The stated initial intention was to punish the Killer Boys through beating and then to deliver them to the police. But the five Killer Boys instead ended up being burned with tires.

Amnesty was denied to the members of the Street Committee on several grounds. None of the twelve applicants could prove that the Killer Boys had collaborated with police and the applicants had gone beyond their original intention of beating. The applicants did not have reasonable grounds to believe nor, in the view of the Amnesty Committee, did they believe that they were acting under the implied authority of the ANC-aligned United Democratic Front (UDF). Finally, there was no political objective. The object was revenge -- as allegedly demonstrated by the method of necklacing.

The Mdantsane Twelve decision does not accept the applicants' claim that, as they wrote in their application,

We perceived the criminals and gangsters as enemies of our struggle. In fact their actions lend credence to this argument of the white supremacists that blacks were not ready to govern themselves.⁶²

The reduction of crime, in the applicants' view, would subsequently bring peace to the community and "unite the people against the enemy -- apartheid."⁶³ More attention should have been given to these statements given the general violence that infused townships, given the destabilization and atomization of reform apartheid, given the revolutionary nature of committee organisations, and given the lack of policing -- regardless of whether the gang had directly collaborated or not with security forces. Moreover, the grant of amnesty would have refuted the apartheid pretence that "black-on-black" violence was wildly criminal.

In some decisions, however, individual acts were squarely situated within the broader climate of pervasive violence. In the Boipatong massacre, hostel residents sought to avenge the death of IFP supporters at the hand of township residents and to deter future attacks. The attack by approximately 300-500 men was extremely violent, killing 45 men, women and children,

⁶² AC Decision 1997/0049 (B.H. Jwambi and others), page 17. There were twelve applicants regarding the same offences. This statement is taken from the application of Soyiso Zuzani, but the decision notes that all applications were "almost identical."

⁶³ AC Decision 1997/0049 (B.H. Jwambi and others), page 17.

injuring many more, and damaging property. In its decision to grant amnesty, the Amnesty Committee recognized the “cycle of attack and counter-attack” between the two “no-go zones.” Further, it noted that “enemies were defined in terms of party affiliation and/or the area where they lived. It did not matter that you did not belong to or support either party.”⁶⁴ Although victims opposed amnesty on the grounds of proportionality, the decision held that “proportionality acquires less significance” when the act is politically motivated.⁶⁵ Here, revenge is explicitly politicized.

The juxtaposition of these cases illustrates the difficulties in distinguishing between the personal and the political, between individual crimes and systemic socio-political violence. Richard Wilson forcefully highlights this deficiency in his analysis of the place of racism in determining political objective. He argues that the TRC may have used “racism” as an overarching explanation for the past “but racism was not conceptualized in both institutional and experiential components, but instead as a set of values and sentiments held by individuals.”⁶⁶ This is especially evident in the TRC’s general position on right-wing violence:

What is sickening is the random indiscriminate nature of the attacks on people simply because they were black. Despite attempts by amnesty applicants to justify the political nature of these attacks, their testimony reveal that, in most instances, their motives had been purely racist.⁶⁷

For example, amnesty was denied to the four van Straaten brothers for the murder of two black security guards, Wanton Matshoba and Sazise Cyprion Qheliso.⁶⁸ The brothers were supporters, but not members, of the Afrikaner Weerstandsbeweging (AWB). In demonstrating political objective, the brothers alluded to the establishment of an Afrikaner *volkstaat*, to teaching the

⁶⁴ AC 2000/0209 Decision (Mqambeleni Buthelezi and others), para.18; see also AC Decision 1998/0012 (Mabunghu Absalom Dladla [AM 4019/96] and Nkanyiso Wilfred Ndlovu [AM 4058/96]).

⁶⁵ AC decision 2000/209 (Mqambeleni Buthelezi and others), para. 14.

⁶⁶ Wilson, *Politics of Truth and Reconciliation*, 32.

⁶⁷ TRC, *Report*, volume 6, section 5, ch. 6, 723-4.

⁶⁸ The following draws from the van Straaten Amnesty Hearing Transcript, Potchefstrom 1, 9-12 September 1996, online: <<http://www.doj.gov.za/trc/amntrans/potch1/potch.htm>> (date accessed: 1 April 2004).

Nationalist government a lesson, and to creating jobs for whites. They emphasized their motivation in terms of a strict Christian upbringing by a father who was member of the extreme right-wing organisation, Ossewa Brandwag, and, in particular, *that they had grown up hating blacks as enemies and believing them to be inferior*. In short, the brothers saw no distinction between their political objective and pure racial hatred. The amnesty panel rejected this position. The brothers were not members of a known political organisation, they were not acting under orders and, moreover, the AWB had dissociated itself by not arranging for the brothers' legal defense.

In contrast, amnesty was granted in full recognition of politicized racial motivation in the murder of Amy Biehl, an American Fulbright student who was stoned and stabbed to death by 7-10 youths in Gugulethu.⁶⁹ The four amnesty applicants explained their actions by saying they had been at a meeting of the Pan African Student Organisation (PASO), where they were urged to help the PAC campaign to stop deliveries into the townships. The meeting was very militant, ending with chants of "one settler-one bullet." This meeting framed their mindset when they saw Biehl driving through the township. PASO is not part of PAC/APLA, and clearly the youths were not acting under orders. Yet the Amnesty Committee decided that Biehl, as a private individual, represented the white community and was therefore a political enemy according to the slogan. Moreover, it was a case with international stature -- the applicants expressed remorse, the PAC expressed regret, and Biehl's parents reached out in reconciliation. Under these circumstances, the grant of amnesty to Amy Biehl's killers was surely "a public relations coup which the TRC could not afford to pass by."⁷⁰

As Wilson says, the seeming distinction between the "personal" racism of right-wing perpetrators and the "political" racism of the PAC was, respectively, "over-legalistic" and "under-legalistic."⁷¹ On the one hand, the confines of the mandate are necessary insofar as amnesty cannot be a "get out of jail free" card for anyone who has killed a person of the opposite race. On the other hand, the narrow definition of political objective in terms of membership significantly misrepresents the pervasive nature of apartheid violence. Moreover, the amnesty decision for Biehl's killers suggests very little individual accountability. In the midst of a campaign of ungovernability, the decision reads, the four applicants "were so aroused and incited, that they lost

⁶⁹ AC Decision 1998/0030 (Vusumzi Ntamo [AM 4734/97] and others).

⁷⁰ Wilson, *Politics of Truth and Reconciliation*, 92.

⁷¹ *Ibid.*

control of themselves and got caught up in a frenzy of violence.”⁷² At the same time, the violent acts of right-wing racism were dissociated from the apartheid system and, consequently, the individuals were held accountable in isolation from their environment. The attendant implication is that while black racial violence is endemic, white racial violence is a private aberration.

V. AMNESTY’S TRUTH

In the end, what sort of “truths” emerged from the amnesty process? The public exposure of individualized amnesty was constructive insofar as torture and killings are now publicly condemned, no matter what the circumstances. But with public attention on infamous perpetrators like “Prime Evil” Eugene de Kock, the connection between beneficiary responsibility and national reconciliation was considerably weakened. Perpetrator confession revealed the “excesses” of the system to apartheid beneficiaries who “did not know.” This professed ignorance is but one part of beneficiary denial. Many have refused even to acknowledge their role in structural violence, let alone its intrinsic connection to torture and killings.⁷³ The TRC of course is not responsible for beneficiary denial. Moreover, the insistence on authorization or orders goes some way toward combating the myth that state perpetrators were bad apples. Yet, at the same time, the insistence upon authorization or orders also detracted from the structural framing of white right-wing and “black-on-black” violence. Many “private” acts of ethno-racism and revenge were thus excluded from the transformative message about breaking the continuum of violence.

One notable exception is the TRC's decision to treat witchcraft-related attacks or killings in the transitional period (1990-1994) as politically motivated crimes. While I cannot treat this as richly as it deserves, violence related to a

⁷² AC Decision 1998/0030 (Ntamo and others). The decision notes the PAC's position that the applicants were young people who were “misguided.” The perpetrators were between 18-22 years of age.

⁷³ See volume 4 of the TRC report on institutional and civil society hearings. See also various analyses tracking attitudes: Gunnar Theissen, “Between Acknowledgement and Ignorance: How White South Africans have Dealt with the Apartheid Past,” (Johannesburg: Centre for the Study of Violence and Reconciliation, 1996), online: <<http://www.csvr.org.za/papers/papgt0.htm>> (date accessed: February 2004); James L. Gibson and Helen Macdonald, “Truth—Yes, Reconciliation—Maybe: South Africans Judge the Truth and Reconciliation Process,” (Rondebosch: Institute for Justice and Reconciliation, 2001) for a survey of South African opinion regarding the TRC, including evidence of beneficiary denial of responsibility; plus the Reconciliation Barometer Research, online: <<http://www.ijr.org.za/baro.html>>.

belief in witchcraft is explicitly recognized by the TRC as encompassing a political conflict between liberation forces and traditional leaders, who were seen as the lackeys of apartheid.⁷⁴ The targeting of alleged witches was also a targeting of agents of political repression. The Committee's decision perhaps goes some way in addressing Mamdani's critique because it recognizes the violence in bifurcated political power -- implicitly that this is one of *the* crimes of apartheid rather than the context of crimes.

The TRC in its report also acknowledges the broadness of political violence in ways that individual amnesty decisions did not or could not. For instance:

in terms of the amnesty criteria, revenge does not qualify as a political objective, and yet it emerged that many incidents occurred in response to previous acts of violence against a perpetrator or his family members. The Amnesty Committee noted, however, that while personal revenge was a feature of the conflicts in the region, the issue had to be seen against the wider backdrop of political conflict and the cycle of violence that gripped villages and townships during this period [1990-1994]. Revenge, personal and political, was part of the fabric and momentum of the conflict and could not be separated out from it.⁷⁵

Furthermore, in its general findings, the Commission places the responsibility of the ANC for necklacings and other types of inter-community violence within the context of covert state violence designed to destabilize communities.⁷⁶ The TRC also notes how traditional structures "featured prominently" in KwaZulu-Natal and it comments on the analogy between PAC ("one settler, one bullet") and right-wing violence.⁷⁷

In these respects, the Report of the TRC provides a broader depiction of violence than in individual amnesty decisions. Indeed, individual grants or refusals of amnesty are de-emphasized in the Report. This can, however, make it an intensely frustrating read. There is no central count of amnesty

⁷⁴ TRC, *Report*, vol. 6, sec. 3, ch. 2, pages 332-337; vol. 6, sec. 1, ch. 3, pages 39-41.

⁷⁵ TRC, *Report*, vol. 5, sec. 3, ch. 2, 323.

⁷⁶ *Ibid.*, vol. 6, sec. 5, ch. 3, par. 52. It specifically refers to the ANC-aligned United Democratic Front.

⁷⁷ *Ibid.*, vol. 6, sec. 3, ch. 2, par. 225; vol. 6, sec 1, ch. 3, par. 44.

applications broken down by organization and type of violation. Statistics per organization are not consistent with one another. Some refer to incidents, some refer to applicants, some are broken down by location, others by violation. In places, the Report points to the total number of applications in order to paint the picture of violence but does not indicate which of these applications were granted. This information is available in Volume 7, which recounts every single victim's experience and indicates whether amnesty was requested and granted.⁷⁸ By subsuming the details of individual amnesties under victim findings, the TRC has clearly given victims moral priority over perpetrators.

This is neither surprising nor inappropriate. After all, the Truth Commission was meant to be victim-centred.⁷⁹ If amnesty was the Achilles' heel of the Truth Commission, it would be salvaged by ideals of truth and reconciliation. Let us return, then, to the *Azapo* decision, which addressed the underlying "truth" of amnesty: the denial of justice to victims. The amnesty process certainly provided information previously unknown, as the Court predicted it would. There was limited overlap between victim statements and perpetrator statements, meaning that for deaths or disappearances, sometimes perpetrators were the only source of information.⁸⁰ Yet, countless perpetrators did not come forward and many remain in positions of power.⁸¹

Consequently, many questions remain unanswered. For example, the TRC's findings on "third force" violence are fairly inconclusive, in part, it suggests, because few amnesty applications were received.⁸² In this case, it seems that "truth" was held hostage by amnesty. As Hamber notes, the

⁷⁸ Amnesty decisions and hearing transcripts are available online; decisions were also published in the parliamentary Gazette as they came down.

⁷⁹ The TRC writes, "The Commission wanted to ensure that the summaries of tell the stories of the victims and not of the *perpetrators*. It is about reclaiming victims' spaces." Thus, perpetrators are not named in the summary, but the amnesty decision reference number is given. *Report*, vol. 7, 1. All I am saying is that this approach could have been supplemented with a more rigorous breakdown of applications in the report of the Amnesty Committee in volume 6.

⁸⁰ TRC, *Report*, vol. 7, 3.

⁸¹ See Terry Bell and Dumisa Buhle Ntsebeza, *Unfinished Business: South Africa, Apartheid and Truth* (London: Verso, 2003); Piers Pigou, "The Apartheid State and Violence: What has the Truth and Reconciliation Commission found?", *Politikon*, 28, no. 2 (2001): 207-233.

⁸² TRC, *Report*, vol. 6, pages 587-588. For critiques of the TRC's 1998 findings on the Third Force (vol. 2, ch. 7) see Wilson, *Politics of Truth and Reconciliation in South Africa*, 73-79; Piers Pigou, "The Apartheid State and Violence."

outcome of the TRC has been far clearer for perpetrators than for victims.⁸³ For instance, the Amnesty Committee accepted perpetrators' claim that there was no "third force" involvement in the Boipotong massacre, but also "acknowledged" victims' allegations and left "open the possibility of security force complicity."⁸⁴ The applicants probably were not lying when they said they saw no police or white men in balaclavas during a crowded and chaotic night. But the individualized nature of full disclosure prevented broader political conclusions -- even as amnesty was granted for the perpetrators' confession. They walked away while victims gained little closure or validation of their accounts.

Hamber also argues that the TRC could have better laid a basis for prosecution of those who did not apply by asking more detailed questions during amnesty hearings and by using its power of subpoena more frequently.⁸⁵ Overall, although some perpetrators came forward because they were under investigation by the Attorney General's office, it appears that the "stick" of prosecution has been a fairly empty threat. Although there is a list for apartheid-era prosecutions, to date there have been only two trials, both unsuccessful. It is surely a bitter turn of history that the killers of Steven Biko, who were denied amnesty, will not be prosecuted due to lack of evidence.⁸⁶ Biko's family were plaintiffs in *Azapo*, and they opposed the amnesty applications. Yet, despite the de facto amnesty these men have received, perhaps the amnesty hearings afforded a public opportunity for disclosure that otherwise might never have arisen.

The lack of prosecution, it should be emphasized, is out of the TRC's control, as is the promise of reparations. Although the Constitutional Court explicitly justified amnesty on the basis of reparation to victims, the government was very slow to announce its reparations policy. Although perpetrators walked away immediately, victims were forced to wait up to five

⁸³ Brandon Hamber, "Dealing with the Past: Rights and Reasons: Challenges for Truth Recovery in South Africa and Ireland," *Fordham International Law Journal* 26 (2003): 1086.

⁸⁴ TRC, *Report*, vol. 6, sec. 4, Appendix, "The Third Force," 585; see also AC Decision 2000/0209. The TRC also regrets that amnesty applications regarding the Sebokeng massacre were heard in chambers, thereby precluding an opportunity to investigate collusion between the IFP and security forces (Appendix, 584).

⁸⁵ Hamber, "Dealing with the Past: Rights and Reasons," 1082. The TRC has admitted its error in not subpoenaing Chief Buthelezi for fear this would fuel violence in KwaZulu-Natal.

⁸⁶ "Biko: Killers not Prosecuted," News24.com, 7 October 2003, online <http://www.news24.com/News24/South_Africa/News/0,2-7-1442_1426929,00.html> (date accessed: 15 February 2004).

years, until the government finally announced its policy in 2003. Moreover, the reparations fall far short of the TRC's recommendations. Victims, including the Khulumani Support Group, have vigorously complained about the insufficient amount of reparation.⁸⁷ Overall, the shortcomings on the reparations front have fuelled perceptions that amnesty is wholly unjustifiable, and that victims are lesser members in the new South Africa. Khulumani has also recently launched a civil lawsuit in the United States under the Alien Tort Claims Act against multinational corporations for "aiding and abetting" the crime of apartheid. Although I cannot comment on this in detail, by targeting businesses, the apartheid litigation speaks to the everyday violence of apartheid that fell outside the realm of amnesty's "truth."⁸⁸

VI. CONCLUSION

As an administrative tribunal, the Amnesty Committee did not operate with a formal system of precedent. Efforts to expedite the process resulted in various amnesty decision panels. The "holistic" rather than mechanical application of political objective criteria sought to attend to the particularities of each case.⁸⁹ While this inevitably produced some inconsistencies, greater procedural rigor is not necessarily the solution. Rather, the point to be made is that the effort to balance the conflicting tasks of transitional law has not surprisingly produced conflicting results. With respect to law's function as boundary, the emphasis on membership and following orders sought to locate individual accountability for political crimes within the context of the struggle for and against apartheid. Where political objective is generously defined, as it was for the murderers of

⁸⁷ Khulumani Support Group, "Reparations Policy," October 29, 2003 (on file with author; online <<http://www.khulumani.net/reparations/KSG%20Gov%20Submission.doc>>).

⁸⁸ For instance, Khulumani singles out mining corporations for providing the blueprint of apartheid and oil, transportation and arms companies for supplying the apartheid security state (See statement of Complaint for *Khulumani et al v. Barclay's National Bank et al*, posted at Cohen, Milstein, Hausfeld & Toll P.L.L.C. (CMHT), online: <http://www.cmht.com/casewatch/cases/apartheid-cmpl.pdf> (accessed 18 May 2004). The South African government has asked the American courts to dismiss the claims. See Declaration by Justice Minister Penuell Maduna on the Apartheid Litigation in the United States, 11 July 2003, online: <<http://www.gov.za/reports/2003/apartheid.pdf>> (date accessed: 1 February 2004). The case is pending and is likely to be dismissed. For full analysis, see Rosemary Nagy, "Post-Apartheid Justice: Can Transnational Litigation and Nation-building be Reconciled?" (paper presented at American Law and Society Association Annual Meeting, Chicago, May 27-30, 2004).

⁸⁹ TRC, *Report*, vol. 6, sec 1, ch. 1, 9.

Mxenge and Biehl, the determination of individual accountability appears somewhat mitigated. Where political objective is narrowly defined, as in the case of the Mdantsane Twelve, the van Straaten brothers, or the killers of Chris Hani, individuals are held personally accountable in isolation from the pervasive political culture of racism and violence.⁹⁰

My purpose is not to dispute individual amnesty decisions so much as to draw critical attention to the underlying, transformative “truth” that emerges. Individual acts were deemed *either* “personal” crimes *or* “political” crimes depending on which side of the nebulous boundary they fell. Such legal categorization obstructed the socio-political “truth” of a continuum of violence. “Private” acts fell entirely outside the scope of broader moral responsibility -- even if they were rooted in “publicly” structured racism or divide-and-rule strategies. This is not to say that all acts of violence under apartheid were political or that poverty and racism nullify criminal accountability. But the hard, perhaps impossible, task of amnesty is to balance the dangers of legitimating general socio-political violence, on the one hand, against the dangers of neglecting the socio-political context of torture and killings, on the other hand. The very necessity of drawing a legal line between private and political acts of violence undermines the transformative process.

The amnesty process did produce a minimally transformative truth insofar as, to borrow Ignatieff's phrase, it narrowed the range of permissible lies. It is no longer acceptable to deny or condone the torture and killings that took place. In this respect, the mechanisms of application and disclosure are paramount in the South African amnesty model. But caution must be urged against high expectations or moral justifications that amnesty will lead to broad acknowledgement of moral responsibility and national reconciliation. This is in part, I have argued, an intractable theoretical problem embedded in the conflicting tasks of transitional law. This does not, however, mean we should give up on the transformative task of transitional law. Rather, it means recognizing that there is an intrinsic dilemma involved in setting a boundary between private acts and political crimes.

This dilemma must be negotiated with care. In particular, decisions to grant amnesty should take seriously the breadth of political objectives. Membership and following orders need not figure so strongly in

⁹⁰ The applicants for amnesty in the case of Biko's murder were denied amnesty on grounds of lack of full disclosure and because none of the applicants alleged political objective in restraining Biko and the “scuffle” that led to his fatal injuries. However, the panel noted that if, as the applicants claimed, the political objective was to extract information from Biko, then killing was disproportionate. AC decision 1999/0020.

determinations of political objective. This is not generally the test in extradition law upon which South African amnesty is based.⁹¹ Other criteria, such as political motive broadly understood and *support* for a party rather than membership, should be given greater weight, while proportionality could be used to limit amnesty for the most egregious violations. In terms of broader policy, the “stick” of prosecution may not be possible in other transitional circumstances. The South African experience shows this may be a somewhat empty threat; universal jurisdiction *may* be a response.⁹² Moreover, the link between amnesty and reparation to victims is highly important. It could be strengthened by giving truth commissions direct control of pre-allocated funds for reparation, rather than subjecting victims to the vagaries of governments facing limited resources. In conclusion, the transition to democracy may stand or fall upon the provision of amnesty. Thus, the challenge is to wind amnesty into the *promises* of democracy without creating false expectations of reconciliation or simplistic truths about the past.

⁹¹ Bhargava, “Defining Political Crimes,” 1329. Amnesty criteria are based upon the Norgaard Principles, which were formulated by former President of the European Human Rights Commission, Professor Carl Norgaard, to guide the process identifying Namibian political prisoners for release. Norgaard surveyed extradition law to determine standard criteria defining political offence; these were later modified in South Africa to include acts committed against, and between, political groups other than the government and offences committed by state officials against political activists. These principles, as modified, are codified in the *TRC Act*. The emphasis in practice on following orders appears, as Bhargava contends, to be a further modification.

⁹² See footnote 88 above regarding Alien Tort Claims. I would not necessarily advocate international criminal prosecution for apartheid-era perpetrators - at least not for those who have been granted amnesty. But the *Pinochet* case and the Special Court for Sierra Leone provide examples of the international community bypassing domestic amnesties that are largely seen as silencing and unjustifiable.