

the fact that the state's justice system is incapable of honest investigation and impartial judgment. Do you agree? Are there other reasons pointing toward including names of violators? What form and methods of investigation would you recommend for a truth commission that intended to publish such names?

3.3 Truth commissions are particularly useful where the people involved—violators, victims, those just standing by—will (indeed must) live in close proximity to each other as members of the same state and society. Hence they are less necessary and less effective in many types of international conflicts where the peoples involved, the violators and the victims, will live separately after some accord and end to the conflict.' Do you agree?

ABDULLAH OMAR, INTRODUCTION TO TRUTH AND RECONCILIATION COMMISSION

<http://www.truth.org.za/legal/justice.htm>

[The author, Minister of Justice of South Africa, was active in the planning of the South African Truth and Reconciliation Commission. He wrote this description as the debate in Parliament over the TRC ended and the scene was 'finally set' for appointment of its commissioners. Several provisions of the legislation governing the TRC that are referred to below were subsequently amended.]

... The Commission is based on the final clause of the Interim Constitution which 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 rounded 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.

... [T]here is a need for understanding but not for vengeance, a need for reparation but not 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 ... 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.

I could have gone to Parliament and produced an amnesty law—but this would have been to ignore the victims of violence entirely. We recognised that we could not forgive perpetrators unless we attempt also to restore the honour and dignity of the victims and give effect to reparation.

The question of amnesty must be located in a broader context and the wounds

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of our people must be recognized. I do not distinguish between ANC [African National Congress] wounds, PAC [Pan African Congress] wounds and other wounds—many people are in need of healing, and we need to heal our country if we are to build a nation which will guarantee peace and stability.

... President [Mandela] supports the setting up of a Commission of Truth and Reconciliation. The democratic government is committed to the building up of a human rights culture in our land.

Objectives of the Commission

The objectives of the Commission will be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by:

- establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for committing such violations, by conducting investigations and holding hearings;
- facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and which comply with the requirements of the Act (Promotion of National Unity and Reconciliation Act);
- establishing and making known the fate or whereabouts of victims and restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and recommending reparation measures in respect of them;
- compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission and containing recommendations of measures to prevent the future violations of human rights.

Functions of the Commission

The function of the Commission will be to achieve its objectives and to that end the Commission shall:

- facilitate, and where necessary initiate or coordinate, inquiries into:
- gross violations of human rights, including violations which were part of a systematic pattern of abuse;
- the nature, causes and extent of gross violations of human rights, including the antecedents, circumstances, factors, context, motives and perspectives which led to such violations;
- the identity of all persons, authorities, institutions and organizations involved in such violations;

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- the question whether such violations were the result of deliberate planning on the part of the State or a former state or any of their organs, or of any political organisation, liberation movement or other group or individual;
- accountability, political or otherwise, for any such violation;
- facilitate, and initiate or coordinate, the gathering of information and the receiving of evidence from any person, including persons claiming to be victims of such violations or the representatives of such victims, which establish the identity of victims of such violations, their fate or present whereabouts and the nature and extent of the harm suffered by such victims;
- facilitate and promote the granting of amnesty in respect of acts associated with political objectives
- ...
- make 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 omission of human rights violations.

Constitution of the Commission

- The Commission shall consist of not fewer than 11 and not more than 17 commissioners, as may be determined by the President in consultation with the Cabinet.
- The President shall appoint the commissioners in consultation with the Cabinet.
- The commissioners shall be fit and proper persons who are impartial and who do not have a high political profile, provided that not more than two persons who are not South African citizens may be appointed as commissioners.

Structure of the Commission

Committee on Human Rights Violations

[Reference to powers and duties referred to under Functions of the Commission]

The Committee will exercise the powers of investigation granted to the Commission in Chapter Six and Chapter Seven of the Act. This entails the establishment of an Investigating Unit . . .

Committee on Amnesty

This Committee will facilitate and promote the granting of amnesty in respect of acts associated with political objectives by receiving from persons desiring to make full disclosure of all the relevant facts relating to such acts applications for the granting of amnesty in respect of such acts and by publishing decisions granting amnesty in the *Government Gazette*.

... The hearings of the Amnesty Committee, which will have a Judge of the Supreme Court as its chairperson, will be held in public unless, in the judgment

of the chairperson and the committee, this may jeopardise life or limb, or contradict a process of fundamental human rights. . . .

If . . . a hearing is necessary the Committee will inform the person of the place and time when the application will be heard and considered. The Committee then will deal with the application by granting or refusing amnesty. One of the provisions laid down is that the applicant must make a full disclosure of all relevant facts. The Committee shall be guided by the consideration of certain laid-down criteria:

- the motive of the person who committed the act, omission or offence;
- the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
- the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
- the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily 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, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
- the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued.

However, this does not include any act, omission or offence committed by any person referred to in subsection (2) of the Act who acted:

- for personal gain . . . ; or
- out of personal malice, ill-will or spite, directed against the victim of the acts committed.

Committee on Reparation and Rehabilitation of Victims

...
The Committee may:

- make recommendations which may include urgent interim measures as to appropriate measures of reparation to victims;
 - make recommendations relating to the creation of institutions conducive to a stable and fair society and the measures which need to be taken to prevent the commission of human rights violations;
- ...

Applications for reparation

Any person who is of the opinion that he or she has suffered harm as a result of a

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ross violation of human rights may apply to the Committee for reparation. The Committee shall consider any such application and may exercise any of the powers conferred on it, as outlined above.

Victims of Human Rights Violations

When dealing with victims, the actions of the Commission shall be guided by the following principles:

- Victims shall be treated with compassion and respect for their dignity;
- Victims shall be treated equally and without discrimination of any kind . . . ;
- Procedures for dealing with applications by victims shall be expeditious, fair, inexpensive and accessible;
- Victims shall be informed through the press and any other medium of their rights in seeking redress through the Commission . . . ;
- Appropriate measures shall be taken in order to minimise inconvenience to victims and, when necessary, to protect their privacy, to ensure their safety as well as that of their families and of witnesses testifying on their behalf and to protect them from intimidation;
- Appropriate measures shall be taken to allow victims to communicate in the language of their choice;
- Informal mechanisms for the resolution of disputes, including mediation, arbitration and any procedure provided for by customary law and practice shall be applied, where appropriate, to facilitate reconciliation and redress for victims.

REPORT OF TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA

1998, 5 vols

[There appear below excerpts from the Report. They are identified by volume, chapter number of volume, and paragraph number of chapter. The Report is available through www.truth.org.za.]

Volume 1

Chapter 4: The Mandate

- *Why the South African Commission is different from other Commissions*

25. The most important difference between the South African Commission and others was that it was the first to be given the power to grant amnesty to individual perpetrators. No other state had combined this quasi-judicial power with the investigation tasks of a truth-seeking body. More typically, where amnesty was introduced to protect perpetrators from being prosecuted for the crimes of the

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past, the provision was broad and unconditional, with no requirement for individual application or confession of particular crimes. . . .

26. Another significant difference can be found in the Commission's powers of *subpoena*, search and seizure, which are much stronger than those of other truth commissions. This has led to more thorough internal investigation and direct questioning of witnesses, including those who were implicated in violations and did not apply for amnesty. . . .

27. The very public process of the South African Commission also distinguishes it from other commissions. . . . The Latin American truth commissions heard testimony only in private, and information only emerged with the release of the final reports.

29. The South African Commission was the first to create a witness protection programme. This strengthened its investigative powers and allowed witnesses to come forward with information they feared might put them at risk.

30. Finally, the South African Commission was several times larger in terms of staff and budget than any commission before it.

• *Interpreting the mandate*

34. It was recognised at the outset that the Commission could not carry out all the tasks required of it simultaneously. Thus, it first gave attention to the question of the restoration of the human and civil dignity of (individual) victims of past gross human rights violations. It did so by creating opportunities for victims 'to relate their own accounts' of the violations they had suffered by giving testimony at public hearings across the length and breadth of South Africa between April 1996 and June 1997. These highly publicised hearings were coupled with an extensive statement-taking drive, investigations, research and so-called 'section 29' hearings (where witnesses and alleged perpetrators were *subpoenaed*) in order to 'establish the fate or whereabouts of victims' and the identity of those responsible for human rights violations.

35. During the second half of the Commission's life (from approximately the middle of 1997), the Commission shifted its focus from the stories of individual victims to an attempt to understand the individual and institutional motives and perspectives which gave rise to the gross violations of human rights under examination. It enquired into the contexts and causes of these violations and attempted to establish the political and moral accountability of individuals, organisations and institutions. The goal was to provide the grounds for making recommendations to prevent future human rights violations. Features of this phase were public submissions by, and questioning of, political parties, and a range of institutional, sectoral and special hearings that focused on the health and business sectors, the legal system, the media and faith communities, prisons, women, children and youth, biological and chemical warfare and compulsory national service. It was also during this period that the majority of amnesty hearings took place.

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- *Who were victims of gross violations of human rights?*

51. It is this systemic and all-pervading character of apartheid that provides the background for the present investigation. During the apartheid years, people did many evil things. Some of these are the gross violations of human rights with which this Commission had to deal. But it can never be forgotten that the system itself was evil, inhumane and degrading for the many millions who became its second and third class citizens. Amongst its many crimes, perhaps the greatest was its power to humiliate, to denigrate and to remove the self-confidence, self-esteem and dignity of its millions of victims. Mtutuzeli Matshoba expressed it thus:

For neither am I a man in the eyes of the law,
Nor am I a man in the eyes of my fellow man.

55. . . . [T]he Commission resolved that its mandate was to give attention to human rights violations committed as specific acts, resulting in severe physical and/or mental injury, in the course of past political conflict. As such, the focus of its work was not on the effects of laws passed by the apartheid government, nor on general policies of that government or of other organisations, however morally offensive these may have been. This underlines the importance of understanding the Commissions as but one of several instruments responsible for transformation and bridge-building in post-apartheid South Africa.

57. But bodily integrity rights are not the only fundamental rights. When a person has no food to eat, or when someone is dying because of an illness that access to basic health care could have prevented—that is, when subsistence rights are violated—rights to political participation and freedom of speech become meaningless.

58. Thus, a strong argument can be made that the violations of human rights caused by 'separate development'—for example, by migrant labour, forced removals, bantustans, Bantu education and so on—had, and continue to have, the most negative possible impact on the lives of the majority of South Africans. The consequences of these violations cannot be measured only in the human lives lost through deaths, detentions, dirty tricks and disappearances, but in the human lives withered away through enforced poverty and other kinds of deprivation.

Just ends, just means and crimes against humanity

64. In making judgments in respect of the above requirements, the Commission was guided by criteria derived from just war theory . . . , international human rights principles and the democratic values inherent in the South African Constitution. By using these criteria, the Commission was able to take clear positions on the evils of apartheid, while also evaluating the actions of those who opposed it.

74. The Commission's confirmation of the fact that the apartheid system was a crime against humanity does not mean that all acts carried out in order to destroy

apartheid were necessarily legal, moral and acceptable. The Commission concurred with the international consensus that those who were fighting for a just cause were under an obligation to employ just means in the conduct of this fight.

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

76. It is for this reason that the Commission considered the concept of crimes against humanity at both a systemic level and at the level of specific acts. Apartheid as a system was a crime against humanity, but it was also possible for acts carried out by any of the parties to the conflicts of the past to be classified as human rights violations.

77. Thus, the Commission adopted the view that human rights violations could be committed by any group or person inside or outside the state: by persons within the Pan Africanist Congress (PAC), the IFP, the South African Police (SAP), the South African Defence Force (SADF), the ANC or any other organisation.

78. It is important to note, however, that this wider application of human rights principles to non-state entities is a relatively recent international development. . . .

79. The Act establishing the Commission adopted this more modern position. In other words, it did not make a finding of a gross violation of human rights conditional on a finding of state action. . . .

• *Political context and motivation*

121. To implement its mandate, the Commission had, furthermore, to determine the 'political motive' of the acts of torture, abduction, killing and severe ill treatment which 'emanated from the conflicts of the past' (section 1(1)(X), the Act). . . .

122. In interpreting this part of the definition of gross human rights violations, the Commission was guided by the definition of an 'act associated with a political objective' (section 20(2) and (3)). However, it also went further and employed the less restrictive notion of 'political motive' (section 1(1)(X)).

123. The framework applied in implementing the political requirement was that a violation of human rights within the prescribed period was found to constitute a gross violation of human rights if it was advised, planned, directed, commanded, ordered or committed by:

- a any member or supporter of a publicly known political organisation or liberation movement on behalf of or in support of that organisation or movement, in furtherance of a political struggle waged by that organisation or movement (section 20(2)(a)). This included not only membership of or support for political organisations like the PAC or the ANC, but also

membership of youth and community-based organisations. Trade unions were also included in this description (given the suppression of purely political organisations and the resultant political role that unions played), as was general resistance to the previous state through, for example, rent boycotts.

- b any employee of the state (or any former state) or any member of the security forces of the state (or any former state) in the course and scope of his or her duties and directed against a publicly known political organisation or liberation movement engaged in a political struggle against the state (or former state) or against any members or supporters of such organisation or movement or any person in furtherance of a political struggle. The act in question must have been committed with the objective of countering or otherwise resisting the said struggle (section 20(2)(b)).

Racism

127. There were cases in which people were victims of racist attack by individuals who were not involved with a publicly known political organisation and where the incident did not form part of a specific political conflict. Although racism was at the heart of the South African political order, and although such cases were clearly a violation of the victim's rights, such violations did not fall within the Commission's mandate.

128. Cases which were interpreted as falling inside the Commission's mandate included instances where racism was used to mobilise people through a political organisation as part of their commitment to a political struggle, or where racism was used by a political organisation to incite others to violence. Examples of these were instances when white 'settlers' or farmers were killed by supporters of the PAC or the ANC, or where black people were killed by supporters of white right-wing organisations.

Naming

152. The Act required the publication of the names of those who received amnesty in the Government Gazette. These individuals had already identified themselves as perpetrators by applying for amnesty. The Commission had therefore, to resolve which of the other perpetrators identified in the course of its work should be named in accordance with its mandate—to enquire into 'the identity of all persons, authorities, institutions and organisations' involved in gross human rights violations, as well as the 'accountability, political or otherwise, for any such violation' (section 4(a)(iii), (V), the Act).

153. In fulfilling this part of its mandate, the Commission was again required to walk a tightrope. This time, it was faced with the tension between the public interest in the exposure of wrongdoing and the need to ensure fair treatment of individuals in what was not a court of law; between the rights of victims of gross violations of human rights to know who was responsible and the fundamentally

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important question of fairness to those who are accused of crimes or serious wrongdoing.

155. Given the investigative nature of the Commission's process and the limited legal impact of naming, the Commission made findings on the identity of those involved in gross violations of human rights based on the balance of probability. This required a lower burden of proof than that required by the conventional criminal justice system. It meant that, when confronted with different versions of events, the Commission had to decide which version was the more probable, reasonable or likely, after taking all the available evidence into account.

Volume 5

Chapter 6: Findings and conclusions

...

The Commission's position on responsibility and accountability

...

66. In the light of the above and of the evidence received, the Commission is of the view that gross violations of human rights were perpetrated or facilitated by all the major role-players in the conflicts of the mandate era. These include:

- a The state and its security, intelligence and law-enforcement agencies, the SAP, the SADF and the NIS.
- b Groups and institutions which, to a greater or lesser extent, were affiliated or allied to the state in an official capacity. These include homeland governments and their security forces as well as groups and institutions informally allied to the state. . . .
- c White right-wing organizations which, while actively opposing the state, actively and violently took action to preserve the *status quo* in the 1990s. . . .
- d Liberation movements and organizations which sought to bring about change through armed struggle and which operated outside South Africa and by covert and underground means inside the country.
- e Organizations which sought to bring about change by non-violent means prior to and post-1990, including the United Democratic Front; and
- f Non-state paramilitary formations such as the ANC's self-defence units and the IFP's self-protection units (SPUs).

...

68. At the same time, the Commission is not of the view that all such parties can be held to be equally culpable for violations committed in the mandate period. Indeed, the evidence accumulated by the Commission and documented in this report shows that this was not the case. The preponderance of responsibility rests with the state and its allies.

...

71. . . . [T]he evidence shows that the perpetration of gross violations of human rights by non-state actors often took place in circumstances where they were acting in opposition to the official state ideology and the policy of apartheid. In this sense, it was the state that generated violent political conflict in the mandate

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period—either through its own direct action or by eliciting reactions to its policies and strategies.

72. . . . A state has powers, resources, obligations, responsibilities and privileges that are much greater than those of any group within that state. It must therefore be held to a higher standard of moral and political conduct than are voluntary associations. . . .

74. It would, however, be misleading and wrong to assign blame for the gross violation of human rights only to those who confronted each other on the political and military battlefields, engaged in acts of commission. Others, like the church or faith groups, the media, the legal profession, the judiciary, the magistracy, the medical/health, educational and business sectors, are found by the Commission to have been guilty of acts of omission in that they failed to adhere or live up to the ethics of their profession and to accepted codes of conduct.

75. It is also the view of the Commission that these sectors failed not so much out of fear of the powers and wrath of the state—although those were not insignificant factors—but primarily because they were the beneficiaries of the state system. They prospered from it by staying silent. By doing nothing or not enough, they contributed to the emergence of a culture of impunity within which the gross violations of human rights documented in this report could and did occur.

[The balance of this section on Findings and Conclusions states detailed findings against each of the state organs, government leaders, internal allies of the state, regional groups, liberation movements, and sectors of civil society to which the earlier parts of this section refer.]

DECISIONS OF AMNESTY COMMITTEE, TRUTH AND RECONCILIATION COMMISSION

<http://www.truth.org.za/amnesty>

*Ntamo, VS (4734/97); Peni, NA (5188/97); Nofemela, EM (5282/97);
Manqina, MC (0669/96) (Heard in July 1997)*

The Applicants were convicted and sentenced to imprisonment for 18 years for the murder of Amy Biehl. . . . The offence was committed on the NY1 Road in the Gugulethu Township, in Cape Town on the 25th August 1993. The applicants are young men whose ages, at the time of the commission of the offence ranged between 18 and 22 years. Except for Ntamo, whose education had not progressed beyond Std 4, the others were high school students.

They have applied for amnesty in terms of section 18 of the Promotion of National Unity and Reconciliation Act No. 34 of 1995.

Amy Biehl their victim was an American Citizen. She was on a Fulbright Scholarship and was affiliated to the Community Law Centre at the University of the Western Cape where she was pursuing her studies for a Ph.D in Political Science. On that fateful afternoon, she was conveying three colleagues in her car.

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She was on her way to drop some of them off in Gugulethu, when her vehicle came under attack by people who were running towards it and throwing stones at it. The stones smashed the windscreen and windows of the car. One of the stones hit Amy Biehl on her head, causing her to bleed profusely. She could not continue driving. She got out of her car and ran towards a garage across the road. Her attackers did not relent. They pursued her and continued throwing stones at her. Manqina tripped her, causing her to fall. She was surrounded by between 7 and 10 people and while she was being stoned, one of her attackers stabbed her. She died as a result of the injuries they inflicted on her.

According to the evidence of the applicants they were among those who were involved in the attack on Amy Biehl. Peni admitted throwing stones at his victim when he was three to four metres from her. Manqina stabbed her with a knife in addition to throwing stones at her. Nofemela threw stones at her and stabbed at her 3 or 4 times. Ntamo threw many stones at her head when he was only a metre away. They stopped attacking her when the police arrived on the scene.

The attack on the car driven by Amy Biehl was one of many incidents of general lawlessness in NY1 that afternoon. Bands of toyi-toying youths threw stones at delivery vehicles and cars driven by white people. One delivery vehicle was toppled over and set alight and only the arrival of the police prevented more damage. . . .

The applicants explained their behavior by saying that earlier that day they had attended a meeting at the Langa High School where a Pan African Student organization (PASO) unit was relaunched. Peni was elected Chairperson at the meeting. Manqina was Vice Chairperson of the PASO unit at the Gugulethu Comprehensive School and Nofemela was a PASO organizer at the Joe Slovo High School.

...
The applicants said that speakers dealt with:

- the strike by Teachers in the Western Cape who demanded recognition for the South African Democratic Teachers Union (SADTU);
- the struggles of the Azanian Peoples Liberation Army (APLA) for the return of the land to the African People;
- APLA had declared 1993 as the 'Year of the Great Storm'. Reference was also made to the launching of 'OPERATION BARCELONA' to stop all deliveries into the townships.

The speakers urged the members of PASO to take an active part in the struggle of APLA by assisting APLA operators on the ground by making the country ungovernable.

The speeches were militant and punctuated by shouting the slogan 'ONE SETTLER ONE BULLET'.

Applicants said that they were all inspired by the speakers to such an extent that they left the meeting with many others in a militant mood. They marched through the township toyi-toying and shouting ONE SETTLER ONE BULLET, determined to put into effect what they had been urged to do. This is how they got involved in the activities briefly described above which led to the killing of Amy Biehl.

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Although they did not act on the orders or instructions of APLA or PAC [Pan African Congress] on that day, they believed they owed loyalty to the same cause.

...

As members of PASO, which was a known political organization of students, they were active supporters of the PAC and subscribed to its political philosophy and its policies. By stoning company delivery vehicles and thereby making it difficult for deliveries into the townships, they were taking part in a political disturbance and contributing towards making their area ungovernable. To that extent, their activities were aimed at supporting the liberation struggle against the State. But Amy Biehl was a private citizen, and the question is why was she killed during this disturbance. Part of the answer may be that her attackers were so aroused and incited, that they lost control of themselves and got caught up in a frenzy of violence. One of the applicants said during his evidence that they all submitted to the slogan of ONE SETTLER, ONE BULLET. To them that meant that every white person was an enemy of the Black people. At that moment to them, Amy Biehl, was a representative of the white community. They believed that by killing civilian whites, APLA was sending a serious political message to the government of the day. By intensifying such activity the political pressure on the government would increase to such an extent that it would demoralize them and compel them to hand over political power to the majority of the people of South Africa.

When the conduct of the applicants is viewed in that light, it must be accepted that their crime was related to a political objective.

The PAC regarded the killing of Amy Biehl as a mistake committed by young people who were misguided. They nevertheless supported the application for amnesty.

The parents of Amy Biehl had come from America to attend the hearing. At the conclusion of the evidence Mr Biehl addressed the Amnesty Committee. Part of his speech reads as follows:

... We have the highest respect for your Truth and Reconciliation Commission and process. We recognise that if this process had not been a pre-negotiated condition your democratic free elections could not possibly have occurred. Therefore, and believing as Amy did in the absolute importance of those democratic elections occurring we unabashedly support the process which we recognize to be unprecedented in contemporary human history.

At the same time we say to you it's your process, not ours. We cannot, therefore, oppose amnesty if it is granted on the merits. In the truest sense it is for the community of South Africa to forgive its own and this has its basis in traditions of ubuntu and other principles of human dignity. Amnesty is not clearly for Linda and Peter Biehl to grant.

...

... We, as the Amy Biehl Foundation are willing to do our part as catalysts for social progress. All anyone need do is ask. Are you, the community of South Africa, prepared to do your part?

The applicants have made a full disclosure of all the relevant facts as required by section 20(1) of the Act. On a consideration of all the evidence placed before us,

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we have come to the conclusion that they be granted amnesty for the murder of Amy Biehl. . . .

Dirk Coetzee (0063/96), David Tshikalange (0065/96), and Butana Almond Nofomela (0064/96) (Heard in November 1996 and January 1997)

... We are dealing now with the applications for amnesty made by the three Applicants in respect of the murder of Griffiths Mxenge. The three Applicants, who were at all relevant times serving members of the South African Police Force, have applied for amnesty in respect of many acts committed by them. [The three applicants had been convicted for one of the offences stated in their application, the murder of Mxenge.]

... The evidence led before us disclosed that the three Applicants were stationed at a place called Vlakplaas, which was a base established in the country where the police stationed what could perhaps fairly be described as hit squads. . . .

At the relevant time all four groups from Vlakplaas were in Durban for various purposes. The First Applicant who was the commander reported, so he said, daily to Brigadier Van der Hoven, the regional security commander at about 7.30 am and again at 4 pm. On one such occasion, a few days before the 19th of November 1981, Brigadier Van der Hoven called him to make a 'plan' with Mxenge. He understood this to mean that he was to make arrangements to eliminate Mxenge. He was told in very brief terms that Mxenge, who was the victim in this application, was an ex-Robben Island prisoner and was an attorney practising in Durban. He acted on behalf of members of the liberation movement and others who were charged with criminal offences arising out of the struggle against apartheid, and a large amount of money was known to have gone through his account. There was no suggestion in the evidence before us that this money was improperly used in any way. . . .

He was told that the security police had been unable to bring any charges against Mxenge and that he had accordingly become a thorn in their flesh by enabling persons charged with political offences to obtain the protection of the courts.

The First Applicant said that Brigadier Van der Hoven told him that they must not shoot or abduct Mxenge but that they should make it look like a robbery. He was then taken to Captain Taylor who gave him certain information about Mxenge. This information related to where his office was, where his house was, what car he drove and matters of that nature. . . .

The First Applicant took charge of arrangements and set up a squad which was to be responsible for killing Mxenge, consisting of the Second and Third Applicants, [a certain] Mamasela, and a certain Brian Ngulunga, because he was from the Umlazi area and knew the vicinity well. The First Applicant took charge of the general planning of the murder. . . . He however left the details as to the actual killing to the four members of the squad he had appointed. . . . They intercepted the car in which Mxenge was travelling and dragged him out of it. While Brian Ngulunga stood by with a pistol in his hand, the others commenced to stab their

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n. . . . The stabbing continued until he was dead. He had been disemboweled; throat had been cut and his ears had been practically cut off. His body was found to have 45 lacerations and stab wounds.

It is quite clear from his evidence and from the evidence of the other two applicants, that they considered this to be an act performed as part of their duties as policemen on the instructions of senior officers who would undoubtedly have advised themselves as to the necessity for it.

With regard to the First Applicant said the following during the course of his evidence before us:

Do you still today believe that those were necessary or lawful orders?

Absolutely not.

Why do you think differently today?

Well, at the time, yes, but with hindsight absurd and absolutely—I mean unjustifiable.

On the evidence before us we are satisfied that none of the Applicants knew the identity of Mxenge, or had any reason to wish to bring about his death before they were ordered to do so. We are satisfied that they did what they did because they regarded it as their duty as policemen who were engaged in the struggle against the apartheid and other liberation movements. It is, we think clear, that they relied on their superiors to have accurately and fairly considered the question as to whether the use of force was necessary or whether other steps could have been taken. . . .

With regard to the First Applicant, there was no direct evidence to confirm that he acted on the orders of Van der Hoven or Taylor. In fact, it is a matter of common knowledge that Van der Hoven and Taylor denied any involvement; they did so during their recent trial in which they were co-accused with the Applicants on a criminal charge in respect of this very incident. While there may be some doubt as to the identity of the person or persons on whose advice, command or order, the First Applicant acted, the fact that he acted on the advice, command or order of one or more senior members of the security branch, admits of no doubt. . . .

In accordance with the view that the three Applicants are entitled to amnesty in respect of this offence, that is the murder of Griffiths Mxenge on the 19th of November 1981, and it will accordingly not be necessary for the Trial Court to deal with the question of sentence.

NOTE

The interim Report of the Amnesty Committee of the TRC (*Truth and Reconciliation Commission of South Africa Report* (1998), vol. 5, Ch. 3) noted that a 'consequential part' of the Committee's workload remained incomplete. Hence the Committee's life span was extended, while the rest of the Commission was suspended on 31 October 1998. The Committee's executive secretary announced that the Committee had to deal in public with over 1,000 amnesty applications.

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Most applications to the Committee came from prisoners. The Committee made efforts to achieve some balance by receiving applications from 'role players in the conflict' as well—that is, government officials, security police, and so on.

The Interim Report stressed the role of the Commission in communicating to relevant public the nature of amnesty and the process for submitting applications through visits of its members and staff to institutions such as prisons and through public talks. The amnesty hearings were open to all media, and television coverage became standard.

With respect to the procedure of the hearings, the Committee took care to 'avoid overly formalising the process' and to retain flexibility. It took the view of the Commission (TRC) that 'process should not be equated to that of a court of law and should not be overly regulated.' Nonetheless, the proceedings 'are largely judicial in nature' and included such rights as cross-examination 'within reasonable bounds.' Proceedings were recorded, and the Committee gave 'reasoned decisions' on all issues to be decided. All decisions were published.

Several legal challenges to the legislation underlying the amnesty provisions and the procedure governing the hearings were brought in the courts. The Constitutional Court resolved one such challenge in *Azanian Peoples Organisation (AZAPO) v. President of the Republic of South Africa*, CCT 17/96 (1996), www.law.wits.ac.za/judgements/azapo.html. The applicants claimed that certain provisions on amnesty of the Promotion of National Unity and Reconciliation Act 34 of 1995 were unconstitutional, since if amnesty were granted, a perpetrator would not be criminally or civilly liable in respect of the acts subject to the amnesty.

The Court upheld the constitutionality of these provisions that limited applicants' right set forth in the Constitution to 'have justiciable disputes settled by a court of law.' The interim Constitution's epilogue on national unity and reconciliation sanctioned this limitation on the applicants' right of access to courts to bring a suit for damages. Absent such provisions, there would be no incentive for offenders to disclose the truth. Moreover, the amnesty provisions were a crucial part of the negotiated settlement leading to the Constitution. Parliament could always act to provide systematic reparations for victims of past abuses, and to provide for individualized reparations taking account of the claims of all victims, rather than preserving civil liability of the state and its officials for provable acts of wrongdoing. The Court also concluded that the amnesty provisions did not violate any international norms.

DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS

(1999), at 260

[Archbishop Tutu was chairperson of the Truth and Reconciliation Commission.]

... The world had expected that the most ghastly blood bath would overwhelm South Africa. It had not happened. Then the world thought that, after a democratically elected government was in place, those who for so long had been denied their rights, whose dignity had been trodden underfoot, callously and without

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unction, would go on the rampage, unleashing an orgy of revenge and
ution that would devastate their common motherland. Instead there was this
kable Truth and Reconciliation Commission to which people told their
ending stories, victims expressing their willingness to forgive and perpetra-
lling their stories of sordid atrocities while also asking for forgiveness from
they had wronged so grievously.

crucial, when a relationship has been damaged or when a potential relation-
as been made impossible, that the perpetrator should acknowledge the truth
e ready and willing to apologize. It helps the process of forgiveness and
iliation immensely. It is never easy. We all know just how difficult it is for
f us to admit that we have been wrong. It is perhaps the most difficult thing
world—in almost every language the most difficult words are, 'I am sorry'.
t is not at all surprising that those accused of horrendous deeds and the
unities they come from, for whom they believed they were committing these
ies, almost always try to find ways out of even admitting that they were
capable of such deeds. They adopt the denial mode, asserting that such-
ch has not happened. When the evidence is incontrovertible they take
in feigned ignorance. The Germans claimed they had not known what the
ere up to. White South Africans have also tried to find refuge in claims of
ce. The former apartheid cabinet member Leon Wessels was closer to the
hen he said that they had not wanted to know, for there were those who
alert them. For those with eyes to see there were accounts of people dying
ously in detention. For those with ears to hear there was much that was so
ting and even chilling

o not usually rush to expose our vulnerability and our sinfulness. But if the
of forgiveness and healing is to succeed, ultimately acknowledgment by the
is indispensable—not completely so but nearly so. Acknowledgment of
h and of having wronged someone is important in getting to the root of
ch. . . .

wrongdoer has come to the point of realizing his wrong, then one hopes
ll be remorse, or at least some contrition or sorrow. This should lead him
ss the wrong he has done and ask for forgiveness. . . .

ictim, we hope, would be moved to respond to an apology by forgiving the
. . . [W]e were constantly amazed in the commission at the extraordinary
imity that so many of the victims exhibited. Of course there were those
d they would not forgive. That demonstrated for me the important point
iveness could not be taken for granted; it was neither cheap nor easy. As it
, these were the exceptions. Far more frequently what we encountered was
oving and humbling.

giving, people are not being asked to forget. On the contrary, it is im-
to remember, so that we should not let such atrocities happen again.
ess does not mean condoning what has been done. It means taking what
d seriously and not minimizing it; drawing out the sting in the memory
atens to poison our entire existence. It involves trying to understand the

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perpetrators and so have empathy, to try to stand in their shoes and appreciate the sort of pressures and influences that might have conditioned them.

Once the wrongdoer has confessed and the victim has forgiven, it does not mean that is the end of the process. Most frequently, the wrong has affected the victim in tangible, material ways. Apartheid provided the whites with enormous benefits and privileges, leaving its victims deprived and exploited. If someone steals my pen and then asks me to forgive him, unless he returns my pen the sincerity of his contrition and confession will be considered to be nil. Confession, forgiveness, and reparation, wherever feasible, form part of a continuum.

... [U]nless houses replace the hovels and shacks in which most blacks live, unless blacks gain access to clean water, electricity, affordable health care, decent education, good jobs, and a safe environment—things which the vast majority of whites have taken for granted for so long—we can just as well kiss reconciliation goodbye.

If we are going to move on and build a new kind of world community there must be a way in which we can deal with a sordid past. . . . It may be, for instance, that race relations in the United States will not improve significantly until Native Americans and African Americans get the opportunity to tell their stories and reveal the pain that sits in the pit of their stomachs as a baneful legacy of dispossession and slavery. We saw in the Truth and Reconciliation Commission how the act of telling one's story has a cathartic, healing effect.

... With all its imperfections, what we have tried to do in South Africa has attracted the attention of the world. This tried, disillusioned, cynical world, hurting so frequently and so grievously, has marveled at a process that holds out considerable hope in the midst of much that negates hope. People . . . see in this flawed attempt a beacon of hope. . . . At the end of their conflicts, the warring groups in Northern Ireland, the Balkans, the Middle East, Sri Lanka, Burma, Afghanistan, Angola, the Sudan, the two Congos, and elsewhere are going to have to sit down together to determine just how they will be able to live together amicably, how they might have a shared future devoid of strife, given the bloody past that they have recently lived through. They see more than just a glimmer of hope in what we have attempted in South Africa.

QUESTIONS

1. Do you view either the Chilean or South African model as abstractly 'one', and if so, superior from what perspectives? Or do you conclude that 'one' model, that the design—purposes, functions, powers, methods—of truth commissions is highly context-dependent?

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2. Assuming that there were no serious political constraints in South Africa on one or another plan, what changes would you have made in the provisions for the TRC, including amnesty?
3. What is your estimate of the long or short term consequences/effects of the hearings, other processes and Report of the TRC for South African democracy, growth, political stability, and acceptance of each other by the different racial and ethnic groups, so as to permit cooperation and peace? Do you view other factors as equally or more important to achieve these goals? How would you assess the significance of the TRC among those other factors?
4. Given the conditions for amnesty in the relevant legislation, do you agree with the decisions in the two amnesty cases? Do you agree with the Amnesty Committee's approach to the notion of a 'political motive', as applied in the Amy Biehl case?
5. Recall that the TRC's provisions for amnesty do not require that the person seeking amnesty apologize, or seek forgiveness. That person must make a full disclosure of the conduct that has led to the request for amnesty. Is apology implicit in full disclosure of violations? Is repentance implicit? Should one or the other have been required by the TRC as a condition to a grant of amnesty with respect to the disclosed conduct?
6. Is forgiveness by the victim, or by relatives of a tortured and murdered victim, in your view essential to the individual and social healing to which Archbishop Tutu refers? Or would apology by the victim be sufficient?
7. What would you imagine forgiveness (understood by Archbishop Tutu in explicitly religious, Christian terms) to entail or represent for a victim—say, with respect to acts of deliberate cruelty directed to the victim and the victims's family with permanent serious consequence? Can a person—say, children of a murdered victim—forgive a perpetrator for the torture and murder of another?

ADDITIONAL READING

N. Kritz (ed.), *Transnational Justice: How Emerging Democracies Reckon with Former Regimes* (3 Vols. 1995); N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (1995); M. Minow, *Between Vengeance and Forgiveness* (1998).

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