

**VOLUME SIX**

**Truth and  
Reconciliation  
Commission  
of South Africa  
Report**



# ■ CONTENTS

NOTE: Please click on the links below to view each Chapter

Foreword by Archbishop Desmond Tutu

## SECTION ONE

### Report of the Amnesty Committee

INTRODUCTION	1
CHAPTER 1	
The Legal Basis of the Amnesty Process	3
CHAPTER 2	
Administrative Report	17
CHAPTER 3	
<i>Modus Operandi</i> of the Committee	36
CHAPTER 4	
Legal Challenges	54
CHAPTER 5	
Some Reflections on the Amnesty Process	83

## SECTION TWO

### Report of the Reparation and Rehabilitation Committee

CHAPTER 1	
Introduction	92
CHAPTER 2	
The Case for Reparation and Rehabilitation: Domestic and International Law	96
CHAPTER 3	
The Argument for Reparation: Comparative and Customary Law	112
CHAPTER 4	
The Argument for Reparation: What the Witnesses Say	120
CHAPTER 5	
Reparations and the Business Sector	140
CHAPTER 6	
Reparations and Civil Society	156
CHAPTER 7	
Implications and Concluding Comments	160
CHAPTER 8	
Administrative Report	165

## SECTION THREE

### The Intersection between the Work of the Human Rights Violations Committee and the Amnesty Committee

CHAPTER 1	
The Former South African Government and its Security Forces	181
CHAPTER 2	
The ANC and Allied Organisations	264
CHAPTER 3	
The Inkatha Freedom Party	338
CHAPTER 4	
The Pan Africanist Congress	375
CHAPTER 5	
Azanian People's Organisation	442
CHAPTER 6	
Right-Wing Groups	444

## SECTION FOUR

### Report of the Human Rights Violations Committee

CHAPTER 1	
Abductions, Disappearances and Missing Persons	512
CHAPTER 2	
Exhumations	550
CHAPTER 3	
Administrative Report	570
APPENDIX	
The 'Third Force'	579

## SECTION FIVE

### Findings and Recommendations

CHAPTER 1	
The Legal Framework within which the Commission made Findings in the Context of International Law	589
Appendix 1	
Applicability of the Geneva Conventions	607
Appendix 2	610
CHAPTER 2	
Holding the State Accountable	614
CHAPTER 3	
Holding the ANC Accountable	642
Appendix	
ANC Declaration to ICRC	670
CHAPTER 4	
Holding the IFP Accountable	673
Appendix 1	
Schedule of Changes and Corrections	680
Appendix 2	
Appendix Concerning IFP Findings	696
CHAPTER 5	
Holding the PAC Accountable	702
CHAPTER 6	
Holding Right-Wing Groups Accountable	720
CHAPTER 7	
Recommendations	726

## SECTION SIX


### Administration

Report of the Chief Executive Officer	733
Managerial Reports	744
Annual Financial Statements	756
ERRATA TO THE FINAL REPORT	784
ACRONYMS	787

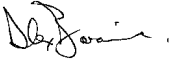
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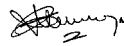
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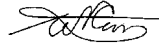
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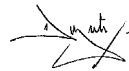
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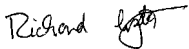
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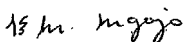
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Volume **SIX**

**Chairperson's  
Foreword**

## ■ FOREWORD BY ARCHBISHOP DESMOND TUTU

This Report is the culmination of a remarkable effort by extraordinary people, and I want to begin by paying a warm tribute to the Commission's staff, committee members and commissioners. At this time in particular, we give thanks for those staff who, under the direction of Commissioners Hlengiwe Mkhize, Denzil Potgieter and Yasmin Sooka, have given such meticulous attention to bringing the project to finality, to the extent of providing us with summaries of the cases of some twenty thousand people declared to have suffered gross human rights violations in the period between 1960 and our first democratic election. We owe a very great debt of gratitude to Sue de Villiers who, with her editorial colleagues, working under considerable pressure, did wonders to produce this codicil on time. Thank you, thank you. It has been an incredible privilege for those of us who served the Commission to preside over the process of healing a traumatized and wounded people.

We are also deeply grateful to the thousands of South Africans who came to the Commission to tell us their stories. They have won our country the admiration of the world: wherever one goes, South Africa's peaceful transition to democracy, culminating in the Truth and Reconciliation process, is spoken of almost in reverent tones, as a phenomenon that is unique in the annals of history, one to be commended as a new way of living for humankind. Other countries have had truth commissions, and many more are following our example, but ours is regarded as the most ambitious, a kind of benchmark against which the rest are measured.

We hope that the completion of the Commission's Report brings a measure of closure to the process. I regret that at the time of writing we owe so much by way of reparations to those who have been declared victims. The healing of those who came to us does hinge on their receiving more substantial reparations and I would be very deeply distressed if our country were to let down those who had the magnanimity and generosity of spirit to reveal their pain in public. I appeal to the Government that we meet this solemn obligation and responsibility, and I should like to express appreciation that the Minister of Finance has made it clear that he still regards reparations as unfinished business.

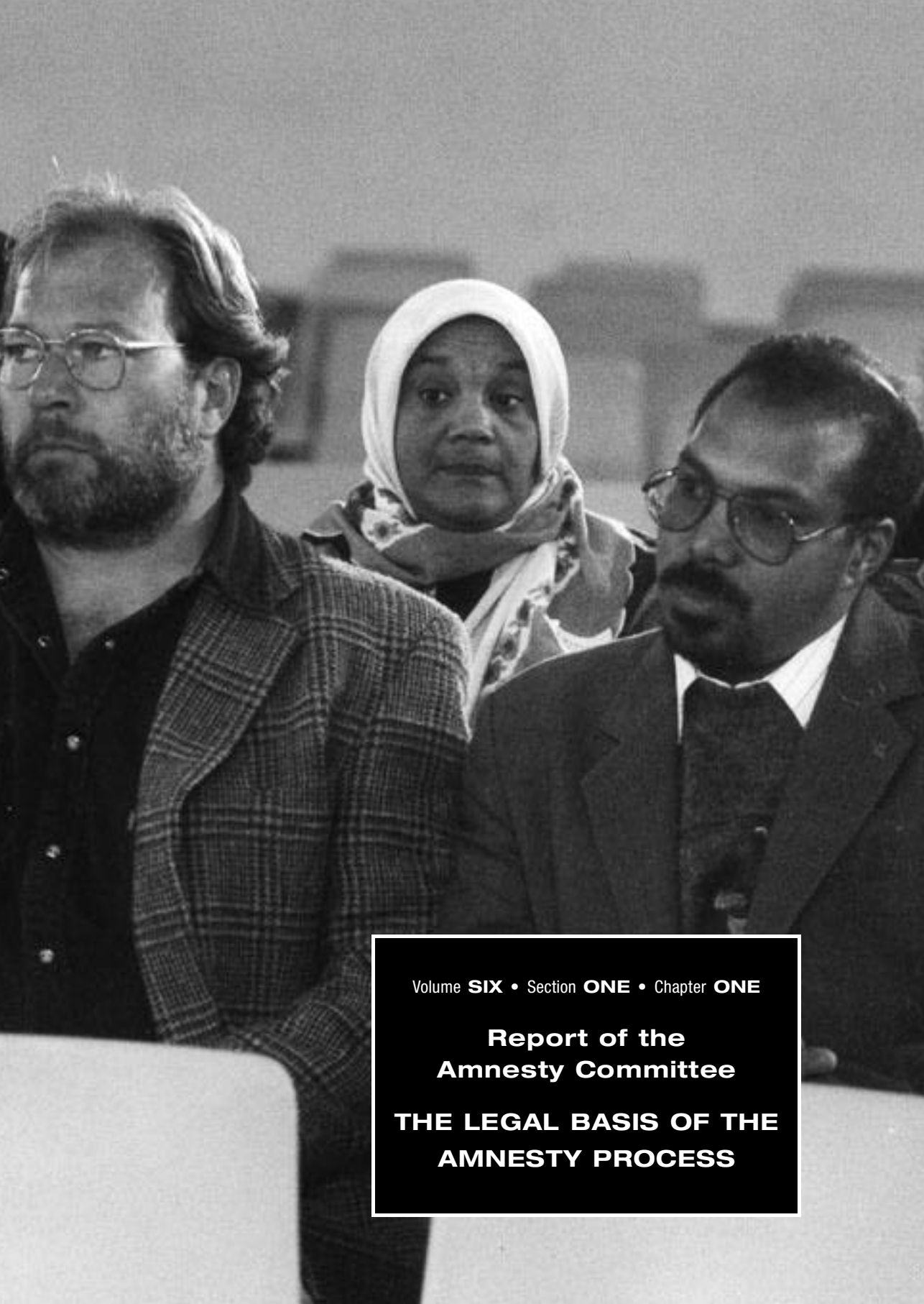
Those who brought to birth the TRC process also ought to be commended for their wisdom, which has recently been demonstrated no more clearly than by the trial of Dr Wouter Basson. Without making any judgment on the correctness of the judge's decision, the case has shown clearly how inadequate the

criminal justice system can be in exposing the full truth of, and establishing clear accountability for what happened in our country. More seriously, we have seen how unsuccessful prosecutions lead to bitterness and frustration in the community. Amnesty applicants often confessed to more gruesome crimes than were the subject of the Basson trial, yet their assumption of responsibility, and the sense that at least people were getting some measure of truth from the process, resulted in much less anger. For the sake of our stability, it is fortunate that the kind of details exposed by the Commission did not come out in a series of criminal trials, which – because of the difficulty of proving cases beyond reasonable doubt in the absence of witnesses other than co-conspirators – most likely would have ended in acquittals.

In terms of the settlement reached between the Commission and Chief Buthelezi and the Inkatha Freedom Party, I draw your attention to appendices 1 and 2 to Section 4, Chapter 4 of this volume, being their responses to the findings made against them in the Final Report handed to President Mandela on 29 October 1996.

It is something of a pity that, by and large, the white community failed to take advantage of the Truth and Reconciliation process. They were badly let down by their leadership. Many of them carry a burden of a guilt which would have been assuaged had they actively embraced the opportunities offered by the Commission; those who do not consciously acknowledge any sense of guilt are in a sense worse off than those who do. Apart from the hurt that it causes to those who suffered, the denial by so many white South Africans even that they benefited from apartheid is a crippling, self-inflicted blow to their capacity to enjoy and appropriate the fruits of change. But mercifully there have been glorious exceptions. All of us South Africans must know that reconciliation is a long haul and depends not on a commission for its achievement but on all of us making our contribution. It is a national project after all is said and done.

We have been privileged to help to heal a wounded people, though we ourselves have been, in Henri Nouwen's profound and felicitous phrase, 'wounded healers'. When we look around us at some of the conflict areas of the world, it becomes increasingly clear that there is not much of a future for them without forgiveness, without reconciliation. God has blessed us richly so that we might be a blessing to others. Quite improbably, we as South Africans have become a beacon of hope to others locked in deadly conflict that peace, that a just resolution, is possible. If it could happen in South Africa, then it can certainly happen anywhere else. Such is the exquisite divine sense of humour.



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

**Report of the  
Amnesty Committee**

**THE LEGAL BASIS OF THE  
AMNESTY PROCESS**

# Report of the Amnesty Committee

## ■ INTRODUCTION

1. In October 1998, the Amnesty Committee (the Committee) submitted an interim report to the Truth and Reconciliation Commission (the Commission). This formed part of the Final Report handed to President Mandela on 29 October 1998. The Final Report contains a broad overview of the functioning and activities of the Committee. In addition, Chapters Four ('The Mandate') and Five ('Concepts and Principles') of Volume One of the Final Report contribute towards a fuller understanding of the amnesty process. Chapter Four describes how the Commission was established and outlines the scope of its mandate, including that relating to the granting of amnesty. It also discusses how the Commission interpreted its mandate and how it went about identifying criteria derived from just war theory and other international human rights principles. The mandate and criteria guided the Commission in determining what constituted gross human rights violations and who or what entities could be held accountable for them, as envisaged in its founding Act, the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (the Act).
2. In Chapter Five of Volume One of its Final Report, the Commission discusses questions of amnesty, truth and justice, the relationship between these three complex concepts and their role in and contribution to furthering the Commission's over-arching objective of promoting reconciliation and a sense of national unity.
3. Although the activities of the Commission were suspended on 29 October 1998, the Amnesty Committee was authorised to continue until it had completed its outstanding work. This it did at the end of May 2001. Moreover, when the lifespan of the Committee was extended in October 1998, certain outstanding duties of both the Human Rights Violations Committee (HRVC) and the Reparation and Rehabilitation Committee (RRC) were statutorily placed under the auspices of the Committee in accordance with an appropriate amendment of the Act. At this stage, two Commissioners, representing the HRVC and RRC respectively, joined the extended Committee to attend to these duties.



4. The purpose of the present section is to account for the activities of the Amnesty Committee from October 1998 until its dissolution on 31 May 2001.<sup>1</sup>
5. It is apposite at the outset of this section to repeat an observation made in the report of the Committee in October 1998, namely that, in the view of the Committee, the terms of its statutory mandate and the judicial nature of its activities preclude it from commenting upon or analysing its decisions or its approach to specific cases in this Report. In the Committee's view, this would amount to an actionable gross irregularity.
6. In compliance with the judicial nature of its mandate, the Committee has given fully reasoned decisions in all hearable amnesty applications as well as motivated decisions in all substantive chamber matters. These decisions constitute the sole repository of the Committee's views on all the substantive issues that were relevant to its activities in relation to the matter of amnesty in general and to the specific amnesty applications it considered. The decisions have been reproduced in full and, due to space constraints, accompany this report in electronic form (compact disc). The decisions are fully indexed to enhance their accessibility to interested parties. All decisions in hearable matters have, moreover, been made available on the website of the Department of Justice and Constitutional Development (<http://www.doj.gov.za/trc/index.html>) in order to promote public access.<sup>2</sup>
7. Finally, we would like to dedicate these chapters on the work of the Amnesty Committee to those members who passed away during the lifespan of the Committee – in recognition of their contribution, dedication and commitment to a process that is, to date, unrivalled not only in South Africa but in the entire world. They are:
  - a The Honourable Mr Justice Hassen Mall: Chairperson;
  - b Advocate Robin Brink: Evidence Leader, and
  - c Mr Dugard Macaqueza: Investigator and Evidence Analyst.
8. The amnesty section of the Report is also dedicated to all Committee members and staff, without whose commitment, dedication and contribution it would have been impossible to give effect to the provisions of the Act. Dealing with the atrocities of the past on a daily basis over a period of almost five and a half years was never easy. Equally difficult were the many days spent on the road, visiting venues all over the country and listening to and adjudicating upon reprehensible acts of severe gross human rights violations.

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<sup>1</sup> In terms of Proclamation R31 dated 23 May 2001.

<sup>2</sup> See Section Five, Chapter Seven, 'Recommendations' in this volume for further action contemplated in respect of the Commission's archives.

# The Legal Basis of the Amnesty Process

## ■ INTRODUCTION

1. The legal basis for the amnesty process of the Truth and Reconciliation Commission (the Commission) is to be found in the legal instruments that emerged from the political negotiations that were initiated in 1990. The original provisions were recorded in the postscript (or what also became known as the 'postamble') to the Constitution of the Republic of South Africa Act No. 200 of 1993 (the Interim Constitution) in the following terms:

### **NATIONAL UNITY AND RECONCILIATION:**

*This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex.*

*The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.*

*The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.*

*In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.*

*With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.*

2. These provisions were preserved in Schedule 6, section 22 of the Constitution of the Republic of South Africa Act No. 108 of 1996 (the Constitution), which provided that:

*Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading 'National Unity and Reconciliation' are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.*

## **THE COMMISSION'S FOUNDING ACT**

3. These constitutional provisions formed the basis for the enactment of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (the Act). Chapter Four of the Act outlined the mechanisms and procedures of the amnesty process. These provided for the establishment of an Amnesty Committee (the Committee) as one of the components of the Commission and empowered it to consider and decide on applications for amnesty. The Act provided that the Committee could grant amnesty where it was satisfied that the application complied with the formal requirements of the Act; that the incident in question constituted an act associated with a political objective as envisaged in the Act, and that the applicant had made full disclosure of all the relevant facts.<sup>3</sup> These requirements are considered in more detail below.
4. The Act also spelt out the fact that the granting of amnesty meant that the applicant was released from all criminal and civil liability arising from the incident, an indemnification that also extended to all institutions or persons who incurred vicarious liability for the incident.<sup>4</sup> Successful applicants serving prison sentences in respect of an incident were, therefore, entitled to immediate release and the expunging of any relevant criminal record.<sup>5</sup>

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<sup>3</sup> Section 20(1)(a-c).

<sup>4</sup> Section 20(7)(a).

<sup>5</sup> Section 20(8) & (10).

## **POWERS, DUTIES AND FUNCTIONS OF THE COMMITTEE<sup>6</sup>**

5. The Committee was a statutory body established in terms of the Act, from which it derived all its powers, functions and responsibilities. It was, in effect, a body with only administrative powers. Due to the adjudicative nature of its functions, the Committee's procedures soon started to resemble a judicial process. This stood in complete contrast to the non-adversarial hearings of the other two Committees of the Commission.

### **Applications for amnesty**

6. Section 18 of the Act provided that any natural person could apply for amnesty on the prescribed form. Institutions and organisations could not apply. Application could be made in respect of any act or omission that amounted to a delict<sup>7</sup> or offence, provided that it had to have been associated with a political objective and committed in the prescribed period (see further below).
7. The Committee was required to give priority to the applications of persons in custody. Regulations prescribing measures in respect of these applications were promulgated on 17 May 1996, after consultation with the Ministers of Justice and Correctional Services. These regulations provided mechanisms for informing prisoners of the procedures in respect of amnesty and how to complete the application form properly. They also provided for the recording of applications, the supplying of additional information and the hearing of such applications.

## **FORMAL REQUIREMENTS**

8. Before an application could be considered, it had first to comply with the formal requirements of the Act.<sup>8</sup> That is, the applicant was required to submit a written application on the prescribed amnesty application form. This application had to be made under oath and attested to by a commissioner of oaths.

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<sup>6</sup> Sections 16 to 22.

<sup>7</sup> A wrongful act for which the injured person has the right to a civil remedy.

<sup>8</sup> Section 18(1) requires applications to be submitted 'in the prescribed form'. The term 'prescribe' is defined in the Act as 'prescribe by regulation made under section 40' of the Act. The latter section empowers the President to promulgate regulations in respect of any matter referred to in the Act. In this context, the Committee took steps to have a prescribed amnesty application form produced in all official languages, to be promulgated for use by prospective amnesty applicants.

9. If the Committee received an incomplete application, the form would be returned to the applicant with directions to complete it properly. Many applications were not submitted on the prescribed form. In such instances, the matter was registered and a proper form was sent to the applicant for completion. A large number of forms were returned because they were unsigned and/or had not been attested to by a commissioner of oaths. In many instances, application forms had been completed without legal assistance or had been completed by third parties on behalf of illiterate applicants. In such cases, it was often necessary for the Committee to condone an applicant's failure to comply strictly with the formalities. It was sometimes possible to communicate with the applicants in question and place them in a position to cure the formal defects in the application. Where it was not possible to do this before the hearing, condonation<sup>9</sup> for minor defects in the application<sup>10</sup> was granted at the hearing itself. The Committee adopted the approach of allowing the applicant to present the merits of the application to the hearings panel. In all such instances, some of which were argued comprehensively, the granting of condonation did not result in prejudice to any other party. The hearing into the killings at Boipatong on the East Rand in 1992, for example, involved a substantial condonation application.
10. A further formal requirement was that the application had to be submitted to the Committee before the closing date for applications, as required by the Act.<sup>11</sup> The interpretation adopted by the Committee in this respect was that it had no statutory power to condone a failure to comply with this requirement. Thus the Committee did not consider applications submitted after the closing date. Although some late applicants petitioned the High Court for orders compelling the Committee to hear such matters, none was successful.
11. Some applicants attempted to amend their applications after the expiry of the deadline. Proposed amendments that attempted to introduce new incidents after the closing date for amnesty applications were normally refused. However, amendments that elaborated on incidents already expressly dealt with or alluded to in the original application were allowed. These included instances where applicants raised the possibility in the application of having been involved in further incidents, details of which they had been unable to recollect at the time of submitting the original application but which had subsequently come to mind.

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9 A legal term meaning to pardon or overlook.

10 Such as a failure to date or attest a duly completed and signed application form.

11 Section 19(1) provided that the closing date was 14 December 1996. This was later extended to 30 September 1997 to cater for an extension of the cut-off date for amnesty from 5 December 1993 to 10 May 1994.

## **ACTS ASSOCIATED WITH A POLITICAL OBJECTIVE**

12. The Act required that the incident forming the subject matter of the amnesty application had to have been associated with a political objective.<sup>12</sup> The latter term was defined in some detail in the Act and included the following components:

### **The actions of the applicant must have amounted to an offence or a delict**

13. The Committee was required to assess the applicant's actions in order to ascertain whether she or he had complied with all the elements of the particular offence or delict. Where there had been a criminal prosecution and conviction based on the incident, this requirement was normally straightforward. Where, however, an applicant denied guilt for an incident, this requirement was not met and the application had to fail.
14. This highlights a significant limitation in the amnesty process. The patent injustice of this situation became clear where it applied to groups of co-applicants, some of whom denied guilt for incidents associated with political objectives for which all members of the group had been convicted and sentenced. Those who admitted guilt qualified for and were granted amnesty, and were released from custody. However, those who were innocent and also had, on the face of it, been wrongly convicted, were unable to benefit from the amnesty process. They were condemned to remain in custody pending the uncertain prospects of cumbersome and often prolonged administrative procedures that might lead to their eventual release (via, for example, a presidential pardon). The Committee had no powers to intervene in this kind of procedure. It did, however, wherever this kind of situation arose (as in the Boipatong case), include in its decision a recommendation that the cases of such 'innocent' applicants be referred to the President for his consideration.
15. The offence or delict requirement was also not met where the applicant successfully raised a defence that excluded legal liability, such as self-defence. In such instances, the fact that the application might comply with all the other requirements of the Act did not qualify the applicant for amnesty.

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<sup>12</sup> Section 20(1)(b).

## **The incident must have occurred within the prescribed time period**

16. The time period set by the Act was between 1 March 1960 (the month in which the Sharpeville massacre took place) and 5 December 1993 (the date the final agreement was reached in the political negotiations). This last date was subsequently extended to 10 May 1994 to coincide with the date of the inauguration of the first democratically elected President of the country.<sup>13</sup>

## **The applicant should fall within one of a number of prescribed categories**

17. These categories essentially encompassed supporters, members or employees of the contending parties involved in the past political conflict in the country. It was a pertinent requirement that the incident in question should have related specifically to the South African political conflict.<sup>14</sup>

## **The incident in question should comply with stipulated criteria in order to constitute an act associated with a political objective<sup>15</sup>**

18. One of the underlying purposes in this regard was to ensure that only conduct associated with the past political conflict in the country would qualify for amnesty. Common crimes were excluded.
19. In this respect, the Act relied heavily on the principles of extradition law and the concomitant definition of a political offence within the international context. A specific and significant influence was the approach followed when preparing for the United Nations-supervised democratic elections in Namibia in 1989. The wording of the Act leaned very heavily on what had become known as the 'Norgaard Principles': an approach formulated under the guidance of Professor CA Norgaard, the former President of the European Commission on Human Rights, and applied to guide the process of identifying Namibian political prisoners for release.
20. The Norgaard Principles were gleaned from a survey of the approaches followed by various state courts in dealing with what is known as the 'political offence exception' in extradition proceedings. In terms of the 'exception', a state that

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<sup>13</sup> The date was initially set in the Interim Constitution to serve as a deterrent to those who wished to continue to use violence to disrupt the elections. However, it was later extended because many of those who had been involved in continued violence later agreed to participate in the democratic process.

<sup>14</sup> This was one of the grounds relied upon by the Supreme Court of Appeal in dismissing the application in the matter of Stopforth and Veenendaal. For further details, see Chapter Four, 'Legal Challenges', in this section.

<sup>15</sup> Section 20(3).

has been requested to extradite an individual may refuse to do so where the crime for which the extradition is sought is political. It was thus necessary for states to formulate an approach to the question of whether a particular crime amounted to a political offence. The background principles, therefore, recorded the common features of the various states' approaches to the issue.

21. The criteria stipulated in the Act contained important guidelines for assessing whether an applicant's conduct would qualify as being politically motivated within the broad context of political offences referred to above. In this regard, the Committee was enjoined to consider a number of factors: the motive of the perpetrator; the context in which the incident occurred (for example whether it occurred in the course of a political uprising); the nature and gravity of the incident; the object or objective of the conduct and, in particular, whether it was directed against political enemies or innocent parties; the existence of any orders or approval of the conduct by a political organisation, and finally, the issue of proportionality. Moreover, the Act specifically provided that, where the perpetrator had acted for personal gain (except in the case of informers) or out of personal malice, ill-will or spite towards the victim, the conduct in question would not qualify as an act associated with a political objective.
22. The approach adopted by the Committee in applying the stipulated criteria was to avoid a piecemeal and mechanical application of the individual criteria. It chose, rather, to adopt a more holistic approach and to assess the totality of the particular facts and circumstances in the light of the criteria as a whole. Where, for example, an applicant had acted on the direct orders of a superior and the conduct in question seemed reasonable, the Committee would see this as going a long way towards satisfying the requirements of the Act. An applicant who had injured or killed an innocent bystander would be subjected to a more critical assessment than if his or her victim had been a clear political enemy. The reality is that each application presented its own peculiar circumstances, making it inappropriate to adopt hard and fast rules. Each case had to be approached with an open mind and decided on its own merits. In this way, the Committee used the criteria as a guide to help it decide whether a particular incident qualified as an act associated with a political objective.
23. The Committee was, moreover, specifically enjoined to take into account the criteria applied in terms of the repealed indemnity legislation that had preceded the Act. These criteria largely overlapped with those stipulated in the Act.<sup>16</sup>

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<sup>16</sup> See Volume One, Chapter Four, pp. 51–2.



## FULL DISCLOSURE

24. The amnesty process had a critical role to play in helping establish the fullest possible picture of the past political conflict in the country. To this end, amnesty applicants were legally required to give a full and truthful account of the incidents in respect of which they were seeking amnesty.<sup>17</sup> They were accordingly required to make full disclosure of all of the facts relevant to the incident in question.
25. It follows that, where an applicant's version was untruthful on a material aspect, the application was refused. It is important to stress, however, that the obligation to make full disclosure related only to relevant facts. This required that the Committee develop an interpretation of the phrase 'relevant facts'. The Committee concluded that the obligation in question related solely to the particular incident forming the subject matter of the application and did not extend to any incidents not raised in the amnesty application. The facts to be disclosed were, therefore, only those relevant to the incident in question. The interpretation adopted by the Committee required that applicants give a full and truthful account of their own role, as well as that of any other person, in the planning and execution of the actions in question. Furthermore, applicants had to give full details of any other relevant conduct or steps taken subsequent to the commission of the particular acts: for example, concealing or destroying evidence of the offence.
26. The interpretation adopted by the Committee has been criticised because it is perceived as having inhibited the potential of the amnesty process to contribute to the overall objective of the truth and reconciliation process, namely of establishing as complete a picture as possible of the political conflicts of the past. It has been argued that it was not conducive to the overall objective of the process to allow amnesty applicants to be selective about the information on past political conflicts they were prepared to share with the South African public. According to this argument, applicants were placed in a position where they were able to hold back information about incidents that were unlikely to be uncovered in the future, an attitude that frustrated the very intention of the overall process.
27. The Committee took note of these arguments, but remains satisfied that it gave a proper interpretation of its obligation as required by the law. The perceived

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<sup>17</sup> Section 20(1)(c).

limitations were inherent in the provisions of the Act itself and were accordingly beyond the Committee's control. It should also be pointed out that the Act gave the Commission certain general powers of investigation and subpoena, which allowed it to look further into any matters left unresolved by the amnesty process. The Committee accepts, however, that the criticism relating to possible shortcomings in the process as enacted is serious and substantial.

## **PROCESSING APPLICATIONS FOR AMNESTY**

28. The Committee relied heavily on information furnished by its own investigators and obtained from the South African Police Services, the Department of Correctional Services, the National Prosecuting Authority and the courts of law. Generally only minimal investigation was necessary in respect of those applications completed with the assistance of a legal representative. Upon completion of such an investigation, the Committee would do one of several things:

### **Acts not associated with a political objective**

29. The Committee would inform the applicant that, based on the particulars before it, his or her application did not relate to an act associated with a political objective and, in the applicant's absence and without holding a hearing, refuse the application for amnesty.

### **Where no gross violation of human rights had been committed**

30. If it was satisfied that the formal requirements had been met, the Committee would inform the applicant that there was no need for a hearing as the act to which the application related did not constitute a gross violation of human rights. In such cases, it would grant the applicant amnesty without holding a hearing.

### **Notification of public hearing**

31. Where the application related to a gross violation of human rights as defined in the Act, a public hearing had to be held. The Committee would notify the applicant, any victim and implicated person and any other person having an interest in the application of the date, time and place where such an application would be heard. These persons had to be informed of their right to be present and to testify at the hearing. The Committee could hear applications individually or jointly.

32. In anticipation of the fact that many of these acts, omissions or offences were the subject of court proceedings, the Act provided that:
- a where the act or omission was the subject of a civil claim, the court might, upon the request of the applicant and after proper notice to other interested parties, suspend proceedings pending the outcome of the application for amnesty, and
  - b in those instances where the applicant was charged with an offence to which the application related, or was standing trial on a charge of having committed such an offence, the Committee could request the appropriate authority to postpone the proceedings, pending the outcome of the application for amnesty.
33. In order to protect the identity of the applicants and the information contained in applications, the Act provided that all the applications, the documentation in connection with them, any further information obtained by the Committee before and during an investigation, as well as the deliberations conducted in order to come to a decision or to conduct a hearing, should be treated as confidential. This confidentiality lapsed only when the Commission decided to release such information or when the hearing into the application commenced.

## **THE ROLE OF PRECEDENT**

34. The Act provided expressly for the establishment of subcommittees or hearings panels to deal with amnesty applications. This provision enabled the Committee to arrange for various hearings panels to hear different matters simultaneously and so expedite the finalisation of its work. The composition of these panels was not fixed, which resulted in different permutations of Committee members constituting hearings panels on different occasions. This situation created the potential for inconsistencies of approach between the different hearings panels. There were those who saw this as a risk and believed that it could be eliminated or limited only by introducing a system of precedent, as is followed in the courts, where, in defined circumstances, prior decisions on issues of law become binding in subsequent similar cases.
35. It is important to point out that the Amnesty Committee was an administrative tribunal, and that no formal system of precedent applied to its activities. Apart from certain broad determinations made by the Committee itself (for example the interpretation of what constituted 'relevant facts' for the purpose of full disclosure),

it would, in the Committee's view, have been inappropriate to attempt to establish a system of precedent.

36. In order to facilitate its proceedings, the Committee accepted the submissions made by the leadership of some of the structures involved in the past political conflict as duly established for the purposes of subsequent hearings. For example, according to the submissions of the Azanian People's Liberation Army (APLA) leadership, APLA operatives executed robberies in terms of a particular directive and policy decision on the part of the organisation in furtherance of its political struggle. Subsequent APLA amnesty applicants were able to rely on this fact without having to re-establish it. A similar situation applied to the submissions of the African National Congress (ANC) in respect of its role in establishing self-defence units (SDUs) in response to violent conflicts in certain townships during the early 1990s.
37. Apart from such instances, it would have been quite impractical to attempt to establish a system of precedent. The myriad different permutations of facts and circumstances that applied to the various applications resulted in no two being identical or sufficiently comparable to justify applying the principle of precedent. Each case had to be decided in the light of its own peculiar facts and circumstances. Each hearings panel was ultimately responsible for making an independent decision on the particular facts of the case to be decided, even though it was possible to engage in collegial discussions and consultations to elicit the views or draw on the experiences of other members of the Committee in particularly complex matters.
38. Although no formal system of precedent was followed, the Committee approached its work on the basis that every amnesty applicant enjoyed the constitutionally entrenched right to fair administrative action, equality and an even-handed approach. The Committee is ultimately satisfied that the absence of a formal system of precedent did not detract from the quality of decision-making, nor did it result in any patent injustice to any participant in the amnesty process.

## **GRANTING OF AMNESTY AND THE EFFECT THEREOF (SECTION 20)**

39. Amnesty was granted where the Committee was satisfied that the application complied with the requirements of the Act: that is, the act, omission or offence to which the application related was an act associated with a political objective and committed in the course of the conflicts of the past, and the applicant had made a full disclosure of all the relevant facts (as defined above).
40. Where amnesty was granted, the Committee informed the applicant and the victim of the decision and also, by proclamation in the Government Gazette, published the full details of the person concerned as well as the specific act, offence or omission in respect of which amnesty was granted.
41. The granting of amnesty completely extinguished any criminal or civil liability arising from the act in question. Any pending legal proceedings against the applicant were likewise terminated. Where applicants were serving a sentence consequent upon a conviction for the act in question, they were entitled to immediate release from custody. The granting of amnesty also had the effect of expunging any criminal record relating to the offence in respect of which amnesty had been granted. It did not, however, affect the operation of any civil judgment given against the successful applicant based upon the act for which amnesty had been granted.

## **REFUSAL OF AMNESTY AND THE EFFECT THEREOF (SECTION 21)**

42. When the Committee refused an application for amnesty, it notified the applicant and victims concerned of its decision and the reasons for its refusal. If criminal or civil proceedings had been suspended pending the outcome of the amnesty application, the court concerned was notified of this.
43. Where amnesty was refused, the law would take its course against the applicant. Any legal proceeding that might have been suspended pending finalisation of the amnesty application was free to continue. The applicant would, however, be protected against the disclosure or use of the record of the amnesty application in any subsequent criminal proceedings. The prosecution would, moreover, be precluded from relying on the facts disclosed in the amnesty application, or facts that had been discovered as a result of information disclosed in the amnesty application. The Act specifically provides that any

evidence obtained during the amnesty process, as well as any evidence derived from such evidence, may not be used against the person concerned in any criminal proceedings.

## **REFERRALS TO THE REPARATION AND REHABILITATION COMMITTEE (SECTION 22)**

44. In line with the objectives of the Commission relating to reparation and rehabilitation, the Act provided that, where amnesty was granted and the Committee was of the opinion that a person was a victim of the incident in question, the matter should be referred to the Reparation and Rehabilitation Committee (RRC) for consideration. Where amnesty was refused and the Committee was of the opinion that the act constituted a gross violation of human rights and a person was a victim in the matter, it was also referred to the RRC.
45. In these instances, the hearings panel was obliged to endeavour to identify any possible victims. This was not, however, always possible, often due to a lack of sufficient information. In such an event, the hearings panels were compelled to make generic victim findings without identifying specific individuals. This was a particular drawback in the process, given the importance of catering for the needs of victims, particularly where the granting of amnesty obliterated the prospects of civil or criminal proceedings. There was some comfort in the fact that the reparation and rehabilitation process had the potential of dealing with these weaknesses.

## **REMEDIES**

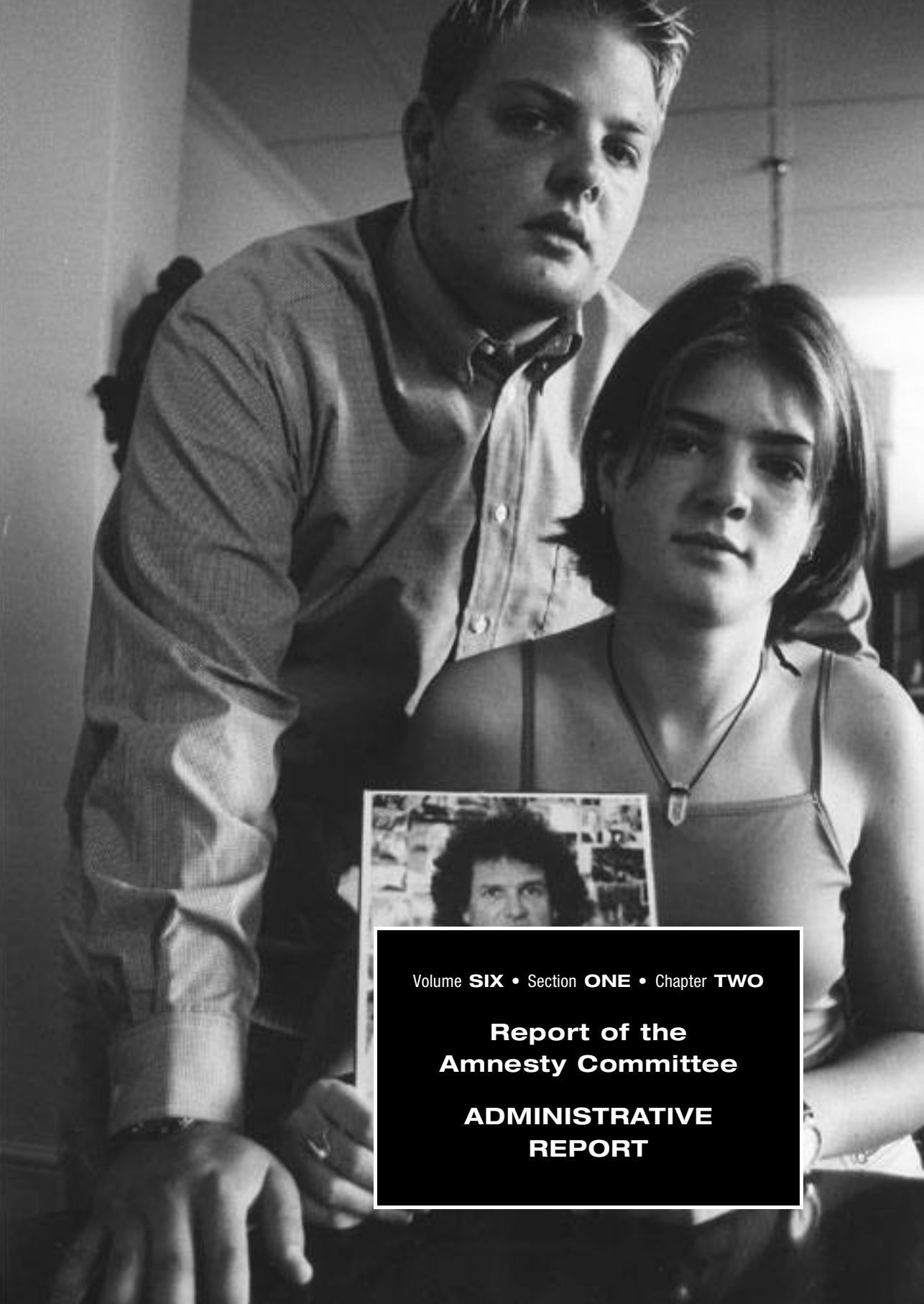
46. Any party aggrieved by a decision of the Committee had the right to approach the High Court for a review of the decision. The process of review of administrative decisions is regulated by the Constitution,<sup>18</sup> which grants everyone the right to administrative action that is lawful, reasonable and procedurally fair.<sup>19</sup> This constitutional provision has superseded the common-law rules relating to review, the latter having been subsumed under the Constitution.

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<sup>18</sup> Pharmaceutical Manufacturers' Association of SA and Another : In re Ex Parte President of the Republic of South Africa & Others 2000(2) SA 674 (CC) at para 33.

<sup>19</sup> Section 33 of the Constitution, 1996.

47. A court reviewing a decision of the Committee does not consider whether the decision is correct, but rather whether it is *justifiable*. Thus the review court does not retry the matter, but simply concerns itself with the question of whether the decision the Committee has made is justifiable in the sense that there is a rational connection between the facts of the particular application and the decision arrived at by the Committee. The review court does not substitute its own views on the merits of the application for those of the Committee in matters where the rational connection referred to above has been established. The review court does, however, consider the merits of the application in order to decide whether the rational connection has actually been established (see also Chapter Four, 'Legal Challenges').



Volume **SIX** • Section **ONE** • Chapter **TWO**

**Report of the  
Amnesty Committee**

**ADMINISTRATIVE  
REPORT**



# Administrative Report

## ■ INTRODUCTION

1. The objective of this chapter is to give as clear a picture as possible of the administrative procedures, mechanisms and functions of the Amnesty Committee (the Committee). The functions of the executive secretary as administrative head of the Committee were integrated with those of the chief executive officer (CEO) of the Truth and Reconciliation Commission (the Commission) during 1997 and performed by the same person, but this section deals mainly with the affairs of the Committee. A separate report is presented on the duties of the CEO.
2. For the sake of completeness, this section should be read with the CEO's report and with the earlier Management Report of the Committee, which formed part of the Commission's Final Report that was handed to the President in October 1998.<sup>20</sup>
3. This chapter offers an overview of the amnesty process from the perspectives of the executive secretary and later the CEO. The provisions of the Act will be reflected upon insofar as they related to the administration and management of, especially, the amnesty process. Reference is also made to the development of the administration and amnesty process since 1996. The contents are based on a variety of documents, including the minutes of the meetings of the Committee since its establishment, internal memoranda, the minutes of meetings of the various components of the Commission and management, as well as inputs from the departments and sections concerned.

## ESTABLISHING THE COMMITTEE

4. Section 16 of the Act provided for the establishment of the Committee as one of the three statutory Committees of the Commission. Its mandate was to grant amnesty to those persons who successfully applied for amnesty in respect of acts, omissions and offences that had been associated with political objectives and committed in the course of the conflicts of the past. One of the basic premises was that national unity and reconciliation would become possible only if the truth about past human rights violations became known (see Chapter One of this volume).

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<sup>20</sup> Volume One, Chapter Ten.

## HOW THE AMNESTY COMMITTEE WAS CONSTITUTED

### The Committee: An overview

5. In terms of section 17 of the Act, the Committee initially consisted of only five members, two of whom had to be Commissioners. President Nelson Mandela appointed Judge Hassen Mall and Judge Andrew Wilson as chairperson and vice-chairperson respectively and Judge Bernard Ngoepe as the third member. After consultation with the Commission, the President appointed Commissioners Sisi Khampepe and Chris de Jager as members of the Committee.
6. These five members had to attend to the setting up of the Committee and deal with all applications for amnesty received. Due to the large volume of work and in order to expedite the process, the membership of the Committee was subsequently increased to eleven in June 1997 and to nineteen during December 1997. All members were legally qualified, being judges of the High Court, advocates and attorneys. The President dissolved the Committee with effect from 31 May 2001 in terms of Proclamation R31 dated 23 May 2001.
7. Despite the increase in numbers, the Committee never experienced the benefit of its full complement of nineteen members for any significant period of time. This was due to the resignation of some members to take up other positions, and poor health on the part of others. Moreover, the limited lifespan of the Committee made it impractical to fill these vacancies. The Committee also suffered the loss of its chairperson, Judge Hassen Mall, who passed away on 18 August 1999. He was replaced as chairperson by Judge Andrew Wilson, and Acting Judge Denzil Potgieter was appointed vice-chairperson.
8. The following persons served with distinction on the Committee:

Judge H Mall	15/12/1995–18/08/1999
Judge A Wilson	15/12/1995–31/05/2001
Judge B Ngoepe	15/12/1995–01/07/1998
Ms S Khampepe	15/12/1995–31/03/2001
Advocate C de Jager SC	15/12/1995–31/05/2001
Advocate D Potgieter SC	01/07/1997–31/05/2001
Advocate N Sandi	01/07/1997–31/05/2001
Mr W Malan	01/11/1997–31/05/2001
Advocate J Motata	01/11/1997–31/01/2001
Advocate L Gcabashe	01/12/1997–30/08/1999

Judge S Miller	05/02/1998–28/02/2001
Judge R Pillay	05/02/1998–31/05/2001
Judge S Ngcobo	05/02/1998–01/01/1999
Advocate F Bosman	05/02/1998–31/05/2001
Advocate S Sigodi	05/02/1998–31/05/2001
Mr JB Sibanyoni	05/02/1998–31/03/2001
Dr WM Tsotsi	05/02/1998–30/10/1999
Mr J Moloi	05/02/1998–01/07/1998
Mr I Lax	05/02/1998–31/05/2001

## The Amnesty Department

9. The Act made no provision for an administrative component for the Committee. It was left to the Committee to secure the services of professional and administrative personnel to assist it in executing its mandate. Resources were initially shared with other components of the Commission. This hampered the Committee in setting up the independent administrative, investigative and corroborative mechanisms it needed.
10. In April 1996, a month before its first public hearing, the Committee had a staff complement of two professional and three administrative officials. A year later, in April 1997, the Committee had only six professional and seven administrative officials to administer, peruse and prepare more than 7000 amnesty applications for decisions by the Committee. Due to tremendous time constraints, there was inadequate opportunity for staff training and development. It was left to the members of the Committee to take care of some of the administrative duties.
11. In an attempt to address these administrative difficulties, Advocate Martin Coetzee, a senior official from the Department of Justice, was seconded to the Commission on a temporary basis in August 1997 to act as the executive secretary of the Committee, with instructions to reassess the entire amnesty process. (Advocate Coetzee was later appointed as executive secretary of the Committee, and became chief executive officer of the Commission in May 1999.)
12. Under Advocate Coetzee, operational processes were co-ordinated and placed under stricter management control. Mechanisms were put in place to deal properly with amnesty applications. The reassessment resulted in an increase in the number of both staff and Committee members. Within a period of six months,

the number of staff members making up the Amnesty Department increased from the original thirteen to ninety-four, in the following categories:

- leaders of evidence;
- evidence analysts;
- information analysts;
- administrative staff members;
- logistics officers;
- investigators;
- witness protectors;
- secretarial staff; and
- an amnesty victim co-ordinator.

### ***Leaders of evidence***

13. Leaders of evidence were advocates and attorneys with practical experience. They were responsible for the final preparation of applications that needed to go for public hearing. Supervised by a chief leader of evidence, leaders of evidence conducted and led evidence at hearings. The chief leader of evidence and the executive secretary were responsible for scheduling hearable applications.

### ***Evidence analysts***

14. Evidence analysts were legally qualified people without practical experience. Later on in the process, persons without legal training but with sound analytical or investigative skills were also appointed as evidence analysts. Evidence analysts were responsible for the initial perusal and preparation of amnesty applications. They saw to it that the necessary investigations were conducted and gathered all relevant information and documentation.

### ***Information analysts***

15. Information analysts were people experienced in analysing data and capturing information on a computer database. They were responsible for the electronic capturing of the contents of applications and other related information.

### ***Administrative staff members***

16. Administrative staff members were responsible for the processing, filing and safekeeping of amnesty applications. Some were also responsible for dealing with incoming correspondence relating to applications.

### ***Logistics officers***

17. Logistics officers were responsible for all logistical arrangements in connection with public hearings.

### ***Investigators***

18. Investigators were responsible for investigating applications and obtaining the evidence and documentation required by the Committee and evidence analysts. The Committee was fortunate in obtaining the services of experienced members of the South African Police Services (SAPS) and Correctional Services and a number of international investigators. Investigators were based in Cape Town and at the Commission's regional offices in Johannesburg, Durban and Port Elizabeth.

### ***Witness protectors***

19. Witness protectors were experienced members of the security forces responsible for the protection of (predominantly) applicants, implicated persons and victims.

### ***Secretarial staff***

20. Secretarial staff consisted of senior and junior secretaries who rendered secretarial services and, in certain instances, served as personal assistants to members of the Committee and senior staff members.

### ***Amnesty victim co-ordinator***

21. The amnesty victim co-ordinator was responsible for attending to the victim referral process of the Committee.
22. The functions and responsibilities of the Committee and the various sections of the amnesty department were clearly demarcated. Regular workshops emphasised training and motivation. Proper guidelines were developed for dealing with applications from the moment they were received and registered until they were finally disposed of. (These will be dealt with in more detail later in this chapter.)
23. All these measures proved effective in placing the amnesty process on a sound footing. The position improved even further when the activities of the Commission were suspended on 29 October 1998, and staff members from other parts of the Commission were reallocated to the Committee.

## THE AMNESTY PROCESS

24. The purpose of this section is to give an account of how amnesty applications were processed before they were ready for decision by the Committee. The process was far from flawless. Indeed, as has already been pointed out, a complete reassessment and the implementation of new and improved systems became necessary during 1997.
25. It should be emphasised from the outset that the amnesty process was unique. There were no historical or legal precedents on which to draw. The Act was silent on procedures, and the Committee had to find its own way. The end product was the culmination of various ideas and proposals and the result of mechanisms that developed as the process evolved.
26. The Commission came into operation on 15 December 1995 and the first application for amnesty was submitted on 1 January 1996. The Committee, which was based in Cape Town, met for the first time in February 1996. It became operational during April 1996 and held its first hearing on 20 May 1996. By the end of April 1996, a total of 197 applications had been received. At this time, five Committee members and four staff members were dealing with the applications. By 30 September 1997, in excess of 7000 applications had been received and were being dealt with by a maximum of nineteen Committee members and ninety-four staff members.

### Receipt and processing of application forms

27. A standard application form for amnesty was developed and distributed for completion by prospective applicants. The form was translated into all eleven official languages of South Africa and was made available at all the offices of the Commission, offices of the Department of Justice and prisons. Upon completion, these forms were handed in at either the head office of the Commission or at one of its three regional offices for forwarding to the head office.
28. Applicants were required to provide the following information and particulars:
  - a personal details;
  - b political or other affiliation, or employment by the state;
  - c particulars regarding the act, omission or offence for which amnesty was sought;

- d particulars regarding victims;
- e particulars regarding the political objective that was being pursued in committing the act, the omission or offence for which amnesty was sought;
- f whether any benefits had accrued as a result of the act, omission or offence;
- g particulars as to whether the act was committed in execution of an order or with implied or express authority; and
- h particulars regarding prosecutions and civil proceedings.

29. On receipt, each application was registered and allocated a unique registration number. The Committee decided that all applications for amnesty had to be registered, whether or not they were submitted on the prescribed form.<sup>21</sup> The rationale behind this decision was to avoid penalising any person who had shown a clear intention to apply for amnesty. The correct application form was then sent to the person concerned with a request that she or he complete it and return it to the Committee. It was also made very clear that, unless an application was properly completed and submitted in terms of the Act, the Committee could not consider it. Some of the applications received and registered as amnesty applications were later found to be applications for reparation or statements on human rights violations, and had to be deregistered and referred to the appropriate section of the Commission.

### **Capturing information**

30. All applications received were electronically registered on the Commission's database. In addition, all information initially contained in the application was electronically captured. As the process progressed, all relevant information pertaining to a specific application, including information on hearings, victims and decisions, was added. This process proved invaluable for the purposes of research and cross-referencing. The resultant database will form an integral part of the history concerning the past political conflict.

### **Safekeeping and administration of application forms**

31. Once registered, copies were made of all applications, and the originals were placed in fireproof strongrooms for safekeeping and in order to secure their confidentiality. The copies were used as working documents when applications were being prepared for consideration.

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<sup>21</sup> Indeed, many 'applications' were made simply by writing a letter to the Committee or by furnishing the information on other application forms used by the Commission.

32. The administrative component of the Committee was the nucleus that managed the movement of the applications, and thus played a central role in the amnesty process. A staff component of eight officials, under the direct supervision of the executive secretary, was responsible for the safekeeping and administration of the application forms. All information, correspondence and documents relating to applications were channelled to this section, which was responsible for filing and subsequent distribution to the staff responsible for preparing the applications. Audits were conducted on a regular basis to ensure that all applications were accounted for.
33. An application was finalised only once the Committee took a decision on it. It was then put on file and prepared for archiving.

## **Workshops**

34. The Committee held several workshops during its existence, with the aim of streamlining the process and ensuring the proper execution of its mandate. The first workshop for evidence leaders and investigative personnel was held in October 1996. This was followed by workshops in September and November 1997, April 1998 and March 1999. Workshops were also held for administrative and logistical staff. Regular meetings to discuss and evaluate the amnesty process were held with all the sections in the Department.
35. These workshops proved an invaluable way of training staff and making them part of the process. Participation by Committee members went a long way towards communicating their expertise to staff and proved invaluable in setting up channels of communication. During these workshops, everyone had the opportunity to air their views and work together to identify problem areas and seek solutions.

## **Developing guidelines**

36. With the benefit of hindsight, it is clear that what was expected of the Committee in terms of sheer workload was totally unrealistic. Certainly it could not reasonably have been foreseen that more than 7000 amnesty applications, relating to more than 14 000 different incidents, would be submitted. Nor could anyone have predicted how much work would be involved in perusing and investigating these applications. For example, was it really reasonable to expect that a single application dealing with incidents involving hundreds of victims and implicated persons – that had, moreover, engaged a court for well over three years – could be dealt with in a matter of days?



37. As has already been mentioned, the Committee began its work with no formal guidelines or prescriptions on how it should prepare applications. Over time, however, it evolved guidelines for its work: some through a process of logical reasoning, others through trial and error.
38. For the purposes of this chapter, the process will be discussed in stages, bearing in mind that none of these processes existed in isolation. At times, indeed, they were intertwined, and at others, their sequence was inverted.

### ***First stage***

39. The initial perusal of the applications was done by the administrative staff, who checked the forms to ascertain whether they were properly completed, signed and attested to. If not, they were returned to the applicants to be rectified. Those forms that complied with the formal requirements were checked to establish whether they had been submitted before the deadline of 30 September 1997. Applications submitted after this date could not be considered by the Committee and were returned to the applicant with an appropriate note.

### ***Second stage***

40. At the second stage, the evidence analysts perused the applications in order to establish which of the following was the case:
  - a The act in respect of which amnesty was sought was not committed within the prescribed period. If so, the Committee could not consider the application and the applicant would be informed accordingly.
  - b It appeared, *prima facie*,<sup>22</sup> that the application did not relate to an act associated with a political objective, or that the act was committed for personal gain or because of malice, ill will or spite towards the victim. In such cases the application was submitted to the Committee for consideration in chambers.<sup>23</sup> If the Committee was satisfied that the application did not meet the requirements of the Act, amnesty was refused and the applicant was informed accordingly. In certain cases, it might not be possible for the Committee to make a decision without further investigation. Such an investigation would be co-ordinated by an evidence analyst.
  - c It appeared, *prima facie*, that the application related to an act associated with a political objective, but that such an act did not constitute a gross violation of human rights. In such cases, the application was submitted to the Committee in chambers. The granting of amnesty could then be considered in the applicant's absence unless further investigation was required.

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<sup>22</sup> On the face of it or at first glance.

<sup>23</sup> These applications were referred to as 'chamber' matters because they were not dealt with by the Committee at a public hearing (see 'Chamber Matters' in Chapter Three of this section).

d It appeared, *prima facie*, that the application related to an act that was associated with a political objective and that constituted a gross violation of human rights. The Committee would then direct that the application be scheduled for a public hearing, subject to further investigation.

41. It must be emphasised that, in making each of the above decisions, the Committee was the sole judge and was also intimately involved in the process of categorising the applications. A panel of at least three Committee members, of whom one had to be a judge, made the final decision to grant or refuse amnesty in each case.

### ***Third stage***

42. The third stage entailed completing the required investigation before proceeding to finalise the application. This was one of the most difficult and time-consuming stages. Firstly, the level and intensity of the investigation depended on the circumstances surrounding each specific application. Moreover, some applications related to more than one incident, each requiring its own investigation. Depending on the facts that needed to be investigated, investigations varied from the mere confirmation of one fact to an in-depth investigation that might last several months.

43. Investigations required by the Committee could include:

- a obtaining further and/or additional information from an applicant;
- b corroboration that an incident had occurred;
- c obtaining prison records from the Department of Correctional Services;
- d obtaining relevant court records (indictments and judgments) from the Department of Justice, reports from the then attorneys-general, and/or police dockets from the SAPS;
- e obtaining confirmation from a political party or liberation movement about whether an applicant was a member or supporter; and
- f obtaining statements about the incident in question from victims, implicated persons and/or witnesses.

44. Over and above the information obtained in the course of its investigation, the Committee also used information gathered by the Commission's research department and the Human Rights Violations Committee (HRVC).

45. The investigations and corroboration were done on behalf of the Committee by a group of dedicated investigators. At its peak, the Committee enjoyed the services of thirty-two investigators. The investigative component consisted of contracted

officials, officials seconded from the departments of Correctional Services and Defence, officials from the SAPS and a number of international investigators seconded to the Commission by their respective governments. Investigations were done in all parts of the country and even overseas. Investigators travelled literally hundreds of thousands of kilometres over all nine provinces. In some cases, isolated areas could be reached only on horseback or on foot.

#### ***Fourth stage***

46. Upon completion of the required investigations and after final perusal by the evidence analyst, an application was ready for submission to the Committee and would be dealt with either in chambers or at a public hearing.
  
47. In the early stages of the Committee's life, applications considered at public hearings were dealt with on an individual basis. Later it emerged that duplication could be avoided and staff expertise used more efficiently if applications were clustered into political groupings and geographical regions. This allowed the Committee to hear more than one applicant in the same region or with respect to the same incident. This not only assisted the Committee in evaluating the evidence of various applicants, but also assisted the Commission in obtaining the fullest possible picture in respect of the incident(s) concerned. The groupings into which the applications were divided included:
  - a Members or supporters of the African National Congress (ANC) and aligned organisations;
  - b Members or supporters of the Pan Africanist Congress (PAC) and aligned organisations;
  - c Members or supporters of the Inkatha Freedom Party (IFP) and aligned organisations;
  - d Members of the former security forces; and
  - e Members or supporters of the white right-wing organisations.
  
48. In an effort to assist the Committee, applications were initially submitted to the chief leader of evidence for quality control before submission to the Committee. Incomplete applications were referred back to the analyst with further instructions. If the application did not involve a gross human rights violation, or where it appeared, *prima facie*, that the application was not likely to be successful, the application was referred to the Committee to be dealt with in chambers. If the application involved a gross human rights violation and it appeared, *prima facie*, that amnesty was likely to be granted, the application was handed to an evidence leader to prepare for a public hearing. When the chief leader of evidence resigned during 1998, the quality control function was taken over by members of the Committee.

### *Fifth stage*

49. The leader of evidence was responsible for putting before the Committee all the relevant evidence it might require in order to come to a decision as to whether or not amnesty should be granted. The leader of evidence was also responsible for ensuring that all the necessary investigations were done and that all relevant documentation was available before a hearing was scheduled.
  
50. The scheduling of an application was a complex issue. Various factors that could influence – and indeed determine – the scheduling needed to be taken into account. These included:
  - a the place where the incident (the focus or subject matter of the hearing) took place, so that the local public could attend;
  - b the location of the applicant at the time of the scheduled hearing (if the applicant was in prison, the necessary arrangements had to be made so that s/he could attend);
  - c the location and availability of victims, so that they could attend the hearing;
  - d whether other similar applications should or could be heard simultaneously;
  - e the availability of the necessary logistical services, namely a suitable and secure venue, translating facilities, recording facilities, accommodation, transport and witness protection services; and
  - f the availability of legal representatives of the applicants, victims and/or implicated persons. Some hearings involved no fewer than nineteen legal representatives.
  
51. There were times when four panels of the Committee sat simultaneously at four different locations, making the scheduling of applications for public hearings a challenging task. Once a hearing was finally scheduled, the chairperson of the Committee assigned a panel consisting of a judge and at least two other members to preside over the hearing. The leader of evidence was then responsible for the following:
  - a Issuing the necessary notices in terms of section 19(4) of the Act, and informing the applicant, victims and implicated parties of the date and venue at least fourteen days before the hearing.
  - b Requesting and confirming all logistical requirements and arrangements. As far as was practical and reasonable, the Committee was responsible for providing transport and accommodation for victims.
  - c Preparing the hearing documentation. This bundle contained all the applications and relevant documentation and could vary from fifty to 500 pages. Copies of these bundles were made available to all the members of the panel of the Committee, applicants, victims and implicated persons.

- d Arranging for the services of a legal representative for those applicants and victims who were not legally represented.
  - e Arranging and conducting a pre-hearing conference with all the legal representatives involved. The purpose of this conference was, amongst other things, to identify and limit the issues, determine matters that were common cause and exchange any documents to be used at the hearing.
52. Once a hearing had been scheduled, it was the task of the Committee's logistics officers to take care of all the logistical arrangements. The success of a hearing depended to a very large extent on proper logistical arrangements. The logistics officer was normally the first official with whom the applicants, victims, implicated persons, legal representatives and media made contact. Thus apart from performing their logistical responsibilities, logistics officers had to double as public relations officers. Hearings could last anything from three days to eight weeks, and the logistical arrangements normally had to include:
- a Securing an appropriate and secure venue for the hearing. In determining a venue, one of the factors that needed to be taken into account was its accessibility to the various parties and the public. In line with the Committee's decision to allow the community concerned to be part of the hearing, a venue was secured, as far possible, in the area where the incident in question had occurred.
  - b Taking care of the required security arrangements.
  - c Taking care of travel, accommodation and catering arrangements for members of the Committee, staff and victims.
  - d Arranging for interpreting services. Honouring the decision of the Commission that everyone should be allowed to give evidence before the Commission in his/her mother tongue, the Committee made use of interpreters contracted by the Commission. At certain hearings, interpretation into no fewer than six languages was required.
  - e Arranging for technical assistance for recording the proceedings and operating the simultaneous interpretation system. Bearing in mind that anything between two and four hearings per week took place simultaneously, proper planning was essential to ensure that these services were always available.
  - f Arranging for telephone, faxing and photocopying facilities.
  - g Securing the services of 'briefers' – qualified mental health workers who were responsible for attending to the emotional well-being of victims for the duration of the hearing. Briefers played an invaluable role in assisting grief-stricken victims and relatives. At times, the demand for these services was so high that logistics officers and evidence leaders had to double as briefers.

- h Ensuring that all recordings were submitted to the transcribers for transcribing.
  - i Submitting a reconciliation of all expenses for audit by the finance department at the completion of the hearing.
53. At its inception, the Committee decided that, as an adjudicative body, it would not issue media statements or give interviews about its work or decisions. It also decided that the Commission's media department and the Committee's executive secretary would deal with all communications with the media. The Committee initially had reservations about media coverage of its hearings, especially television coverage. It felt that this might deter people from applying for amnesty or from giving evidence. Concern was also expressed that legal representatives might be tempted to exploit to their advantage the public exposure that television coverage affords.
54. Notwithstanding these concerns, the Committee agreed, albeit reluctantly, that full media coverage would be allowed during hearings, provided that the Committee had the discretion to disallow or halt coverage when it was in the interests of justice to do so.
55. It emerged, however, that the media were to play a very constructive and important role in covering amnesty hearings, and an excellent working relationship developed between the media and the Committee. The role of the media in communicating the essence of the amnesty process and involving the public in the proceedings cannot be underestimated; and it must be said that the process was considerably enriched by this contribution.

***Sixth stage: Hearings***

56. The hearings of amnesty applications were the only publicly visible part of the amnesty process. Not only did they physically take place in public, but the hearings were also extensively covered by the print and electronic media.
57. The Act provided that the Committee should determine the procedural rules regulating public hearings of amnesty applications. This was done over a period of time, taking into account the practicalities of the process. In general the guidelines were as follows:
- a Any person giving evidence was required to do so under oath or affirmation.
  - b The first to testify were the applicants, followed by any witnesses they wished to call.

- c The next to give evidence were the victim(s) or the relatives of the victim(s) and any witnesses they wished to call. Victims who were unable to contribute towards the merits were allowed to make a statement rather than testify if they so preferred. These statements normally dealt with contextual or background factors and subjective views and experiences, often critical to issues of reconciliation and closure for victims.
  - d If applicable, the Committee could then call witnesses, either of its own volition or, if it was seen to be in the interest of justice, at the request of any person who had a material interest in the proceedings. The Committee could also allow any implicated person an opportunity to rebut any allegations against him/her.
  - e The Committee had the discretion to allow cross-examination of any person giving evidence before it by any interested person or her/his legal representative. The Committee could limit the scope and extent of cross-examination.
  - f At the conclusion of the evidence, the applicant or his/her legal representative was entitled to address the Committee. This would be followed by an address by the other interested parties or their legal representatives. The Committee could, within reasonable limits, restrict the scope and duration of the addresses, which were required to be succinct and to the point.
  - g A person giving oral evidence was entitled to do so in any of the official languages.
  - h Any person who wished to make use of any document during the hearing had to ensure that sufficient copies were furnished to the Committee and to all other known interested parties in good time. This rule was more strictly applied where the person was legally represented.
  - i Evidence was limited to issues that were material to a proper consideration of the application.
58. The Committee could, in its sole discretion, vary any of these procedures, which did not in any way detract from the general competence of the Committee or its inherent powers.
59. The decision to allow cross-examination of any applicant or witness could be influenced by the following factors:
- a whether or not the cross-examiner was opposing the application;
  - b whether or not the concerns of implicated persons could be adequately met by an affidavit in which they stated their version;
  - c whether or not the purpose of the cross-examination was to show that the applicant was not entitled to amnesty;

- d whether or not the cross-examination was directed at specific requirements prescribed by the Act in order to qualify for amnesty; and
  - e whether or not the interests of justice demanded that cross-examination be allowed and to what extent it should be allowed.
60. The decision not to promulgate formal rules of procedure allowed the Committee to adopt a flexible approach that was more appropriate to the unique nature of the amnesty process. The guidelines adopted by the Committee enabled it to use its sole discretion in determining the order of proceedings and to rule on any relevant point of law or matter during the course of a hearing. It was thus able to allow:
- a affidavits to be submitted to the panel from persons not present at or available to attend the hearing;
  - b documents to be submitted as evidence during the course of the proceedings;
  - c hearsay evidence to be heard and its evidentiary value determined; and
  - d cross-examination, having due regard to time constraints, fairness, relevance and the purpose of such cross-examination.
61. Moreover, persons (or legal representatives acting on their behalf) who challenged or contested the allegations contained in affidavits submitted to the Committee could do so by filing written representations or by submitting an affidavit within a reasonable period of time after the hearing.
62. The Committee could, on application by a party, take cognisance of evidence given at judicial proceedings, provided that the party sufficiently specified the relevant portion of the evidence concerned, and allow persons implicated by evidence given during the course of the hearing to make representations within a reasonable period of time after the hearing.

### ***Seventh stage***

63. The final stage in dealing with an application was the delivery of a decision by the Committee and the consequent notification of all parties concerned.
64. In certain instances, the Committee gave *ex tempore* (immediate) decisions at the conclusion of a hearing. In the majority of the cases, however, the Committee only decided the matter at a later stage.
65. The reason for this is that many of the hearings stretched over a period of days and the evidence ran to thousands of transcribed pages. Thus, both the Committee and the legal representatives needed time to go through the evidence.



In certain instances, legal representatives required a reasonable period to submit written heads of argument and Committee members needed time to discuss the evidence and prepare a decision.

66. As soon as a decision was reached, it was handed to the executive secretary, who promptly notified the applicant and all other interested parties of the outcome and provided them with a copy of the decision as well as a copy of the proclamation that would be published in the Government Gazette. Known victims and implicated persons were notified through their legal representatives. Where applicable, notifications were also sent to the Department of Correctional Services, the head of the prison concerned, the National Prosecuting Authority and the registrar of the court concerned. The Commission was similarly notified.

## **CHALLENGES FACED BY THE COMMITTEE**

67. The Committee was faced with various challenges, not all of a substantial nature. Only those factors that made it difficult for the Committee to do its work will be reflected upon here.

### **Reviews**

68. No provision was made in the Act for an appeal against any decision of the Committee. Once the Committee had made its decision and informed the applicant, the Committee was *functus officio* (its function fulfilled) and could not review its decision or change it. The only remedy available to those who were dissatisfied with the decision (whether applicant, victim or interested party) was to approach the High Court to review the decision.
69. At the time of compiling this report, eight review applications had been filed against the decisions of the Committee. In two instances, the applications succeeded and the matters were referred back to the Committee for reconsideration. In three instances, the applications were dismissed. The remaining three instances were still pending at the time of publication. (These reviews are dealt with in more detail in Chapter Four, 'Legal Challenges'.)

### **Operational challenges**

70. Operational challenges had the most profound impact on the ability of the Committee to finish a huge workload within the shortest period possible. Some of the most significant are mentioned below:

## **Staff**

71. All members of staff were employed in a temporary capacity and on a contractual basis. Due to the lack of employment security and uncertainty about exactly when the process would end, staff members were understandably constantly on the lookout for permanent employment elsewhere. Apart from a basic salary, staff members were offered no incentives, such as service bonuses, causing the Committee to lose experienced staff on a regular basis. It became increasingly difficult to fill vacancies, as it was almost impossible to find experienced and skilled people willing to enter into contracts for limited periods without being able to offer them substantial incentives.

## ***Budgetary constraints***

72. The Committee did not have its own budget and had to compete with the rest of the Commission for available funds. More funds would certainly have gone a long way towards making it possible to employ more staff and so reduce some of the pressure on the Committee.

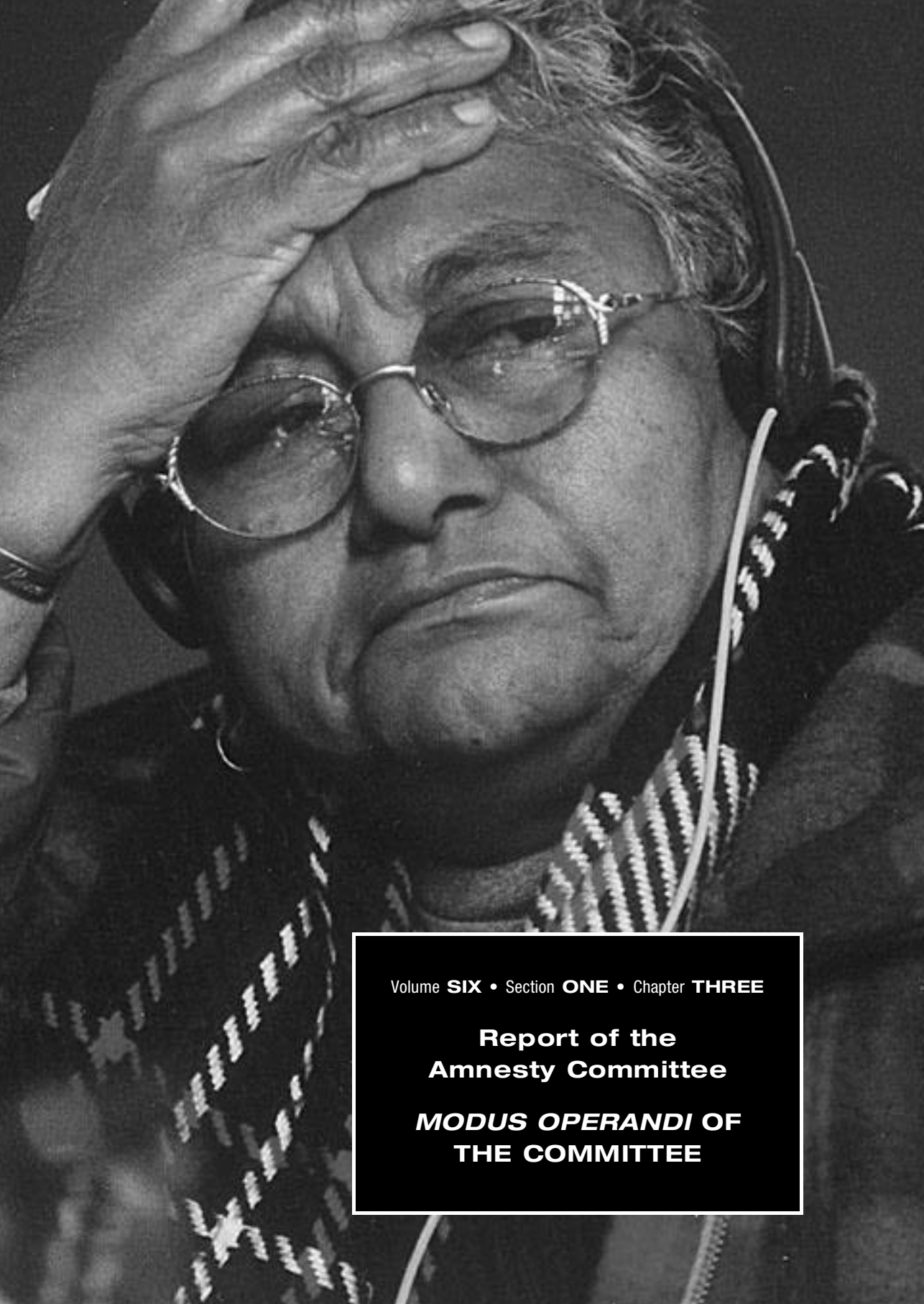
## ***Preparation of applications***

73. The preparation of an application entailed substantially more than simply reading it and submitting it to the Committee for finalisation. The information contained in applications was, as a rule, very scant and had to be supplemented in one way or another. The vast majority of applicants did not have the luxury of a legal representative to assist them in completing the application form, and those who had lawyers usually divulged as little as possible. This necessitated a continuous exchange of correspondence between the Committee and applicants to elicit the necessary information.
74. Approximately 65 per cent of the applications were submitted by people who were in custody and had limited means of obtaining information. In most of these instances, court and police records had to be obtained. Delays were frequently experienced in obtaining records from the responsible institutions and, in many instances, the investigators had to go personally to collect them.
75. Corresponding with applicants in custody was often very difficult, since they were often transferred from one prison to another without the Committee being informed. This resulted in correspondence being despatched to the wrong address and reaching them only after a delay.

76. Some of the incidents mentioned by applicants had never previously been investigated by the police or dealt with at a trial. Consequently, the Committee had to investigate these incidents long after the event had taken place.
77. Establishing the identity and location of implicated persons, and especially of victims, was a very difficult and time-consuming task. The print and electronic media had to be used. The cost of placing even a single newspaper advertisement per missing person could add up to a considerable amount of money.
78. Investigative work took investigators all over the country, in many cases to remote and inaccessible areas. Investigators often had to contend with uncooperative victims and implicated persons, but all information furnished by applicants had to be verified.
79. The co-operation of political parties with the amnesty process was at times disappointing. Getting them simply to confirm an applicant's membership or provide information about an incident or policy could take anything between two and six months. In the meantime, the Committee was left to contend with irate and frustrated applicants.

### ***Hearings***

80. The task of scheduling – and adhering to a planned schedule – was complicated by a number of factors, including the difficulty of finding a suitable venue. Not all institutions were willing to make accommodation available for a hearing, especially for periods of up to two weeks or longer. Factors that had to be taken into account in the choice of a venue included financial constraints, security, and the accessibility of the venue to applicants, victims and the general public. Another difficulty was finding a date that suited the various legal representatives representing the applicants, the implicated persons and victims. In addition, lawyers tended to treat hearings as criminal trials, with the result that the cross-examination of applicants sometimes continued for days.
81. These are but some of the challenges the Committee faced. Due to dedication and effort on the part of everyone involved, none of these challenges proved insurmountable. Notwithstanding these less than optimum circumstances, the Committee was able to complete its mandate successfully by 31 May 2001.



Volume **SIX** • Section **ONE** • Chapter **THREE**

**Report of the  
Amnesty Committee**

***MODUS OPERANDI OF  
THE COMMITTEE***

# *Modus Operandi* of the Committee

## ■ CHAMBER MATTERS

1. Section 19(3) of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (the Act) gave the Amnesty Committee (the Committee) the discretion to deal with certain applications in the absence of the applicant and without holding a public hearing – after having investigated the application and having made such enquiries as the Committee considered necessary. These matters were generally referred to as ‘chamber matters’ and concerned incidents that did not constitute gross violations of human rights as defined in the Act (see further Chapter One).<sup>24</sup>
2. Subsection 19(3)(a) of the Act empowered the Committee to refuse an application in chambers when it was satisfied that the application did not relate to an act associated with a political objective. In appropriate circumstances, the Committee was authorised to give the applicant the opportunity to make a further submission before the matter was finalised. This happened quite frequently where the available information created some doubt as to whether the requirement of a political objective had been satisfied, for example where it was not clear whether the applicant had acted within the scope of a particular order or mandate.
3. In terms of subsection 19(3)(b) of the Act, amnesty could be granted in chambers only if the requirements for amnesty (as set out in section 20(1) of the Act) had been complied with; if there was no need for a hearing, and if the act, omission or offence to which the application related did not constitute a gross violation of human rights.
4. The largest percentage of applications the Committee dealt with were chamber matters. Out of a total of 7115 applications, 5489 were dealt with in chambers.

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<sup>24</sup> Section 1(ix) defined gross violations of human rights as killings, abductions, torture and severe ill-treatment, including any attempt, conspiracy, incitement, instigation, command or procurement to commit any of these acts.

## DIFFICULTIES ENCOUNTERED WHEN DEALING WITH CHAMBER MATTERS

5. One of the difficulties the Committee experienced when dealing with chamber matters arose from the lapse of time between the commission of the act or offence and the consideration of the application for amnesty. Where this spanned a period of years, it was often difficult to trace victims or possible witnesses in order to obtain their comments on an applicant's version. In many such cases, it was difficult if not impossible to obtain police or court records. Even where court records were traced, applicants often averred that they had lied to the trial court to escape punishment. It was also not uncommon to learn from applicants that they had concealed the political motivation for their deeds in their court evidence, as this would, at the time, have been regarded as an aggravating circumstance. This left the Committee with the dilemma of having to decide whether an applicant had disclosed the truth in the amnesty application or whether this new version was also just an expedient stratagem. Obviously, these difficulties also arose in 'hearable' matters.
6. Another difficulty arose from the fact that, in the time gap between the submission of an application by a serving prisoner and its consideration by the Committee, an applicant might have been released from prison without leaving any forwarding address or contact details. In these instances, the Committee took the view that applicants had a duty to keep the Committee informed of their whereabouts. Nevertheless, the Committee took all possible steps to trace applicants. If several attempts and a final ultimatum failed to elicit a response, such matters were dealt with on the basis of unsupplemented information.
7. The use of pseudonyms, and references to co-perpetrators by pseudonyms or *noms de guerre*, hampered the proper linking of files relating to the same incident and consequently made it extremely difficult to corroborate the versions of the various applicants by cross-referencing. This was a particular problem when dealing with applications by members of the liberation movements. The resultant delays made the process of dealing with chamber matters more time-consuming than had originally been anticipated.
8. Other delays resulted from slow responses to enquiries directed to political organisations, government institutions and private individuals. This was not always due to reluctance or unwillingness to assist the Committee on the part

of those concerned, but more often reflected a lack of the necessary capacity to deal with these enquiries expeditiously.

9. The Committee was mindful of the particular difficulties experienced by government departments. In many instances, old files had been destroyed in the normal course of events or as part of a deliberate policy to conceal information.<sup>25</sup> Some considerable changes in staff after the democratic elections in 1994 caused additional difficulties in accessing archival material. In the case of private individuals, communication by mail presented its own problems, particularly in areas that were not easily accessible, such as outlying rural areas and informal settlements.

## **PROCEDURE FOLLOWED BY THE COMMITTEE IN DEALING WITH CHAMBER MATTERS**

10. The procedure followed when dealing with chamber matters was adapted from time to time to take account of the availability of Committee members. This resulted in differing views on the interpretation of the Act. Initially, when the Committee consisted of only five members, all were required to consider the application and only one member was mandated to sign the decision on behalf of the full Committee. After the enlargement of the Committee, two signatures were at first considered sufficient. The Committee, however, eventually settled on a three-member panel (one of whom had to be a judge) to decide chamber matters.
11. Committee members dealt with chamber matters as and when they were available in between hearings and the writing of decisions. At times, this resulted in the involvement of more than just the three Committee members required to sign the final decision. A Committee member would, for example, be assigned to deal with a particular matter in chambers and might, in the process, direct an administrative official to obtain further particulars (such as a police docket or court record) to clarify the application. Once the additional information became available, the same file might be referred to another Committee member who happened to be available at the time, and not necessarily back to the member who had originally dealt with the file. This member would, if satisfied, take a decision and have a draft decision prepared. If s/he did not consider the application to be a straightforward one, s/he might decide to consult with other Committee members before drafting the decision. Once the decision was drafted and the three members concurred, it would be signed and the interested parties would be informed of the outcome of the application.

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<sup>25</sup> See particularly Volume One, Chapter Eight, 'The Destruction of Records'.

12. Some chamber matters proved to be of such complexity that they required the attention of more than the requisite three Committee members, and even of the full Committee. However, after appropriate consultations among members, the matter would still be finally decided by a three-member panel.
13. In less complicated cases, where an application was refused, no summary of the facts was given but only the ground/s for the refusal. Where amnesty was granted in less complicated cases, a brief summary of the facts was provided, followed by the Committee's decision.

## **SPECIAL CASES**

14. Some cases that were originally earmarked to be dealt with in chambers were eventually referred to a hearing after further consideration and investigation. These special cases fell into three categories. The first concerned a collection of applications involving witchcraft and the burning of people as a result of this phenomenon. These were particularly prevalent in, but not limited to, the Northern Province. The second category concerned a cluster of cases involving the activities of self-defence units (SDUs) in the townships, some of which did not, strictly speaking, require a hearing, but were ultimately heard to ensure that the Committee obtained a complete account of SDU activities. The last category concerned the activities of Azanian People's Liberation Army (APLA) operatives, particularly robberies and related violent acts committed, it was argued, to raise funds for the organisation.
15. At first glance, all of these incidents appeared to be common crimes. The SDU applications, moreover, contained scant information, which aggravated the difficulty of determining the events that had taken place. As the context of these incidents was clarified, however, it became evident that these matters could only be properly decided at public hearings where all the relevant circumstances could be fully canvassed. The Committee accordingly opted for this approach.

## **Witchcraft**

16. Applications relating to offences involving witchcraft were considered to fall into a unique category of human rights violations and were given special attention by the Committee. The question as to whether amnesty could be granted where a victim or victims had been attacked or killed as a result of a belief in witchcraft elicited much debate, and members of the Committee were initially divided on the issue. One view was that such a belief was not sufficient grounds for



granting amnesty and that applications of this nature ought to be refused. Others argued that the concept 'conflicts of the past', as envisaged in the Act, also encompassed the very real conflict between traditional values – essentially supporting the *status quo* – and the emerging democratic values supporting transformation.

17. So contentious was the issue initially that it was referred to a full meeting of the Committee. At this meeting, a subcommittee was mandated to investigate the matter and make recommendations. It was ultimately decided that all witchcraft cases should be dealt with in one cluster and referred to a public hearing.
18. The bulk of the witchcraft cases were heard in two hearing sessions at Thohoyandou in the Northern Province. Professor NV Ralushai, an expert witness and chairperson of the 1995 Commission of Inquiry into Witchcraft Violence and Ritual Murder in the Northern Province, testified at the principal hearing. His evidence, as well as the Interim Report of his Commission – which was made available to the hearings panel – were invaluable in helping the Committee make informed decisions on all witchcraft-related applications.
19. Largely as a consequence of these contributions, the Committee concluded that a belief in witchcraft was still widely prevalent in certain rural areas of South Africa. Moreover, it became clear to the Committee that the issue of witchcraft had – at certain times in some rural areas – been a central factor in some of the recent political conflicts between supporters of the liberation movements and the forces seeking to entrench the *status quo*. The former were of the opinion that traditional practices and beliefs related to witchcraft had been exploited by the latter to advance their positions.
20. The Committee accepted the following finding of the Ralushai Commission of Inquiry:  
*Apartheid politics turned traditional leaders into politicians representing a system which was not popular with many people, because they were seen as upholders of that system. For this reason, traditional leaders became the target of the now politicised youth.*<sup>26</sup>
21. It further accepted the view of the Commission of Inquiry that:  
*[I]n some cases the youth intimidated traditional leaders in such a way that the latter had little or no option but to sniff out so-called witches.*<sup>27</sup>

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26 Interim Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murder in the Northern Province, p. 49.

27 Interim Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murder in the Northern Province, p. 144.

22. It was also clear from the evidence heard by the Committee that, in Venda particularly, the liberation forces used cases of witchcraft and ritual killings to politicise communities. This strategy was facilitated by the fact that local communities were dissatisfied with the manner in which the apartheid authorities had handled such cases. For example, the failure of the authorities to act against people who were believed to be witches resulted in a belief that the government was the protector of witches. In Venda, where traditional leaders with relatively poor education were politically empowered and were associated with some of the most heinous abuses, the situation was ripe for political conflict.
23. In some cases, where comrades and other pro-liberation movement activists were perceived as having died as a result of witchcraft, community organisations took steps to eliminate those they believed to have been responsible for these deaths.
24. This exposition represents only some aspects of the hearings on these complex witchcraft-related applications. Although the facts and merits of the various applications were diverse, the incidents occurred largely against the background outlined above, which also informed the decisions of the Committee. Within this framework, each application was decided individually and according to its own merits. The specific circumstances of each case are fully recorded in the amnesty decisions accompanying this report.
25. The Committee shares the widespread concern expressed by civil society about the continued prevalence of practices and violent incidents related to a belief in witchcraft in certain areas. It is the Committee's view that this issue warrants further attention by the appropriate government authorities.<sup>28</sup>

### **Self-defence units and township violence**

26. The Final Report of the Truth and Reconciliation Commission (the Commission) discussed the phenomenon of SDUs and the various acts of violence their members committed in many parts of the country<sup>29</sup>. It will not, therefore, be elaborated on here.
27. Applications by former members of SDUs presented the Committee with formidable problems. Most SDU applications were hurriedly completed and submitted just before the closing date for amnesty applications.<sup>30</sup> These forms contained only basic information with few, if any, details about the incident(s)

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<sup>28</sup> See Section 4, Chapter 6, 'Findings and Recommendations' in this volume.

<sup>29</sup> See Volume Two, pp. 35,36,675ff, 684; Volume Three, pp. 214–15,298–303,515,692.

<sup>30</sup> Applicants had been assisted by a community worker who had been closely involved in monitoring community conflicts.

for which amnesty was being sought. Most were identical and simply contained general reference to unspecified SDU activities.

28. These SDU applications caused a number of specific difficulties.
29. First, and not unnaturally, SDU members stated in their applications that they had acted in self-defence. On a strict legal interpretation, such conduct is not unlawful and does not, therefore, amount to an offence. As one of the statutory requirements for amnesty is that the applicant's conduct must constitute an offence associated with a political objective, SDU applicants did not qualify for amnesty (see also Chapter One of this volume).
30. Second, given the form of the violence in the townships and the nature of the operations undertaken by SDUs during the early 1990s, applicants frequently could not identify any specific victim(s) of their actions. Incidents tended to involve violent conflicts between crowds of African National Congress (ANC) and Inkatha Freedom Party (IFP) supporters. Many applicants were unable to say whether or not any person(s) had been injured or killed as a result of their actions in the course of these clashes. They were often not even able to say whether any injuries or deaths had resulted during specified clashes.
31. Third, some applicants (usually convicted prisoners) denied having participated in or even having been associated with the commission of the offence(s) for which they had been convicted and for which they were seeking amnesty. Again, in terms of the Act, they could not be said to have committed an offence with a political objective as required by the Act. Generally the Committee took the view that it was not a court of appeal and that applicants who had been refused amnesty had to seek redress from the courts. The Committee did, however, endeavour to draw the attention of the appropriate government authority to the anomaly of releasing via the amnesty process those guilty of offences, sometimes of a heinous nature, while retaining in prison those innocent of these offences. This is obviously a matter requiring further focussed attention by the appropriate authorities.
32. Fourth, in some SDU cases the Committee found that the applicant(s) concerned had acted against targets without knowing whether or not they were members or supporters of an opposing political organisation or party. Rather, they acted against communities that were perceived to be supporting a rival organisation. This created a potential complication in that the Act required the applicant to have acted against a political opponent.

33. Fifth, the Committee also heard that some SDU applicants had acted during specific incidents without an order from (a) leader(s) of the political organisation or party they represented or of which they claimed to have been a member or supporter at the time of the commission of the offence(s). Again, this complicated even clearly politically motivated action.
34. Sixth, those ANC-aligned SDU members who had committed acts of robbery ostensibly with the aim of buying arms for their activities could not conceivably be said to have acted in accordance with the general policy of the ANC, which disavowed robbery as part of its policy.
35. Finally, due to the lack of legal representation and advice available to them at the time of the completion of the amnesty application forms, many SDU applicants failed to provide the necessary particularity concerning their actions. These applications were, therefore, at risk of being refused for their failure to comply with the requirements of the Act.
36. After intense discussions prior to the finalisation of SDU applications, the Committee decided to deal with them at public hearings where the context of the conflict and the activities of the SDUs could be fully ventilated.
37. The hearings helped clarify the political background and context within which these offences occurred through the evidence of witnesses who were part of the leadership of the organisations involved in the conflict. The Committee also benefited from the reports and testimony of representatives of non-governmental organisations who had been involved in monitoring the political violence and trends in the areas where these activities occurred. In evaluating the merits of the applications, the Committee also considered the submissions of the ANC, and subjected applicants to pertinent and probing questions about the ANC's tactics and policies.
38. However, although these submissions were generally helpful, they did not always enable the Committee to reach an informed decision on every individual case. It was clear, for example, that it had not always been possible for SDU members to receive a specific order before launching an attack or operation. The areas in question were, moreover, gripped by large-scale, ongoing and indiscriminate violence where the maintenance of law and order had all but collapsed. Testimonies at the hearings depicted a grim picture of day-to-day survival as communities came under attack by clandestine forces, often operating

with the tacit approval and even support of the security forces. The East Rand in the early 1990s offered a clear example of this, with young people testifying about their involvement in violent operations in defence of their communities.

39. It was often difficult to draw a distinction between legitimate SDU operations and criminal actions. Local criminal elements exploited the violence and civil strife for their own ends. Some SDUs became a virtual law unto themselves, even acting against fellow SDU members, as was the case in Katlehong in 1992. Other SDU elements launched operations against the express orders of their political leadership.
40. Investigating the involvement of the security forces in the township violence of the early 1990s proved difficult. Lack of investigative capacity on the part of the Committee was one factor; time constraints were another. But the biggest obstacle was the attitude of the security forces themselves. Security force members were reluctant to appear before the Committee to refute allegations about their role in the violence. In many cases, they responded by submitting affidavits or instructing legal representatives to cross-examine those who had implicated them. Rarely did they attend the hearings to present their own version. The result was that, at the end of these hearings, there was little to contradict the strong impression that certain members of the security forces had been involved in acts of violence against communities which had simply sought to defend themselves.
41. It must also be mentioned that, in some of the SDU cases, there was no objective evidence to corroborate the testimonies of the applicants – either because the victims were unknown to the applicant or because they had left the area in which the attack occurred. This did not deter the Committee from making victim findings (in terms of section 22 of the Act) in the hope that the victims, once they reappeared, would be able to access the reparations process. There were also cases where victims took a conscious decision not to attend the hearings and testify for fear of reprisals by other members of an applicant's political organisation or party.

## **APLA operations**

42. Applications from persons claiming to have been members or supporters of APLA – the armed wing of the Pan Africanist Congress (PAC) – presented the Committee with problems peculiar to this particular category of applicants.

43. These problems resulted from certain policies of the organisation, acknowledged by their leaders, which sometimes made it difficult to distinguish between acts associated with a political objective committed by bona fide APLA members and purely criminal acts committed for personal gain, often coupled with severe assault and murder.
44. The first such policy was that expressed in the APLA slogan 'one settler, one bullet'. Given the fact that APLA and the PAC regarded all white people as settlers, this slogan actually translated into 'one white person, one bullet'. Thus individuals became legitimate targets simply because of the colour of their skin, as in the case of the white American exchange student, Ms Amy Bieh<sup>31</sup>, the patrons of the Heidelberg Tavern<sup>32</sup>, the King William's Town Golf Club, and the Crazy Beat discotheque in Newcastle. These were, of course, analogous to incidents that involved members or supporters of the white right-wing organisation, the Afrikaner Weerstandsbeweging (AWB)<sup>33</sup>, where black people were seen as supporters of the ANC and/or communists simply because they were black, and became targets as a result.
45. The second problematic policy position related to the 'repossession' of property. Particular difficulties arose in respect of 'repossessed' goods that, unlike firearms, could not be used directly in the furtherance of the liberation struggle. Many amnesty applications by APLA operatives involved the robbery or theft of a variety of goods and valuables, including cash and vehicles. They often alleged that some of the proceeds of these operations were used as subsistence for the operatives: that is, the proceeds provided their means of survival so that they could continue with their political work. Where goods other than cash were 'repossessed', it was claimed that these were sold to raise funds for the liberation struggle. APLA commanders who testified at hearings were at pains to point out that they viewed these acts of theft and robbery as the legitimate repossession of goods to which the African people of South Africa were rightfully entitled, in line with APLA policy.
46. In dealing with the APLA applications, the first issue the Committee had to resolve was whether these were bona fide operations associated with the liberation struggle. The Committee adopted the approach that amnesty would be refused if the applicants were unable to satisfy the Committee that the property involved had either been handed over to APLA or used in accordance with APLA policy in furtherance of the liberation struggle.

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31 Volume One, p. 11; Volume Three, p. 510.

32 Volume Three, p. 508.

33 Volume One, p. 120; Volume Two, pp. 643,645–8, 665; Volume Five, pp. 209,237.

47. Given the open-ended nature of this 'repossession' policy, it was not surprising that a large number of prison inmates attempted to obtain amnesty ostensibly under the flag of the PAC or APLA. The Committee initially inclined to the view that all these doubtful matters could be dealt with in chambers. However, it later adopted a more cautious approach, with the result that many alleged APLA cases were later revisited and referred to a public hearing.
48. A further difficulty that bedevilled the Committee in assessing the APLA applications was the somewhat loose structure of the APLA units that operated inside the country and, in particular, the 'task force' or 'township trainees' recruited by trained APLA commanders to assist in operations. According to the general submission of the PAC to the Commission, as well as the evidence of APLA commanders at hearings, these task force members were often recruited from the ranks of known criminals both in and outside prison. This was done, it was suggested in evidence, specifically because people with criminal records were best suited to the task of 'repossession' by means of theft and robbery.
49. The use of code names, the unavailability of APLA records and the impossibility at times of ascertaining the true identity of individual amnesty applicants further compounded the problems experienced by the Committee. According to the testimony of APLA commanders, the records of the organisation had been confiscated by the police and never returned. A further difficulty arose from the fact that the PAC and APLA maintained independent organisational structures. This duality is illustrated by the fact that, in the early 1990s, the PAC leadership – which represented the political wing of the organisation – suspended the armed struggle, while APLA, the military wing, continued with the armed struggle in apparent conflict with the PAC position. The resultant confusion presented a further difficulty for the Committee when it came to apply the amnesty-qualifying criteria of the Act – such as the provision that the act under consideration had to be 'associated with a political objective'.
50. The Committee sought the assistance of the PAC and APLA leadership in an attempt to ascertain the truth or relevant information to shed more light on particular aspects of various applications. Unfortunately this assistance was very seldom forthcoming. In those cases where assistance was given, it took an inordinately long time before a query was responded to.
51. Bold allegations of APLA membership or APLA involvement, uncorroborated by any objective proof, were obviously insufficient to comply with the requirements

of the Act. Unfortunately, in many instances, APLA commanders failed to attend hearings or to come to the assistance of applicants. This left the Committee in the position of having to test alleged APLA membership or involvement in incidents as best as it could, for example by evaluating an applicant's knowledge of the history, policies and structures of the organisation.

## HEARABLES

52. In line with the provisions of the Act, the Committee was obliged to deal with any application concerning a gross violation of human rights at a public hearing.<sup>34</sup> This part of the Committee's mandate encompassed its most visible activities and was its public face. Although the Act provided for hearings to be held behind closed doors under exceptional circumstances, all the hearings conducted by the Committee were accessible to members of the public as well as to all sectors of the media, including television. The media covered most of the hearings and gave particularly extensive coverage to the cases considered to be high-profile amnesty applications, although this coverage and interest waned towards the end of the process.

## Constitution of panels

53. The Act empowered the chairperson of the Committee to constitute subcommittees or hearings panels, which had to be presided over by a High Court judge. Normally a hearings panel would consist of three members who constituted a quorum, though at times, and in more complex matters, panels of up to five members were established.<sup>35</sup> An effort was always made to ensure that panels were representative of the racial and gender composition of the Committee itself, taking into account the exigencies of the particular case. Other relevant factors such as language were also taken into account. In applications involving official languages other than English, an effort was made to ensure that at least some members of the panel were proficient in the language in question, although a simultaneous interpretation service was provided at every hearing. This approach significantly facilitated the work and deliberations of the hearings panel outside of the formal hearing itself.

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<sup>34</sup> Subsections 19(3)(b)(iii) & (4).

<sup>35</sup> There is no statutory quorum requirement set out in the Act. The quorum stipulation was established by decision of the Committee. The Act initially provided for a single committee of five members to consider applications. This soon proved impractical in view of the tremendous workload of the Committee. The Act was consequently amended to expand the membership of the Committee and to provide for multiple hearings panels in order to expedite finalisation of the work of the Committee within the general time constraints that applied to the Commission's process as a whole. It was, therefore, only on rare occasions that panels of more than three members were constituted later on in the process.



54. There is no doubt that the general representivity of the hearings panels greatly benefited the hearings process and helped the panels to deal with and appreciate the nuances of particular cases, enhancing the ultimate quality of decision-making within the Committee.

## Hearings procedure

55. Although the Act gave the Committee the latitude to prescribe a formal set of rules to govern hearings, the Committee decided, after some consideration, that it would be in the best interests of the unique process created by the Act not to opt for a set of rules in advance.<sup>36</sup> It settled instead on the more flexible approach of determining the hearings procedure as the amnesty process unfolded, taking into account the practical demands of the process itself. This enabled the Committee to ensure procedural fairness in all cases, even where this required deviations from the procedures followed in the majority of cases. In the end, the procedure followed in most cases did not differ substantially from that which applies in a court of law.
56. It must be noted that there were those who criticised what they described as the 'judicialisation' of the amnesty process, arguing that the Committee was under no statutory obligation to adopt the process it followed: one which, even in the setting and formalities of hearings, very closely resembled the court approach.
57. A further and related criticism concerned the membership of the hearings panels. Although the Act required only that the Committee and the hearings panels be chaired by judges, the membership of the Committee consisted exclusively of lawyers. Critics argued that the exclusion of persons skilled in other disciplines – for example the social sciences – from Committee membership, impoverished the process. It was their view that multi-disciplinary panels would have diluted the legalistic process adopted by the Committee and introduced, instead, a rich variety of perspectives.
58. This criticism is reproduced here without analysis or comment, save to offer the Committee's view that, in a process requiring adjudication, lawyers will inevitably play a significant if not leading role and that the process will tend, therefore, to be judicial in nature. While it must be accepted that any system designed by humans will always leave room for improvement, it is the Committee's view that the adopted process did not result in prejudice to any party.

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<sup>36</sup> There was a view within the Committee that procedures should have been agreed upon and publicised at the outset.

59. In general, the Act provided for a process with clear inquisitorial elements. The Committee was expressly required to conduct investigations in respect of amnesty applications<sup>37</sup> and to ensure that the fullest possible picture emerged of the particular incident forming the subject matter of the application. This process had, moreover, to be undertaken within the context of the new constitutional system, which requires that administrative bodies such as the Committee should engage in fair administrative action.<sup>38</sup>
60. Within the broad parameters set by the legislation, the Committee endeavoured to steer a middle course between a purely inquisitorial and an adversarial procedure<sup>39</sup> in its hearings. The guiding principle followed was to allow every interested party the fullest possible opportunity to participate in the proceedings and to present a case to the panel. Every party that participated in the hearings had the right to legal representation, and even those who were indigent were always afforded some form of legal representation.<sup>40</sup> This enabled the hearings panels to adopt a less inquisitorial approach during the course of the hearings, which eventually became predominantly adversarial in nature. In some exceptional cases, and where it was demanded by the interests of justice, hearings panels acted proactively by postponing hearings (even when they had already been partly heard) to allow a party the opportunity to investigate or deal with material issues that arose in the course of the hearing. This meant that parties were allowed the fullest possible opportunity either to present or oppose an amnesty application. While endeavouring to make the process as fair as possible, the Committee was cognisant of and guarded against the possible abuse of the flexibility of the adopted procedure to the detriment of one of the parties or the process as a whole.
61. Throughout the process, the Committee was faced with the challenge of having to balance the need to allow applications to be fully canvassed with the need to conclude the process within the shortest possible time and with ever-dwindling resources. To this end, the Committee was authorised by the provisions of the Act to place reasonable limitations on cross-examination and the presentation

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37 Section 19(2) provides that the 'Committee shall investigate the application and make such enquiries as it may deem necessary ...'.

38 Section 33 of the Constitution (Act 108 of 1996) provides that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair'.

39 An inquisitorial procedure is one in which the court or committee takes the leading role in questioning witnesses and examining evidence. In an adversarial procedure the court or committee plays a neutral role and allows the parties to present their cases and question each other. South African courts are traditionally adversarial, and commissions of inquiry traditionally inquisitorial.

40 Section 34 of the Act entrenches the right to legal representation while at the same time providing for a legal assistance scheme for indigent parties to amnesty proceedings. In practice this scheme was chiefly applied to assist victims, since the government introduced a state-sponsored scheme to assist applicants who were former or present state employees or members or supporters of liberation movements. The perceptions of the victims with regard to the quality of legal representation provided for in the respective schemes are dealt with elsewhere in this report.

of argument at hearings.<sup>41</sup> Hearings panels were, therefore, in a position to direct cross-examination and argument towards only those elements of a case that were relevant to assessing the factors to be considered in deciding the amnesty application. In many instances, the incidents in question had already been fully canvassed at court hearings – particularly in criminal trials – which had already established the objective facts surrounding an incident (such as the date, time, place and nature of the incident, the identity of the victims and the like).

62. There was, however, a significant limitation to the degree of assistance that could be obtained from the records of many criminal trials in cases where an amnesty applicant had appeared as the accused. The striking difference between an amnesty application and a criminal trial lies in the fact that, in a criminal trial, the accused invariably try to exonerate themselves, while at an amnesty hearing they incriminate themselves. This latter factor is, of course, one of the legal requirements for qualifying for amnesty. The Committee was often struck by the extent to which both defence and prosecution had perverted the normal course of justice in earlier criminal trials. Not only did amnesty applicants who had earlier been accused admit to having presented perjured evidence to the trial court, but similar admissions were often made by amnesty applicants who had appeared as prosecution witnesses at criminal trials or who had investigated cases as members of the former South African Police. A similar situation pertained to official commissions of inquiry, such as the Commission of Inquiry into Certain Alleged Murders convened in 1990 and chaired by Mr Justice LTC Harms.
63. With a few notable exceptions, the Committee generally received the co-operation of legal representatives in confining cross-examination or argument to strictly relevant issues. As the amnesty process progressed, oral argument at the conclusion of hearings became the norm. It was only in particularly complex cases, or where extensive evidence and other material were presented to the hearings panel, that the parties were called to give written argument. In some exceptional cases, hearings panels had to reconvene to receive oral submissions on the written argument that was presented to the panel.

## Decision-making

64. Only in the most exceptional cases did the Committee deliver its decision immediately on conclusion of the proceedings. These few *ex tempore* (immediate)

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<sup>41</sup> Section 34(2) deals with this issue as follows: '(2) The Commission may, in order to expedite proceedings, place reasonable limitations with regard to the time allowed in respect of cross-examination of witnesses or any address to the Commission.'

decisions were handed down in clear-cut cases where all parties agreed that amnesty ought to be granted and that any further delay would occasion irreparable prejudice to the applicant, who was in many cases serving a prison sentence for the offence for which amnesty was being sought.

65. However, in the normal course of events, the Committee would reserve its decision at the end of the hearing to allow members of the panel to consider the case. In the majority of cases, panels reached consensus. There were, however, instances where dissenting decisions were handed down. For the most part, the dissenting opinion related to the overall outcome of the application. In some cases, however, it applied only to a particular issue, or to only one of a number of incidents forming the subject matter of the application, or to some of the applicants only.
66. In all cases, the hearings panel handed down reasoned, written decisions.<sup>42</sup> The decision was then made available to all parties that had participated in the application, and was simultaneously made public.
67. Insofar as the specific process of decision-making was concerned, it was the responsibility of the presiding judge to allocate the writing of the particular decision to a member of the hearings panel. In most cases, the panel was able to come to a decision soon after the finalisation of the hearing. In more complex cases, or where there was no immediate consensus, the panel took time to consider the entire case and review the transcript and any preliminary views expressed by members of the panel. Sometimes, one or more meetings had to be convened to canvass the matter.
68. In order to decide a case, the panel had to make a decision based on the relevant facts. These findings were then tested against the requirements laid down in the Act in order to determine whether the particular applicant qualified for amnesty. One of the difficulties that confronted the Committee was that hearings panels were sometimes presented with only a single version, namely that of the amnesty applicant. This was the case where the applicant was the only witness to the incident in question, or where other potential witnesses were untraceable or deceased. Needless to say, this was not a particularly satisfactory way of determining applications, especially those concerning grave incidents. The reality was, however, that panels had to make a decision on each and every application and were left with the task of assessing the single version as best they could,

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<sup>42</sup> A full text electronic version of all decisions handed down in hearable matters accompanies this report in the form of a compact disc.

taking into consideration the established objective facts as well as the probabilities. Unfortunately, there was always the possibility of suspicion or doubt around cases of this nature. There was, however, no foolproof method of eliminating the possibility of abuse of the process in cases of this nature.

69. Usually, however, hearings panels were faced with the task of deciding cases in the face of conflicting versions of fact. These could and did take a variety of forms and related to both peripheral and material issues. There was often a conflict between the version of the applicant and the version of those opposing the application. Frequently this conflict did not relate directly to the merits of the incident in question but to other relevant issues, such as the political motivation for the incident, or the alleged political activities of a deceased victim. In other instances, the factual dispute related to conflicting versions amongst multiple applicants.
70. Equally frequently, there was a conflict between versions tendered at the amnesty application and those that had been given at earlier criminal trials, inquests, commissions of inquiry and the like. In many instances, there was a conflict between the written application for amnesty and the testimony of the applicant at the amnesty hearing.
71. In situations where amnesty applicants and other parties who appeared at amnesty hearings readily admitted to having given false testimony in earlier judicial proceedings, the Committee could obtain very little assistance from the decisions of those tribunals. The same caveat applied with respect to the potential value of prior police investigations. The shocking injustices that had been perpetrated as a result of police investigations in some of the incidents that came before the Committee often meant that the results of these investigations had to be treated with caution when deciding amnesty applications. One of the more prominent examples of this was the so-called 'Eikenhof incident', where the wrong people were convicted and sentenced on the strength of false confessions obtained in the course of the police investigation.<sup>43</sup>
72. In these rather challenging circumstances, the Committee tried as best it could, by means of its own investigative capacity and a very careful weighing of all the relevant facts and circumstances, to reach just and fair conclusions. Aggrieved parties had the option of taking decisions of the Committee on review to the High Court. To date, eight of the Committee's decisions have been challenged

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<sup>43</sup> Phila Dola [AM3485/96].

and taken on review. Though the Committee was required by the High Court to review one of its decisions, that process resulted in the Committee reaffirming its original refusal of amnesty. The most prominent of these cases was that involving the assassins of the senior ANC/South African Communist Party official, Mr Chris Hani – namely Messrs Clive Derby-Lewis and Janusz Walus – where the Committee’s rejection of their amnesty applications was upheld.<sup>44</sup>

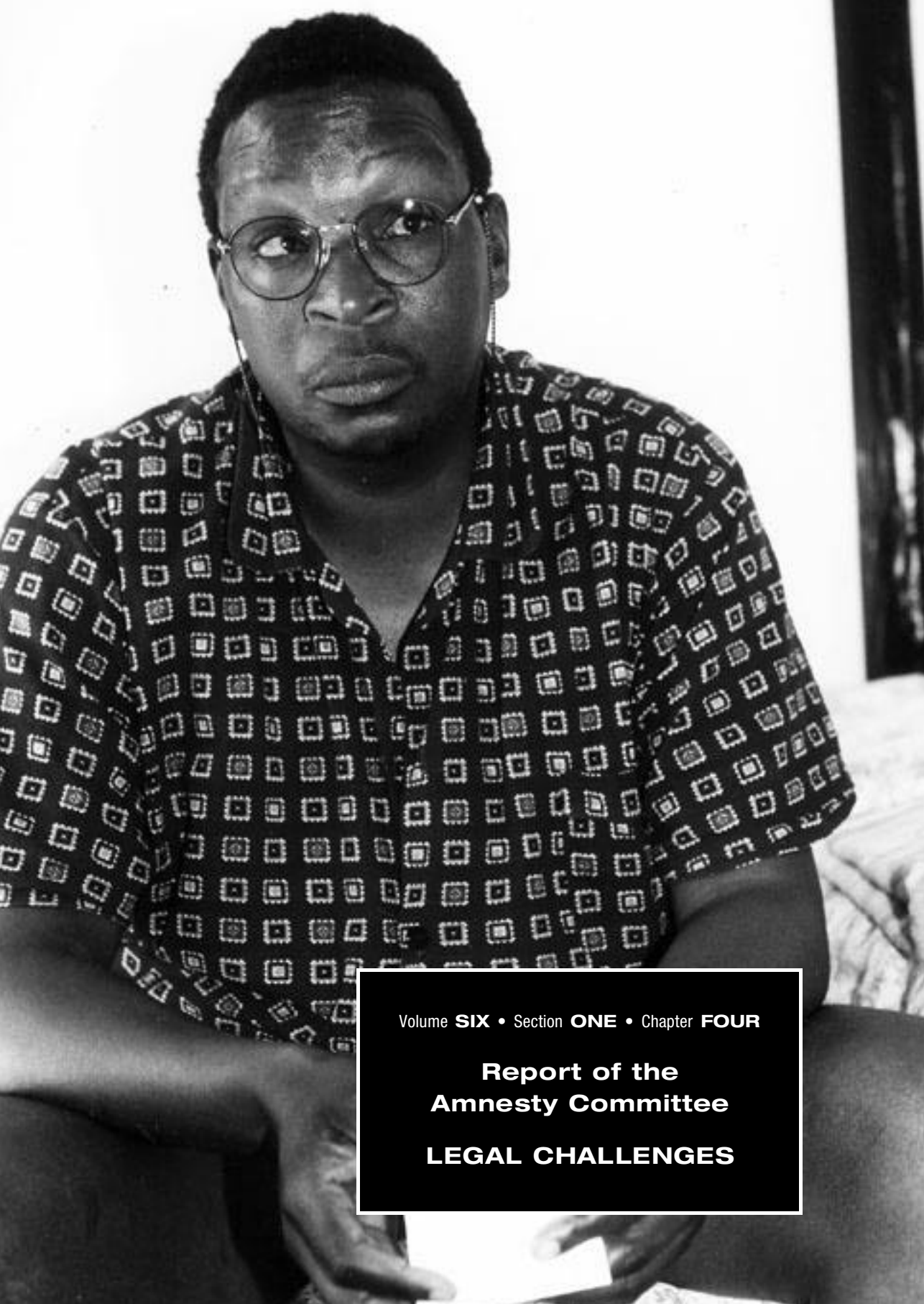
73. Finally, it is also pertinent to note that the Act did not expressly introduce an onus of proof on applicants. It simply required that the Committee should be satisfied that the applicant had met the requirements for the granting of amnesty. This requirement is less onerous on applicants and introduced greater flexibility when deciding amnesty applications.

[Back to Contents Page](#)

[... go to page 54](#)

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<sup>44</sup> See this section, Chapter Four, ‘Legal Challenges’.



Volume **SIX** • Section **ONE** • Chapter **FOUR**

**Report of the  
Amnesty Committee**

**LEGAL CHALLENGES**

# Legal Challenges

## ■ INTRODUCTION

1. On 29 October 1998, the Truth and Reconciliation Commission (the Commission) submitted its Final Report to President Mandela. It is a matter of public record that this historic occasion almost failed to take place due to the threat of two legal challenges which, had they succeeded, would have prevented the Commission's Report from being published at this time. Those who instigated these two court actions were the African National Congress (ANC) and former State President Frederick Willem de Klerk.
2. After submitting its Report to the President, the Commission and its Commissioners were placed in suspension pending the completion of the work of the Amnesty Committee (the Committee), which was eventually dissolved on 31 May 2001. This chapter supplements Chapter Seven of Volume One of the Final Report ('Legal Challenges'), and covers the period from October 1998 until dissolution of the Commission.
3. Subsequent to November 1998, the Commission was subjected to further legal challenges, mainly against the decisions of the Committee in respect of various amnesty applications. In addition, several matters that had been initiated before October 1998 were finalised during this period. These included complaints to the Public Protector by the Inkatha Freedom Party (IFP) and by certain generals of the former South African Defence Force (SADF).<sup>45</sup>
4. The IFP also launched an application in the High Court with the aim of compelling the Commission to provide all the information and evidence it possessed relating to the findings made against the IFP in the Commission's Final Report. This matter is dealt with below.

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<sup>45</sup> Reported on in Volume One, pp. 196–7.



## LEGAL CHALLENGES TO THE PUBLICATION OF THE COMMISSION'S REPORT

### African National Congress<sup>46</sup>

5. During the early hours of the morning of 29 October 1998 – the date of the scheduled handover of the Commission's Report to the President in Pretoria – the ANC launched an urgent application to the High Court for an interdict restraining the Commission from publishing any portion of its Final Report that implicated the ANC in gross violations of human rights before the Commission had considered certain written submissions it had received from the ANC on 19 October 1998. The ANC's submissions were made in response to the contemplated findings annexed to the Commission's notice in terms of section 30(2) of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (the Act).<sup>47</sup>
6. The ANC's submissions were largely critical of the Commission's competence, integrity and bona fides in respect of the findings on the ANC. The ANC was especially concerned in view of the fact that the struggle for liberation against the unjust system of apartheid was in itself morally and legally justifiable in terms of international law.
7. It is necessary to understand that the Commission's mandate to investigate and report on the commission of gross violations of human rights required it to cut across political lines and that the Commission was, furthermore, required to conduct its investigations in an objective and transparent manner. Thus, in addition to investigating the former government and its various structures, the Commission also analysed the role of the liberation movements during the mandate period.
8. The Commission also made a distinction between human rights violations committed: firstly, by the armed combatants of the liberation movements in the course of the armed struggle; secondly, against their own members outside South Africa and, thirdly, by their supporters during the 1980s and after the unbanning of the organisations concerned on 2 February 1990.

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46 The African National Congress v The Truth and Reconciliation Commission: Case No. 1480/98 (Cape of Good Hope Provincial Division).

47 Those findings appear in Volume Two, Chapter Four, pp. 325–66.

9. The Commission based its conclusions and findings on the ANC on a wide range of information and evidence it obtained from:
  - a statements made by those who alleged they had been the victims of gross violations of human rights at the hands of the ANC;
  - b amnesty applications by ANC members and supporters in respect of acts they had committed, which could have resulted in the perpetration of gross violations of human rights; and
  - c the ANC itself in its detailed submissions to the Commission and from its own Commissions of Inquiry into human rights violations, namely the Stewart Report and the Motsuenyane and Skweyiya Commission Reports.
  
10. The Commission's findings that led to the ANC being held morally and politically responsible for the commission of gross violations of human rights pertained largely to the deaths and physical injuries sustained by unarmed civilians. These, the ANC had itself admitted, could be attributed to two main causes: either poor reconnaissance, faulty intelligence, faulty equipment, infiltration by the security forces, misinterpretation of policy by their cadres and anger on the part of individual members of MK, or the 'blurring of lines' between civilian and military targets during the 1980s.
  
11. As a result of the information placed before it, the Commission found the ANC to be responsible for a range of gross human rights violations arising out of unplanned operations; the bombing of public buildings, restaurants, hotels and bars; the landmine campaign in the northern and north-eastern parts of South Africa; the killing of individual enemies, defectors and spies; operations of uncertain status; the conflict with the IFP; violations committed by supporters in the context of a 'people's war' fostered by the ANC, and the severe ill-treatment, torture and killing of ANC members outside of South Africa.

### **Events leading up to the ANC's legal challenge**

12. On 24 August 1998, the Commission served notice on the ANC (in terms of section 30(2) of the Act) that it intended to make certain findings against the ANC that would be to the latter's detriment. The notice invited the ANC to respond either by leading evidence before the Commission at a hearing or furnishing submissions within fifteen days of the date of the notice. This meant that the ANC was obliged (in terms of the provisions of the Act) to respond to the notice by no later than 8 September 1998 if it elected to make further submissions or bring further evidence.

13. The ANC failed to respond within the time limit stipulated. Instead, it entered into a series of correspondences with the Commission, seeking an extension of the deadline and requesting an audience with the Commission to discuss the findings the Commission intended to make against it.
14. In this context, it needs to be clearly understood that the Commission was required to set certain absolute deadlines for the receipt of information in order to finalise the editing, printing and publishing of the Final Report by the already determined handover date of 29 October 1998. Yet, despite various extensions acceded to by the Commission, no written submissions were forthcoming from the ANC. The Commission also explained in detail to the ANC why it could not grant the requested audience and, on 2 October 1998, informed the General Secretary that 5 October 1998 would be the last date on which the Commission would be able to consider any submissions.
15. On 19 October 1998, the ANC made its submission to the Commission. On 26 October 1998, the Commission informed the ANC that the submission had arrived too late to be considered but that, nevertheless, some but not all the Commissioners had been given access to the submission and that much of the factual content referred to in the objections had been rectified during the editing process. The ANC was also assured that its position as a liberation movement had been contextualised in the chapter on 'The Mandate' and that the findings of the Commission were based on a careful analysis of the evidence placed before it.
16. The ANC expressed its dissatisfaction with the Commission's response and demanded an assurance from all the Commissioners that they had properly considered all the issues and matters raised in the written submissions of 19 October 1998. The Commission responded on the same day, reiterating its earlier position and indicating that there was nothing more that could be done. The ANC responded with its legal challenge.

## **The court finding**

17. In a judgment by Mr Justice J Hlope, the court dismissed the ANC's application with costs. In summary, the court found that the onus was on the ANC to establish the existence of a clear right (or a right clearly established in its favour) for the granting of an interdict to prevent the publication of the Commission's findings against the ANC. The court found that the Commission was entitled (in terms of section 30(1) of the Act) to adopt a procedure for the purposes of implementing

the provisions of section 30(2) (the notice provisions). The procedure was to invite submissions in writing before it made findings to a person's detriment or to receive evidence at a hearing of the Commission, as the case might be.

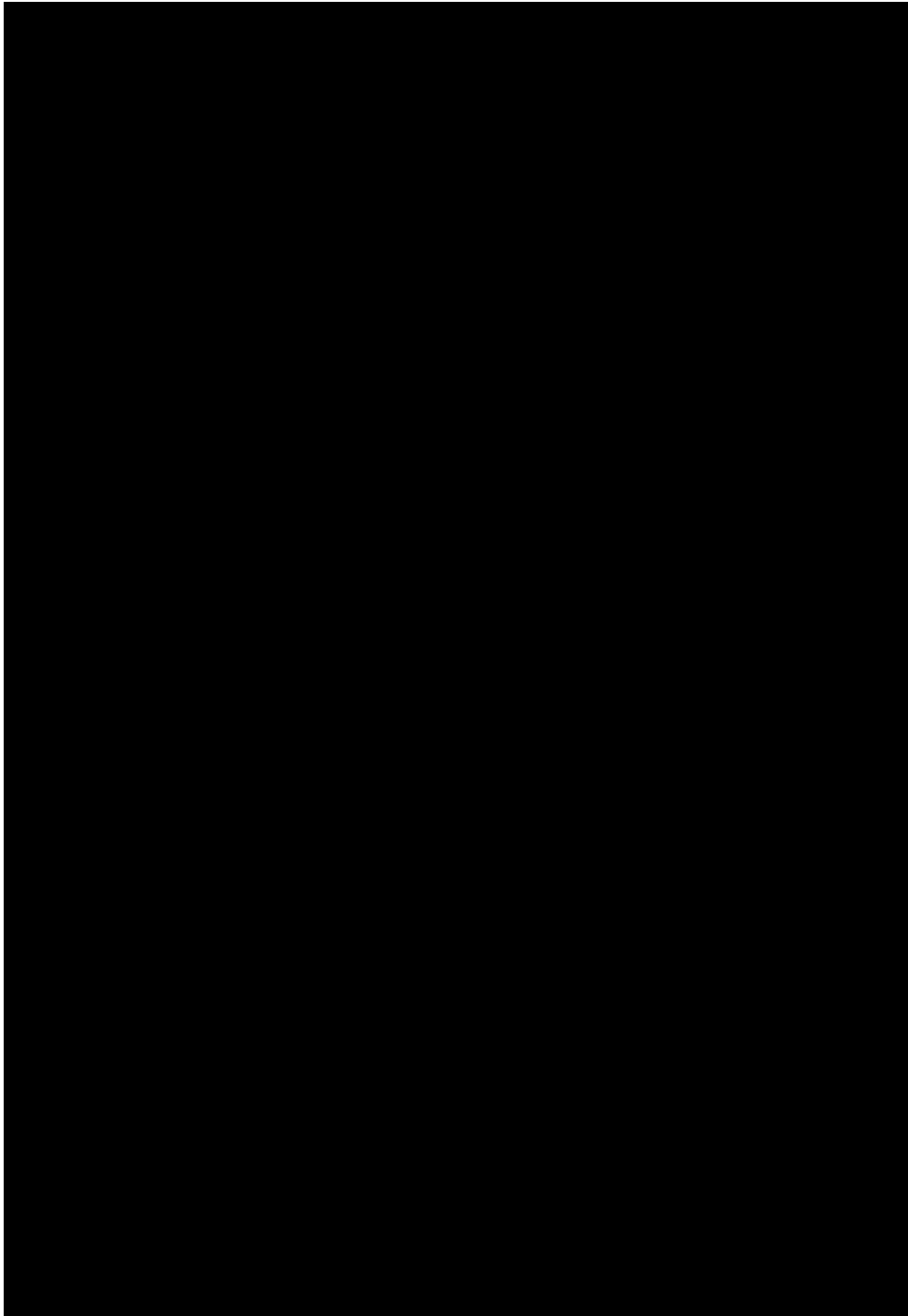
18. The court found that there had been no objection by the ANC to the fifteen-day notice period. This was substantially in accordance with the ruling in the case of Niewoudt v Truth and Reconciliation Commission 1997 (2) SA 70 SECLD at 75 H-I. The ANC had not argued that this time period was unreasonably short, nor had it elected to testify at a further hearing of the Commission.
19. The ANC was, as a result, lawfully obliged to respond to the section 30(2) notice by no later than 8 September 1998 and, in the circumstances, had no right to insist on a further extension of time. Any extension of time granted by the Commission would be the result of largesse rather than legal obligation.
20. The Commission had clearly impressed on the ANC that it should make its submissions by 5 October 1998, given the Commission's responsibility to finalise the report for handover to the President. Because the ANC submission tendered on 19 October 1998 was extensive and contained serious allegations regarding the Commission's competence, integrity and bona fides, it was unreasonable to have expected it to convene as a body between 19 and 29 October 1998 to discuss and deliberate on submissions delivered so late in the day.
21. The court found that the ANC had failed to prove that the Commission had either condoned the late filing of the submission (in terms of section 30(2) of the Act) or that the ANC had a legitimate expectation of having the submission considered by the Commission, given the fact that the Commission had set 5 October 1998 as a final date for submission in extension of the original date of 8 September 1998, when the submission had been lawfully due.

### **Former State President de Klerk's challenge<sup>48</sup>**

22. On 1 September 1998, the Commission gave notice to former State President FW de Klerk of its intention to make findings against him to his detriment (in terms of the provisions of section 30(2) of the Act). The findings it contemplated making were set out in an annexure to the notice. Mr de Klerk was notified of his rights under the section 30(2) provisions and was required to respond to them. The Annexure read as follows:

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<sup>48</sup> FW de Klerk and Another v The Chairperson of the Truth and Reconciliation Commission and the President of the Republic of South Africa: Case No. 14930/98 (Cape of Good Hope Provincial Division).



23. Despite objections by Mr de Klerk, the Commission resolved to publish its findings. As a result, on 26 October 1998, Mr de Klerk filed an urgent application

with the Cape High Court for an order directing, *inter alia*, that the Commission be interdicted from:

- a making any of the intended findings set out in the annexure to the notice dated 1 September 1998 issued in terms of section 30(2) of the Act;
  - b including any of the intended findings in the report to be submitted to the President on 29 October 1998; and
  - c submitting the report to the President, should it contain any of the intended findings.
24. The Commission's findings against Mr de Klerk were challenged on various grounds, including allegations of bias against him by members of the Commission.
  25. Given the timing of this legal challenge (26 October 1998) and the fact that the Commission was due to hand over its Report on 29 October 1998, the Commission was advised by its legal team not to risk an interdict, which would have had the effect of preventing the Report from being handed over to President Mandela. The Commission acted on this advice and agreed not to publish the finding and to deal with the matter after publication and the handover.
  26. The Commission 'blacked out' the findings.
  27. The matter was to be set down for hearing in the Cape High Court. In the intervening period, the President's Office tried to facilitate a settlement between the Commission and Mr De Klerk. As the full Commission was in suspension and the Amnesty Committee was the only body in existence at the time, it entered into discussions with Mr De Klerk in an effort to resolve the matter.
  28. As a result of these discussions, the Amnesty Committee accepted the following finding, which Mr De Klerk conceded to.
  29. ***Proposed finding relating to Mr FW de Klerk's knowledge of the Khotso House bombing:***

*Mr FW de Klerk was a member of the State Security Council throughout the 1980s and State President and head of the former government during the period 1989 to 1994.*

*On 31 August 1988, Khotso House, which was located in the central business district of Johannesburg, a densely populated urban area, was bombed by members of the SAP. The bomb had immense explosive force, rendered Khotso*

*House unusable and damaged neighbouring properties and vehicles. There was a high risk to passers-by who could have been killed or injured; there were blocks of flats in the immediate vicinity which were inhabited; there was a flow of pedestrian traffic in the area which was very high till the early hours of the morning. The effect of the explosion was unpredictable. Colonel Eugene de Kock, who led the SAP bombing team, foresaw the possibility of loss of life as did Mr Vlok, who considered it a miracle that no one was killed. The group of policemen who carried out the task did so armed with automatic assault rifles with orders to shoot – if necessary – even at fellow policemen. As a result of the blast, a number of persons were injured (though not seriously). The inherent risk in unleashing a devastating explosion in a high-density area in the circumstances described above, involved the risk that persons might be killed. This risk was inevitably foreseeable and was in fact foreseen; the bombing was nevertheless ordered and proceeded with by the perpetrators with reckless disregard of the consequences.*

*During his presidency, Mr de Klerk was told by General JV van der Merwe, his former Commissioner of Police, that he had been ordered as head of the Security Branch of the SAP to bomb Khotso House. Mr de Klerk did not report the matter to the prosecuting authorities or the Goldstone Commission because he knew that General van der Merwe would be applying for amnesty in respect of the relevant bombing.*

*On 21 August 1996 and 14 May 1997, Mr de Klerk testified before the Commission in his capacity as head of the former government and leader of the National Party. His testimony was accompanied or preceded by written submissions. In his written and oral submissions to the Commission on 21 August 1996, Mr de Klerk stated that neither he nor his colleagues in cabinet, the State Security Council or cabinet committees had authorised assassination, murder, torture, rape, assault or other gross violations of human rights.*

*In a written question directed to Mr de Klerk on 12 December 1996, he was asked whether he maintained this assertion in the light of the allegation made by General van der Merwe against Mr Vlok. The allegation was to the effect that Mr PW Botha had instructed Mr Vlok to bomb Khotso House, and that Mr Vlok, in turn, had instructed General van der Merwe to do so. In his written reply on 23 March 1997, which reflected his views at the time of the preparation of his submission as well as the views of as many of his Cabinet colleagues as were conveyed to him at the time, he stated that Mr Vlok and any other members of former*

*Cabinets should be allowed to speak for themselves. In his oral submissions to the Commission on 14 May 1997, Mr de Klerk stated that the bombing of Khotso House was not a gross violation of human rights as there was serious damage to property, but nobody was killed, or seriously injured.*

*The Commission finds that the bombing of Khotso House constituted a gross violation of human rights and that at all material times, Mr de Klerk must have had knowledge it did despite the fact that no lives were lost.*

*The Commission finds that when Mr de Klerk testified before the Commission on 21 August 1996, he knew that General van der Merwe had been authorised to bomb Khotso House, and, accordingly, his statement that none of his colleagues in Cabinet, the State Security Council or Cabinet Committees had authorised assassination, murder or other gross violations of human rights was indefensible.*

*The Commission finds that when Mr de Klerk testified to the Commission on 21 August 1996 and responded in writing to the Commission's questions on 23 March 1997, he failed to make a full disclosure of the involvement of senior members of the government and the SAP in the bombing of Khotso House.*

30. However, this finding was never made an order of court as it was never put to the Commission and was thus never discussed, accepted or rejected.

## **COMPLAINTS TO THE PUBLIC PROTECTOR BY THE IFP AND FORMER SADF GENERALS**

31. Both the IFP and a group of former SADF generals made formal complaints to the Office of the Public Protector concerning what they claimed to be disparate treatment of themselves by the Commission. The Commission responded fully to the allegations and the Public Protector neither took nor recommended any action against the Commission.
32. The Commission considers both these matters to be finalised.



## LEGAL CHALLENGE: IFP REQUEST FOR INFORMATION<sup>49</sup>

33. As a result of its investigations and hearings in terms of section 29 of the Act, the Commission served notice on the IFP and its leader, Chief Mangosuthu Buthelezi, and other members of the IFP, of the contemplated findings it intended to make against them, which were to their detriment. They were invited to respond in writing. On 24 August 1998, the Commission received a comprehensive submission from legal representatives for the IFP, Chief Buthelezi and the other implicated persons. The findings appear in full in Volume Three of the Final Report.<sup>50</sup>
34. In summary, during the period 1982–94, the IFP – known as Inkatha prior to July 1990 – was responsible for gross violations of human rights committed in the former Transvaal, Natal and KwaZulu against persons perceived to be leaders, members or supporters of the United Democratic Front (UDF), the ANC, the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU). Other targets were persons who were identified as posing a threat to the organisation, and Inkatha/IFP members or supporters whose loyalty was questionable.
35. The violations of human rights referred to formed part of a systematic pattern of abuse that entailed deliberate planning on the part of the organisation and its members.
36. The organisation was responsible for the following conduct:
  - a speeches by the IFP President and senior party officials, inciting supporters to commit acts of violence;
  - b mass attacks by members and supporters on persons regarded as their political enemies;
  - c the killing of leaders of political organisations and their supporters who were opposed to Inkatha/IFP policies;
  - d colluding with the South African government's security forces to commit the violations referred to;
  - e colluding with the SADF to create a paramilitary force to carry out such violations;

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<sup>49</sup> Inkatha Freedom Party and Mangosuthu Gatsha Buthelezi v Truth and Reconciliation Commission, The President of the Republic of South Africa and the Minister of Arts, Culture, Science and Technology: Case No. 6879/99 (Cape of Good Hope Provincial Division).

<sup>50</sup> Chapter Three, pp. 155–328.

- f creating self-protection units made up of the organisation's supporters with the specific objective of violently preventing the holding of elections in KwaZulu-Natal in April 1994; and
- g conspiring with right-wing organisations to commit acts that resulted in injury or loss of life.
37. By virtue of his position as leader of Inkatha and/or the IFP, and Chief Minister in the KwaZulu government, Chief Buthelezi was held accountable by the Commission for the commission of gross violations of human rights by any of the agencies referred to.
38. In court papers served on the Commission in December 1998, the IFP and Chief Buthelezi declared that they regarded the findings of the Commission to have been defamatory of the organisation and himself, unwarranted and unjustified, and not supported by the information and evidence collected or received by the Commission. In the court application, the IFP and Chief Buthelezi sought an order compelling the Commission to provide all the information collected and received upon which it had made its findings. This claim was based on the provisions of section 32(1) of the 1996 Constitution, which reads:
- Everyone has the right to access to – (a) any information held by the state; (b) any information that is held by another person and that is required for the exercise or protection of any rights.*
39. When this matter was argued before Mr Justice Davis in the Cape High Court, the Commission contended, first, that it was not an 'organ of State' nor 'in any sphere of Government' and, second, that the information sought had not been proved to have been required for the exercise and protection of any of the applicants' rights.
40. On 15 December 1999, Mr Justice Davis dismissed the application with costs. The court upheld the second of the Commission's objections, namely that the applicants had not established that the information was required for the exercise and protection of any of their rights. It further held that the applicants should either have sued the Commission for defamation based on bad faith (*male fide*) if so proven, or brought review proceedings in terms of rule 53(3) of the Uniform Rules of the High Court to set the Commission's finding aside.

## Settlement

41. The applicants subsequently applied for leave to appeal to the Constitutional Court against the judgment of Mr Justice Davis. This was granted, and the matter was set down for hearing on 9 November 2000. Before the appeal to the Constitutional Court was heard, the parties settled the matter on the basis that each party would withdraw their respective appeals and pay their own legal costs. The Commission agreed to provide access to the record of information and evidence to the applicants by 1 March 2001, on condition that appropriate measures were employed to safeguard the confidentiality of persons who had made statements to the Commission.
42. The decision to settle the matter was based on the consideration that the Promotion of Access to Information Act No. 2 of 2000 was due to be gazetted on 15 September 2000 and that this legislation would have entitled the applicants to obtain the information they were seeking. To proceed with an appeal on a point of law about to be settled by the promulgation of an Act would have been futile and a waste of resources. This decision was taken after consultation with the Commission's senior counsel and in terms of a resolution of the Amnesty Committee acting in terms of section 43 of Act No. 34 of 1995.
43. Despite the above settlement arrangements, the IFP and Chief Buthelezi instituted review proceedings against the findings of the Commission on 20 October 2000.
44. Just before the Commission was due to publish its Codicil, the IFP interdicted it from publication on the grounds that the terms of the settlement had not been met.
45. Discussion culminated in a settlement which was finalised at a hearing on 29 January 2003. The requirements agreed in the settlement appear as an Appendix to Chapter 3 of Section Four of this Volume.

## CHALLENGES TO AMNESTY DECISIONS

### Clive Derby-Lewis and Janusz Walus: The killing of Chris Hani<sup>51</sup>

46. The facts, issues and legal arguments in this matter are reflected in the court's decision in the above case, handed down on 15 December 2000. A summary of the main points and aspects of the review proceedings follows. It needs to be stressed that the source of this summary is the court record and judgment, and should in no way be interpreted as a comment by the Commission or the Committee on its own amnesty decision.
47. On 10 April 1993, Mr Janusz Walus shot and killed Mr Martin Thembisile Hani (aka Chris Hani) in the driveway of the latter's residence in Dawn Park, Boksburg. Mr Walus was arrested on the same day, as were Mr Clive Derby-Lewis and his wife, Mrs Gabrielle (Gaye) Derby-Lewis. They were all charged in the Witwatersrand Local Division of the High Court with, amongst other things, the murder of Mr Hani. All three accused pleaded not guilty, but both Mr Derby-Lewis and Mr Walus were convicted of the murder of Mr Hani and the unlawful possession of the murder weapon (a Z88 pistol). Mr Derby-Lewis was also convicted of the unlawful possession of five rounds of ammunition. Mrs Derby-Lewis was acquitted of all charges against her.
48. On the 15 October 1993, both applicants were sentenced to death on the murder count. Both Derby-Lewis and Walus appealed to the Supreme Court of Appeal against their convictions and sentences; but their appeals were turned down in November 1995. The death penalty was, however, declared unconstitutional by the Constitutional Court on 6 June 1995.<sup>52</sup> As a result, the applicants escaped the gallows and had to be re-sentenced by the trial court. On 14 November 2000, the court imposed sentences of life imprisonment on both Derby-Lewis and Walus.
49. In April 1996, the applicants applied for amnesty for the murder convictions and the unlawful possession of the murder weapon and, in the case of Derby-Lewis, the illegal possession of ammunition. The SACP and the family of Chris Hani strenuously opposed the applications for amnesty.

51 Clive John Derby-Lewis and Janusz Jakub Walus v The Chairman of the Committee on Amnesty of the Truth and Reconciliation Commission, his Lordship Mr Justice H Mall N.O., The Honourable Chairman of the Truth and Reconciliation Commission, the Right Reverend Archbishop Desmond Tutu, Ms Limpho Hani and The South African Communist Party; Case No. 12447/99 (Cape of Good Hope Provincial Division).

52 See S v Makwanyane and Another 1995 (3) SA 391 (CC).

50. The applications for amnesty were considered by the Amnesty Committee, comprising Mr Justice Mall (as chair) and Judges Wilson, Ngoepe, Potgieter and Khampepe.
51. On 7 April 1999, the Committee refused the amnesty applications of both applicants. Subsequently, an application for a review of the Committee's refusal was brought before a full bench of the High Court, Cape of Good Hope Provincial Division. The applications for a review were opposed by the chairperson of the Committee as well as the Hani family and the SACP.

## **The facts**

52. Mr Clive Derby-Lewis was a founder member of the Conservative Party (CP) in February 1982. In 1987, he became the party's spokesperson on economic affairs and represented the CP in Parliament between May 1987 and September 1989. He was an elected member of the CP's General Council (the highest body of the party).
53. The CP regarded the unbanning of the ANC and SACP by former President FW de Klerk in February 1990 as a betrayal of the country. In May 1990, at a mass meeting of the CP at the Voortrekker Monument, Dr Andries Treurnicht, the leader of the CP, announced that the 'third freedom struggle' had begun. Derby-Lewis regarded this speech as a 'call to arms for Afrikaners' implying that, although diplomatic channels remained open to the CP, its followers should prepare for war and arm themselves accordingly. There was increasing fear within the CP of a National Party (NP) handover to an ANC/SACP government without a mandate from white voters. Various calls to arms led to the implementation of the CP mobilisation plan on 26 March 1993. This was seen as the only way of saving South Africa from plunging into misery and chaos should the ANC/SACP alliance take over the government of South Africa. As the leader of the SACP, Mr Chris Hani was regarded by the CP as the real threat to the future of South Africa. His leadership role and his past position as Chief of Staff of Umkhonto we Sizwe (MK) made him a prime military and political target. The CP regarded him as 'enemy number one' of the Afrikaner nation and the likely successor as President to Mr Nelson Mandela.
54. Against this background, Derby-Lewis and Walus started to plan the assassination of Hani in about February 1993. Their objective was to create a situation in which the radicals who supported Hani would cause widespread chaos and mayhem in the wake of his death. Because the NP would not be

able to take effective control, this situation would unite right-wing leaders. They would then be able to combine with the security forces and, by 'stepping in', trigger a 'counter-revolution' and take over the government of the country.

55. Despite the above, the evidence reflected that the CP did not espouse a policy of violence nor the killing of political opponents. It was also common cause that neither Derby-Lewis nor Walus had received any direct or indirect order from anyone in the top structure of the CP to assassinate Hani. Equally plain was the fact that the plan to assassinate Hani was not shared with anyone else. Nevertheless, Derby-Lewis contended that, by virtue of his senior position in the CP, he had the necessary authority in the prevailing circumstances to take the decision to assassinate Hani on behalf of the CP.
56. Derby-Lewis handed Walus a list of names and addresses he had obtained from his wife, a journalist. Walus numbered these names on the list. This was done at a time when Derby-Lewis and Walus had 'started talking about the identification of targets'. Derby-Lewis insisted that they discussed only one target, namely Hani, who had been number three on the list.
57. It was agreed that Walus would carry out the shooting after a certain amount of surveillance had been carried out. During March 1993, Derby-Lewis claimed that he had obtained a Z88 pistol and silencer. This was ostensibly for self-defence purposes, while the silencer was primarily to allow him to practice at home without disturbing the neighbours. It was intended to provide some element of surprise if he were to be attacked at his home by either MK or the Azanian People's Liberation Army (APLA).
58. Walus had requested an 'untraceable weapon with a silencer' for the purpose of the assassination.
59. On 6 April 1993, Derby-Lewis handed Walus the pistol and a few rounds of subsonic (silencer) ammunition. On 7 and 10 April, Walus requested further subsonic ammunition. On the morning of 10 April, Derby-Lewis informed Walus that he had made arrangements for further ammunition. No discussion about killing Hani took place on that particular day. The shooting of Hani came as a shock to Derby-Lewis because he had wanted to postpone the assassination plan for a variety of reasons.

60. Although Walus' evidence largely coincided with that of Derby-Lewis, Walus indicated that Derby-Lewis had mentioned to him that before the Easter weekend would be a bad time to assassinate Hani.
61. On 10 April 1993 (the day before Easter), Walus decided to reconnoitre the Hani residence. After contacting Derby-Lewis about more subsonic ammunition and being told that it was not yet available, he loaded the unlicensed Z88 pistol with his own ammunition.
62. On arriving at the Hani residence, Walus noticed Hani driving off in his vehicle without his usual bodyguards. He decided that this was the 'best occasion' to execute the assassination and waited for him to return. When Hani got out of his vehicle in the driveway to his house, Walus approached him and fired two shots at him. After he had fallen, Walus shot him twice at close range behind the ear. He left the scene in his vehicle and was arrested a short while later.
63. Walus insisted that he had killed Hani on the instruction of Derby-Lewis and the CP. He had never expressly asked Derby-Lewis whether the CP had authorised the assassination, as it was 'obvious' to him that it had. However, Walus conceded that, had it come to his attention prior to April 1993 that the CP had not changed its policy from non-violence to violence, he would not have proceeded with the murder.

### **The decision of the Amnesty Committee**

64. The basis of the Committee's refusal of amnesty was that it found that both Derby-Lewis and Walus had failed to satisfy two of the three jurisdictional pre-conditions for the granting of amnesty as set out in section 20(1) of the Act: that is, they had failed to comply with the requirements of section 20(1)(b) read together with section 20(2), and they had not made a full disclosure of all relevant facts as required by section 20(1)(c).
65. With reference to section 20(2)(a), the Committee was not satisfied that, in assassinating Hani, the applicants had acted on behalf of or in support of the CP, the publicly-known political organisation of which both applicants were members at the time of the assassination. The Committee expressed itself as follows:

*It is common cause that the applicants were not acting on the express authority or orders of the CP, which party they purported to represent in assassinating Mr*

*Hani. The CP has never adopted or espoused or propagated a policy of violence or the assassination of political opponents.*

*The CP was never aware of the planning of the assassination and only became aware thereof after the event. It never approved, ratified or condoned the assassination.*

66. The Committee did not find it necessary to decide whether the phrase 'on behalf of' (in section 20(2)(a) of the Act) should be interpreted narrowly. This would have had the effect of confining the application of this phrase to cases where a person acted as a representative or agent of the relevant political organisation or liberation movement. The Committee held the view that, in any event, section 20(2)(a) 'does not cover perpetrators who act contrary to the stated policies of the organisation which they purport to represent'. As the assassination of political opponents was contrary to the stated policies of the CP, the applicants had failed to comply with the requirements of section 20(2)(a) of the Act.
67. With reference to section 20(2)(d) of the Act, the Committee found that, in assassinating Hani, the applicants were not acting within the course and scope of their duties or on the express authority of the CP. This was confirmed by the evidence tendered by the leader of the CP, Mr Ferdi Hartzenberg, and by the applicants themselves.
68. In respect of section 20(2)(f), the Committee rejected the argument that the applicants had any 'reasonable grounds' for believing that, by assassinating Hani, they were acting in the course and scope of their duties, or within the scope of their express or implied authority.
69. Finally, the Committee found that both Derby-Lewis and Walus had failed to make full disclosure (as required by section 20(1)(c)) in respect of a number of 'relevant and material issues', identified by the Committee as follows:
  - a the purpose of the list of names and addresses found in Walus' apartment after his arrest and on which Hani's name and address appeared;
  - b the purpose for which the names on the list were 'prioritised';
  - c the purpose for which the Z88 pistol (the murder weapon) was obtained and fitted with a silencer; and
  - d whether or not Walus, in assassinating Hani, was acting on the orders or instructions of Derby-Lewis.



## **The applicants' challenge**

70. The applicants challenged all the above grounds provided by the Committee in refusing amnesty, and argued that its decision should be reviewed and set aside on the grounds that they had complied with all the legal requirements for amnesty. They argued that the Committee had misinterpreted section 20(2)(a); that the Committee had failed to follow the correct interpretation of section 20(2)(a) as established by other (differently constituted) amnesty committees in previous decisions where amnesty had been granted (such as the murder of Ms Amy Biehl and the St James' Church attack); that the Committee had misdirected itself both in fact and in law in its interpretation of section 20(2)(f), and that its findings in respect of these subsections were not justifiable in relation to the reasons given for them. The case of Mr Koos Botha, a CP member of Parliament who planted a bomb at a school, was cited. Mr Botha had been granted amnesty for purely political objectives because he 'had interpreted the public utterances of the CP leaders as a call to violence'.
71. With regard to the question as to whether or not Walus had acted on the orders of Derby-Lewis, they claimed that the Committee had erred in law by setting a higher standard than the Act required, because it had elevated the criterion or consideration set out in section 20(3)(e) of the Act to the status of a substantive requirement for amnesty in the context of section 20(1).
72. With the exception of the purpose for obtaining the pistol and silencer, the other issues identified as relevant facts for purposes of section 20(1)(c) were not relevant facts required to be disclosed fully by the applicants in order to qualify for amnesty.
73. Even if the issues referred to above, or only some of them, were relevant facts for the purposes of section 20(1)(c), the decision of the Committee in respect of each of these issues was not justifiable (objectively rational) in relation to the reasons given for them.

## **The decision of the court**

74. The full bench of the High Court decided that the questions to be decided were whether there was any merit in the applicants' main points of argument. The court considered all the evidence that had been presented before the Committee, as well as the arguments by all the parties, and analysed the various provisions of section 20 of the Act in considerable detail. The court's main findings were as follows:

75. The court held that the established principles of interpretation should be applied in interpreting the provisions of section 20. Legislative purpose, as opposed to legislative intent, was only one of the principles to be applied. The court should not adopt a purely benevolent or a purely restrictive interpretation.
76. The fact that other amnesty committees had interpreted or applied section 20 in an incorrect way could not create a legitimate expectation that such an error, either of law or of fact, would be perpetuated by the court.
77. In respect of Section 20(2)(a), the court held that the applicants did not act on behalf of the CP, but that they had embarked on a terrorist foray of their own. Although the applicants said that they held the *subjective* belief that their conduct would advance the cause of their party, the court held that it should assess *objectively* whether it was reasonable for them to hold such a belief. The court concluded that the Committee had correctly rejected the applicants' contention that they fell within the ambit of this section.
78. In respect of section 20(2)(d), the Committee had correctly held that the applicants had not acted in the course and scope of their duties as members of the CP as required by this section of the Act, as assassination had never been one of Derby-Lewis' duties as a senior member of the CP. It followed that Derby-Lewis could not have shared a nonexistent duty with Walus; nor could he have delegated part of it to Walus. It also followed that assassination never formed part of Walus' duties.
79. In respect of section 20(2)(f), Derby-Lewis did not act, and could not have had any reasonable grounds for believing that he was acting, in the course and scope of his duties and within the scope of his authority in assassinating Hani. He was a senior ranking member of the CP, a parliamentarian and a serving member of the President's Council.
80. Walus was, however, in a different position, as he was a rank-and-file member who was entitled to assume that Derby-Lewis had authority to speak on behalf of the party. Walus could have made a case for such a proposition and this could have led to a closer evaluation of his (Walus') beliefs and the reasonableness of them. This was not, however, the case that he had made. Walus had stated in his original application that 'he had acted alone in the planning and commission of the deed'. Under cross-examination, he said that this was not true. He later amended his amnesty application to incorporate Derby-Lewis as his accomplice, insisting that this was the truth. Walus' version was that he believed that he had been assigned the assassination plan as an order from Derby-Lewis, given as a

result of his senior position within the CP or as part of his duties as a member of the party. The court found that this claim lacked objective credibility, and therefore Walus also did not meet the requirements of this section.

81. With regard to relevance and full disclosure, the evidence of the applicants in respect of the main issues (namely the purpose of obtaining the pistol and silencer, the purpose of the list of names and the prioritising of the names on the list) was generally improbable, contradictory and lacked candour. The Committee was correct in rejecting the applicants' evidence in these respects as being false and was, therefore, entitled to find that the applicants had failed to make full disclosure of all relevant facts as required by section 20(1)(c) of the Act.
82. In the result, the full bench dismissed the application with costs. Both Derby-Lewis and Walus subsequently brought an application before the same court for leave to appeal to the Supreme Court of Appeal. The court refused leave to appeal on the grounds that the applicants had failed to show that there were any reasonable prospects of success on appeal or that another court could come to a different conclusion on the same facts.
83. On 31 May 2001, the applicants filed a petition to the Chief Justice seeking leave to appeal. The petition was refused. The applicants have now exhausted all their available remedies in law.

## **APPEAL BY MEMBERS OF THE NASIONAL SOSIALISTE PARTISANE<sup>53</sup>**

84. Mr CJ van Wyk and Mr Pierre du Plessis applied for amnesty for a wide range of criminal offences, including the theft of a motor vehicle, three counts of murder, attempted robbery with aggravating circumstances, contravention of the Firearms and Ammunition Act, housebreaking with the intent to steal, theft, two counts of robbery and contraventions of the Explosives Act.
85. Mr van Wyk had been convicted and sentenced to life imprisonment, and Mr du Plessis had been sentenced to an effective twelve years' imprisonment. The applicants belonged to an organisation or movement called the Nasional Sosialiste Partisane (NSP). At the time of the acts for which amnesty was sought, this organisation had only four members, inclusive of the two applicants. The other two members died during a shootout with the police when the applicants were arrested.

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<sup>53</sup> CJ van Wyk and P du Plessis v Komitee oor Amnestie; Saak Nr. 16602/99 (Transvaal Provinsiale Afdeling).

## **The facts**

86. On 13 October 1991, the applicants and two others (deceased) travelled in a stolen vehicle to Louis Trichardt, where they planned to rob a household belonging to a Ms Roux. They believed that only a servant, a Ms Dubane, would be present. However, things did not go according to plan, and one of the others in their group shot and killed Ms Dubane and cut her throat. When Ms Dubane's husband appeared, he too was shot and killed and had his throat cut. Ms Roux tried to escape the attack by hiding in a cupboard, but she too was shot and killed and had her throat cut by one of the other members of the group (later deceased). Nothing was taken from the house, despite the fact that the group had been informed that there would be an R4 rifle and ammunition at the premises.
87. From Louis Trichardt the group proceeded to Oudtshoorn, where they planned to steal weapons from an army base. Here they obtained a quantity of arms, ammunition and explosives. They also broke into an army base in Potchefstroom, where they stole two R4 rifles. They fired shots at the soldiers in an attempt to kill them.

## **Amnesty decision**

88. The Committee refused to grant amnesty to the two men for the following reasons:
89. First, the NSP was not a publicly known bona fide political organisation or liberation movement acting in furtherance of a political struggle waged against the state or any former state; nor was it a publicly known political organisation or liberation movement as required by the provisions of section 20(2)(a) of the Act.
90. Second, when they committed the acts for which amnesty was sought, the applicants had done so specifically in their capacity as members of the NSP. The fact that their objectives may have been similar to or the same as those of other recognised political organisations or liberation movements was irrelevant.

## **Court's findings on review**

91. The High Court found nothing untoward in the reasoning of the Committee and dismissed the application for review with costs. The presiding judge, Mr Justice van der Walt, indicated that, although it was a tragic situation and one would possibly want to grant amnesty to persons of the calibre of the applicants, one could not do so because they had placed themselves beyond the pale of the provisions of section 20(2) of the Act, and that was solely their own doing.

## **THE DUFFS ROAD ATTACK: APPEAL BY MEMBERS OF THE ORDE BOEREVOLK<sup>54</sup>**

92. Mr David Petrus Botha and two other persons, Messrs Smuts and Marais, were convicted in the Supreme Court, Durban, on seven counts of murder, twenty-seven counts of attempted murder and one count of unlawful possession of firearms and ammunition. They were members of a right-wing group called the Orde Boerevolk. All three were sentenced to death on 13 September 1991. This sentence was subsequently commuted to 30 years' imprisonment.
93. On 9 October 1990, the applicants and their colleagues attacked a bus full of black commuters on Duffs Road, Durban, by shooting at them with automatic weapons. The reason they gave for the attack was retaliation for an incident that had occurred earlier that day, when a group of approximately thirty supporters of the Pan Africanist Congress (PAC) or APLA, wearing PAC T-shirts, had randomly attacked white people on Durban's beachfront with knives, killing an elderly person and injuring several others.
94. All three applied for amnesty and appeared before the Committee on 5 September 1997.
95. The Committee accepted that Orde Boerevolk was a recognised political organisation involved in a political struggle with the then government and other political organisations, and that their acts were associated with a political objective. In applying the additional criteria set out in section 20(3) of the Act, the Committee distinguished between the roles played by Mr Botha on the one hand and by Messrs Smuts and Marais on the other. The basis for the distinction was that Smuts and Marais were subordinates of Botha and were under orders to carry out the attack as members of the Orde Boerevolk. Botha, on the other hand, had received no order or instructions to carry out the attack; nor had his actions been approved by any one of his superiors or by the organisation.
96. For this reason, Smuts and Marais were granted amnesty. Botha was refused amnesty in respect of the charges of murder and attempted murder, but was granted amnesty in respect of the charges of unlawful possession of firearms and ammunition.

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<sup>54</sup> David Petrus Botha v Die Voorsitter SubKomitee oor Amnestie van die Kommissie vir Waarheid en Versoening, Saak Nr. 17395/99 (Transvaal Provinsiale Afdeling).

97. Botha appealed to the Transvaal Provincial Division<sup>55</sup> against the Committee's refusal to grant him amnesty.

## **Review proceedings**

98. The presiding judge, Mr Justice J Smit, held that the Committee had failed to consider properly whether the applicant's conduct in respect of the attack on the bus had complied with the requirements of section 20(3)(e) of the Act as to 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'.
99. The court also found that the Committee had misdirected itself in losing sight of the fact that the provisions of section 20(3)(e) were merely criteria to be applied to determine whether an act was committed with a political objective, and not requirements necessary for the granting or refusal of amnesty.
100. As a result of this, the court determined that it could interfere in the Committee's finding and made an order setting aside the refusal of amnesty and referring the matter back to the Committee to hear further evidence on this point.

## **Second amnesty hearing**

101. On the 13 December 2000, Botha again appeared before the Committee and led evidence by the leader of the Orde Boerevolk, Mr Pieter Rudolph. This evidence did not take the matter any further as Mr Rudolph indicated that he would not have authorised the attack had he been asked to do so by the applicant and that, in any event, he had had no way of communicating with his supporters at the time as he had been in detention.
102. The Committee subsequently refused amnesty to the applicant on the same basis as before, namely that Botha had had no authority from his political organisation to launch such an attack on innocent and unarmed civilians.

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<sup>55</sup> The name of this court still refers to the pre-1994 provincial arrangement in South Africa, as the complex process of restructuring the court system is still underway.

## THE NAMIBIAN EXTRADITION CASE: APPEALS OF DARRYLE STOPFORTH AND LEONARD VEENENDAL<sup>56</sup>

103. Because similar questions of law were raised in both these appeals, the Supreme Court of Appeal deemed it convenient to deal with them at one and the same time.
104. The court was constituted of five judges, namely Justices Mahomed, Olivier, Melunsky, Farlam and Madlanga. The only question raised in these appeals that affected the work of the Commission concerned the jurisdiction of the Committee to grant amnesty for offences committed by South African citizens outside the Republic. This matter was reported in Volume One<sup>57</sup> of the Commission's Final Report, where the facts are comprehensively set out.

### Background to the appeal

105. In November 1996, the appellants launched motion proceedings in the Transvaal Provincial Division of the Supreme Court of South Africa. The proceedings were, amongst other things, for an order suspending the Minister of Justice's decision of 10 October 1996 ordering their extradition to Namibia, pending the adjudication by the Committee of their applications for amnesty – primarily for the killing of two persons during an attack on the United Nations Transitional Action Group (UNTAG) offices in Outjo on 10 August 1989.
106. The application was heard by Justice Daniels who came to the conclusion that the Commission (acting through the Committee) could not grant amnesty for deeds committed in Namibia, because it had no jurisdiction over crimes that had been committed in what was then South West Africa. The court also held that section 20 of the Act was not applicable, as Namibia could not be classified as a 'former state' of South Africa. He accordingly dismissed the application with costs.
107. On appeal, the court investigated the competency of the Committee to grant amnesty to an applicant for gross violations of human rights committed outside the country. The court relied on the provisions of section 20(2) of the Act, namely that the act in question must have been advised, planned, directed, commanded,

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<sup>56</sup> Darryle Garth Stopforth v The Minister of Justice, The Truth and Reconciliation Commission (Amnesty Committee), The Government of Namibia, The Minister of Safety and Security: Case No. 317/97 (Supreme Court of Appeal of South Africa) and

Leonard Michael Veenendal v The Minister of Justice, The Truth and Reconciliation Commission (Amnesty Committee), The Government of Namibia, The Minister of Safety and Security: Case No. 316/97 (Supreme Court of Appeal of South Africa).

<sup>57</sup> p. 192.

ordered or committed within or outside the Republic against the state, or any former state or another publicly known political organisation (section 20(2)(a)).

108. According to the preamble to the Act, amnesty is to be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past. These conflicts must have sprung from South Africa's deeply divided society. The envisaged amnesty is intended to reconcile opposing South African people.
109. The court held further that the acts of the appellants committed in 1989 in what was then South West Africa were not part of the conflicts of the past as intended by the Act. Those acts were not directed against South African opponents in the context of South Africa's own past. Thus an internal conflict between groups in South West African society fell outside the jurisdiction of the Committee.
110. The appeals were accordingly dismissed.

#### **THE 'MOTHERWELL FOUR'<sup>58</sup>**

111. Messrs Marthinus Dawid Ras, Wybrand Andreas Lodewicus du Toit, Gideon Johannes Nieuwoudt and Nicolaas Jacobus Janse van Rensburg each filed review proceedings against the refusal of the Committee to grant them amnesty arising from the murders of Warrant Officer Mbalala Mgoduka, Sergeant Amos Temba Faku, Sergeant Desmond Daliwonga Mpipa and Mr Xolile Shepard Sakati, aka Charles Jack, committed at Motherwell, Port Elizabeth, on the 14 December 1989. This matter became known as the 'Motherwell Four' amnesty application.
112. The applicants in the review proceedings were part of a group of nine amnesty applicants, including Messrs Eugene Alexander de Kock, Daniel Lionel Snyman, Gerhardus Lotz, Jacobus Kok, and Nicolas Johannes Vermeulen. All were former members of the security forces.
113. The four deceased were killed when the motor vehicle in which they were travelling was blown up by an explosive device that had been attached to it. They were all members of the Port Elizabeth Security Branch, except for Charles Jack, who was an askari (a turned ANC/MK member) and also on the Security Branch payroll.

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<sup>58</sup> Marthinus Dawid Ras v The Chairman of the Amnesty Committee of the Truth and Reconciliation Commission: Case No. 7285/00 (Cape of Good Hope Provincial Division); Wybrand Andreas Lodewicus du Toit v Die Voorsitter Subkomitee oor Amnestie van die Kommissie vir Waarheid en Versoening: Saak Nr. 9188/00 (Cape of Good Hope Provincial Division); Gideon Johannes Nieuwoudt v Die Voorsitter Subkomitee oor Amnestie van die Kommissie vir Waarheid en Versoening: Saak Nr. 366/01: (Cape of Good Hope Provincial Division); Nicolaas Jacobus Janse van Rensburg v Die Voorsitter Subkomitee oor Amnestie van die Kommissie vir Waarheid en Versoening: Saak Nr. 4925/01 (Cape of Good Hope Provincial Division).



114. At the criminal trial, Nieuwoudt, Du Toit and Ras were convicted of murder, perjury and defeating the ends of justice, and sentenced to twenty, fifteen and ten years' imprisonment respectively. Lotz and Kok were acquitted, whilst De Kock, Snyman and Vermeulen gave evidence on behalf of the State and were, except for Vermeulen, granted indemnity against prosecution.
115. The motive for the killings was that the deceased were believed to have been involved in a breach of security. Nieuwoudt, who had been in charge of the group, had received an order from one of his superiors – one Gilbert – that the deceased should be killed to prevent them from disclosing information about the affairs of the Security Branch, as they had threatened to do.
116. Nieuwoudt sought the assistance of Van Rensburg, who approached De Kock at Vlakplaas to help with the assassination of the deceased. Du Toit and Kok from the Technical Division of the Security Branch, Pretoria, were to manufacture the explosive device. Snyman, Vermeulen and Ras were instructed by De Kock to assist as back-up should the planned explosion fail to kill the deceased, in which event they were to shoot them with (untraceable) Eastern Bloc weapons. An explosive device was fitted to a motor vehicle in which the victims would be driving when it exploded.
117. The Amnesty Committee refused amnesty to the other eight applicants on the following grounds:
- a Except for De Kock, the applicants were not found to be credible as witnesses. Their evidence was vague and somewhat contradictory regarding the motive behind the killing.
  - b The motive for killing the deceased was to prevent them from carrying out their threat of exposing the illegal activities of the security police. The deceased had made the threat because they were facing charges of fraud after having been involved in intercepting cheques and funds mailed to various trade unions and left-wing organisations. They were not killed for any political objective associated with the conflicts of the past, nor was the killing directed against any member or supporter of the ANC or any other publicly known political organisation as was required by the Act.
  - c With the exception of De Kock, the applicants had failed to make a proper and full disclosure of all relevant facts relating to their own participation in the assassination of the deceased.
  - d The killing of the deceased was wholly disproportionate to any objective that the applicants might have pursued. There was no reliable evidence to link the

deceased with the ANC or any other political grouping. There was, in fact, evidence from the applicants themselves that there was no good reason to doubt the loyalty of the deceased to the Security Branch.

118. As a result, the applications for amnesty were refused.
119. Each of the applicants contested the findings of the Amnesty Committee and were successful in their application in the High Court for the review of the Amnesty Committee's decision to refuse them amnesty. The High Court ordered that the Committee's decision be set aside and that the Minister of Justice reconvene an Amnesty Committee to hear the applications.

### **THE KILLING OF RUTH FIRST, JEANETTE CURTIS SCHOON AND KATRYN SCHOON<sup>59</sup>**

120. On 30 May 2000, the Amnesty Committee granted amnesty to Messrs Craig Michael Williamson and Roger Howard Leslie Raven for the killing of Ms Ruth First in Maputo on 17 August 1982 and of Ms Jeannette Schoon and her daughter Katryn Schoon in Angola on 28 June 1984.
121. It was common cause that Ruth First and Jeanette and Katryn Schoon were killed by bombs concealed in parcels that were addressed to them. Both Williamson and Raven were members of the Security Branch. The assassinations of the deceased were ordered, advised, planned and/or directed within the Republic of South Africa, while the explosion and resulting deaths occurred outside the borders of the Republic.
122. The Committee was mindful of the Stopforth and Veenendal judgment referred to above. It held that it had the necessary jurisdiction to hear these amnesty applications, despite the fact that the killings occurred outside the Republic.
123. After a protracted hearing, the Committee was satisfied that the following applied:
  - a The killings of Ruth First and Jeannette and Katryn Schoon were offences committed in the course of the conflicts of the past.

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<sup>59</sup> Claire Sherry McLean N.O.; Shaun Slovo, Gillian Slovo; Robyn Jean Slovo v Amnesty Committee of the Truth and Reconciliation Commission, Judge Andrew Wilson N.O. (Chairperson) Craig Michael Williamson and Roger Howard Leslie Raven: Case No. 8272/00 (Cape of Good Hope Provincial Division).

- b The applicants were members of the Security Police and, as such, were employees of the state. They had acted within the course and scope of their duties and within the scope of their express or implied authority.
- c The offences were directed against publicly-known political organisations or liberation movements, namely the ANC and SACP and/or members or supporters of those organisations, and were committed bona fide to the objective of countering or resisting the struggle.
- d Katryn Schoon, aged six years, was tragically killed in the crossfire. Williamson testified that he had not expected the Schoon children to be with their parents in a military zone, but to have been in London at the time.
- e The evidence indicated that, although the Schoons and Ruth First were lecturing at their respective universities, they had not totally withdrawn from politics and were still involved in the liberation struggle waged by the ANC/SACP.
- f There was no evidence to support the allegation that Williamson acted out of malice towards the deceased. The Committee held that there was evidence that Williamson had received orders from his superiors to proceed with the letter bombs.
- g The killings of Jeannette and Katryn Schoon and Ruth First achieved their objective to shock, destabilise and demoralise the ANC/SACP. The acts were accordingly not disproportionate to their objectives.
- h The applicants had made a full disclosure of all relevant facts.

## **Review application**

- 124. Following the granting of amnesty to both applicants, the Schoon and Slovo families launched review proceedings against the granting of amnesty. The Committee did not oppose the application and chose to abide by the judgment of the High Court. The various grounds for review may be summarised as follows:
- 125. First, the Committee had failed properly to consider the evidence relating to the applicants' knowledge of the Schoons' domestic arrangements abroad.
- 126. Second, the Committee had failed properly to consider the requirements of proportionality (as required by section 20(3)(f)) in the killing of a six-year-old child. Further, the Committee should have refused amnesty on the grounds that the statement that 'it had served the Schoons right that their daughter had been killed because they had used her as their bomb disposal expert' indicated personal malice or spite as contemplated in section 20(3)(ii).

127. Third, the Amnesty Committee had misdirected itself in finding that the Schoons were still engaged in political work, thereby justifying its conclusion that the bomb was sent bona fide with the object of countering or resisting the struggle within the meaning of section 20(2) of the Act.
128. Fourth, the sending of a letter bomb to kill the Schoons had not been act associated with a political objective, as the Security Police had already succeeded in driving the Schoons out of South Africa.
129. Fifth, there had been failure to make full disclosure in respect of a wide range of evidence given by Williamson and Raven. This related to the identification of the targets to whom the bombs were sent, the manner in which the bombs were packaged, the construction of the device itself, the involvement of General Petrus Johannes Coetzee and the precise role played by each of the applicants.
130. Similar objections were raised by the applicants in respect of the killing of Ms First.
131. The respondents (Williamson and Raven) had not, at the time of publication, responded to the allegations set out in the founding papers. As the Committee decided not to oppose the application, the interest of the Commission in this matter is limited. Both Williamson and Raven filed an exception to the review application on the basis that a review against the granting of amnesty in terms of section 20 was not permissible in law.
132. This matter had not yet been resolved and was still pending at the time of publication of this Codicil.

## **THE CASE OF BHEKUMNDENI QEDUSIZI PENUEL SIMELANE**

133. Mr Simelane brought an application to the Cape High Court to review the Amnesty Committee's decision to refuse him amnesty. At the time of publication, this application was still pending and is currently being handled by the Ministry of Justice.



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

**Report of the  
Amnesty Committee**

**SOME REFLECTIONS ON  
THE AMNESTY PROCESS**

# Some Reflections on the Amnesty Process

1. As was noted in Chapter Two of this volume, the South African amnesty process was unique in that it provided not for blanket amnesty but for a conditional amnesty, requiring that offences and delicts related to gross human rights violations be publicly disclosed before amnesty could be granted. This meant that the Amnesty Committee (the Committee) set sail in uncharted waters, with no international or local precedents to guide it.
2. Nobody foresaw the immensity of the work ahead. The legislature originally envisaged that the entire task could be completed within a mere eighteen months. Both the Truth and Reconciliation Commission (the Commission) and the Committee were astonished at the sheer volume of amnesty applications.
3. While the Committee is aware that the process as it developed was by no means perfect, it believes nonetheless that the experience was in many respects a positive one for South Africa. While recognising that the realisation of national unity and reconciliation is a long-term project involving a range of role players, the Committee is of the view that the amnesty process has contributed in no small way to the promotion of these objectives.
4. The Committee is also aware that its work has been closely watched and widely admired by the international community. While mindful of the fact that the work of truth commissions must be tailored to the individual cultural, political and other needs of the societies within which they operate, and that the South African model cannot be randomly superimposed on other societies, the Committee believes, nonetheless, that there are lessons to be learnt from the South African experience. It is in this light that the following comments are made.

## Perceptions about the Committee

5. Even before the Committee was established, the controversial idea of amnesty and the way it should be dealt with became the topic of lengthy debates and deliberations (see Chapter Four of Volume One). Shortly after the Amnesty Committee was established, the very constitutionality of the amnesty provisions

was challenged in the Constitutional Court in the case of Azanian People's Organisation (AZAPO) & Others v The President of the Republic of South Africa & Others (Constitutional Court Case No. CCT17/96). The Constitutional Court unanimously upheld the constitutionality of the amnesty provisions.

6. There were negative perceptions about that part of the Committee's work that related to indemnifying offenders. These perceptions were prevalent not only amongst the general public, but were also evident amongst some officials of the prosecuting authority and the police, especially during the early stages of the Committee's existence. There was some resistance from some of the officials who were requested to assist the Committee with investigations into amnesty applications. This resistance could possibly be ascribed to an understandable view that the Committee was undermining their work in fighting crime by indemnifying criminals. Various meetings, at which the role and objectives of the Committee were explained, helped ease the situation and improve the working relationship with members of these bodies.
7. Thus the amnesty process was often the subject of scrutiny and criticism. Although the Committee was a creature of statute, some critics saw its work as being at odds with that of the Commission's other Committees. While the Human Rights Violations Committee (HRVC) was perceived to be devoting its time and energy to acknowledging the painful experiences of victims of gross violations of human rights, the Amnesty Committee, it was argued, was indemnifying many of the perpetrators of such violations against prosecution and the legal consequences of their actions. These perceptions were, of course, the result of the statutory scheme created by the provisions of the Act. Moreover, while the Amnesty Committee had the powers to implement its decisions, the Reparation and Rehabilitation Committee (RRC), for example, could only make recommendations for reparations for victims. Thus, while perpetrators were granted immediate indemnification if their amnesty applications succeeded, victims were required to wait until Parliament took a final decision on implementing reparations.
8. The resultant view that the Committee was 'perpetrator friendly' was thus to an extent understandable and even unavoidable. Any accusation that the Committee was insensitive towards victims is, however, totally unfounded. The Committee's records bear ample testimony to the resources made available to assist victims. Substantial budgetary provision was made for locating victims, arranging for their legal representation and providing subsistence, transport and accommodation to enable them to attend and participate fully in amnesty hearings.

9. The statutory provisions that ensured the Committee's independence as an adjudicative body unfortunately resulted in the development of some distance and differences of opinion between the Committee and the rest of the Commission. It was, however, considered necessary to maintain such an 'arm's length' relationship in order to allay fears that the Commission might influence the decisions of the Committee. This was vividly exemplified by the fact that the Commission, on one occasion, brought a court application to set aside the Committee's decision in respect of the collective amnesty application of thirty-seven prominent leaders of the African National Congress (ANC).
10. It was against this background that the Committee was required to perform its statutory functions. The Committee never allowed any of these circumstances to deter it from its statutory mandate to adjudicate objectively, impartially and even-handedly on all applications for amnesty.

### **Composition of the Amnesty Committee**

11. Appointments to the Committee were made exclusively from the ranks of the legal profession: that is, its members were judges, advocates and attorneys. There were those who questioned this. It was their view that the process would have been enriched had social scientists and other non-lawyers – for instance historians or anthropologists – been appointed to the Committee. The argument was that the specialised knowledge of such persons could have benefited the deliberations of the Committee.
12. In the view of the Committee, this argument entailed the danger of assuming findings of fact prior to evidence having been heard. It also felt that the presence of non-lawyers could have increased the fears of those persons who were concerned that they might not receive a fair and impartial hearing.
13. Committee members were all aware of the fact that they had entered the process with different perspectives. They were equally aware of their statutory duty to act impartially and decide applications objectively. Given the fact that its role was largely adjudicative, the Committee remained convinced that the legal training of its members rendered them better equipped to perform this adjudicative function. Hence, in the Committee's view, its impartiality was generally accepted by all those who participated in the amnesty process.



14. The question does, however, raise the need for expert evidence concerning the background and context of incidents in respect of which amnesty was applied for. Only on rare occasions did the Committee avail itself of the opportunity to receive such inputs. This was helpful in matters concerning witchcraft, the self-defence units (SDUs), the policies of the Azanian People's Liberation Army (APLA)<sup>60</sup> and the activities of so-called right-wing groupings. Given the positive inputs of these non-legal experts, it might well have assisted the process had the Committee been empowered to use the services of experts qualified in a particular field of enquiry as assessors at hearings on an *ad hoc* basis.

## **Unfolding of the Process**

15. What was true for the Commission as a whole was also true for the Committee: no preparatory work had been done before the Committee was established. The original Committee of five members had to start from scratch, designing application forms and determining its own operational procedures. It had to appoint staff with no clear idea either of the scope of its tasks nor of the volume of work that lay ahead. As it turned out, the number of staff members appointed was inadequate to cope with the workload.
16. In spite of this obvious lack of preparedness, the Commission exerted pressure on the Committee to commence with hearings. Despite a concerted effort to summarise applications and capture the information on a database, the first hearings were held before the closing date for the filing of applications for amnesty, and before all applicants who had applied for amnesty for the same incidents had been linked. As a result, not all the evidence that related to a specific incident had been placed before the Committee or could form part of the record of the hearing. This necessitated different panels hearing different applicants on the same incident, resulting in duplication and extra costs. Moreover, the Commission's Investigation Unit was at that time taken up with investigations on behalf of other arms of the Commission. As a result, the Committee had done no proactive investigations by the time the initial hearings began.
17. There was, however, one very positive result that arose from these early hearings. The fact that the amnesty process was being publicly observed seems to have reduced public scepticism, and consequently the volume of applications increased.
18. The lack of a dedicated or adequate investigative capacity for the Committee created numerous problems, which are discussed briefly below.

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<sup>60</sup> See this section, Chapter Four.

19. First, although hearings were scheduled in the expectation that the relevant applications would have been properly investigated prior to the hearing, on more than one occasion this turned out not to be the case. In some cases, not all victims had been informed of the hearing, and some had not even been traced. The result was that hearings had to be postponed, prolonging the overall process.
20. Occasionally, however, hearings had to proceed at a stage when more extensive investigations could possibly still have been done, or even where the event for which an applicant had applied for amnesty had not been fully corroborated by the Committee. The Committee had to weigh the interests of all parties in deciding at what particular stage to set a matter down for a hearing. The prejudice caused by delays, especially to applicants in custody, was of particular relevance in this regard.
21. Second, in those instances where the Committee realised that further applicants still had to be heard in respect of the same incident, a decision was held over, pending the hearing of all applications relating to that incident. This was done in order to avoid potential prejudice to interested parties. Decisions on specific incidents were thus also postponed. By so doing, the Committee simply created more work for itself, since the hearings panel had to revisit the record of the proceedings and their notes in order to refresh their memories before finalising the delayed decision.
22. Third, the delay in finalising decisions on incidents that concerned clusters of applicants deprived lawyers for those applicants of guidelines on the requirements for amnesty contained in decisions of the Committee. This resulted in the presentation of extensive evidence on minutiae and non-material matters, and sometimes unnecessary cross-examination, out of excessive caution on the part of legal representatives. This added a lot of unnecessary time to the process.
23. There are a number of observations to be made in respect of the above.
24. First, the prescribed application form could have been simplified by providing for a narrative summary of both the incident and the role of the applicant. In far too many applications, correspondence with applicants was required simply to obtain information the application form should have elicited in the first place.
25. Second, legal assistance should have been made available to applicants who required help with the completion and submission of their applications. This would have substantially reduced the number of defective applications, particularly those that failed to disclose a political objective or an offence or delict. People in prison were particularly vulnerable in this respect. The saving of time and

effort in processing better quality applications, taken together with the enhanced prospects of justice being done in respect of indigent applicants, would have more than compensated for the extra costs of providing additional legal assistance. This situation contrasted sharply with the situation of amnesty applicants who qualified for legal assistance from the state. These applicants were entitled to legal representation from the stage of preparing their applications.

26. Third, and in the same vein, legal assistance should have been provided to all applicants on a basis of parity from the outset. The Legal Aid Board provided legal assistance to applicants at much lower rates than that provided to former or present employees of state departments. Victims or their families also received the lower rates and, by implication, less experienced legal assistance. The Committee assumed the responsibility for providing legal assistance towards the middle of 1999, after which its legal department negotiated better fee structures with legal representatives. This made for a more equitable arrangement. Although the Committee is of the opinion that no real prejudice resulted from this situation in view of the more inquisitorial approach it adopted in these earlier hearings, victims understandably felt aggrieved by that semblance of inequality. This should not detract from the very positive aspects of the process, particularly the fact that legal assistance was afforded to all interested parties.
27. Fourth, the absence of useful precedents inhibited the Committee's ability to conceptualise, plan and manage the process in an integrated fashion from the outset. It would, for example, have served the process much better had the Committee immediately dedicated its full capacity to capturing all applications on the database with the least possible delay. All linked applications should have been prioritised for analysis and subjected to focused and managed investigations. This should have entailed the tracing of victims or their next-of-kin and other interested parties with a view to obtaining their versions of events and, where applicable, to obtaining research material relevant to the applications in question.
28. Fifth, pre-hearing conferences involving legal representatives could have been better utilised to limit the scope of hearings by minuting common cause facts and thus focusing the hearing solely on matters actually in dispute.
29. Sixth, the more regular use of *ex tempore* decisions in the many instances where applications were clear-cut would have contributed towards effecting savings and speeding up the overall process.

## A Few Reflections on the Provisions of the Act

30. In some instances, applicants applied for amnesty in respect of offences for which, they maintained, they had been wrongly convicted. Since the Act required that the conduct for which amnesty was sought should have constituted an offence or delict, the Committee could not consider such applications favourably. In some cases, co-applicants confirmed the innocence of such an applicant. The Committee referred those cases to the Department of Justice in the hope that they could be dealt with in terms of the Presidential prerogative. The Committee merely wishes to record that such cases could have been dealt with had the legislation either conferred additional powers on the Committee or provided for a concurrent process to deal with those cases.
31. In a few cases, the Committee found that gross human rights violations that did not fall within the ambit of the Act had occurred during and as a result of the conflicts of the past. These related mainly to intra-organisational conflicts. In such conflicts, the acts in question were not directed at a political opponent as required by the Act. Although these cases might have been deserving, they could not qualify for amnesty. This difficulty could have been addressed by extending the ambit of 'an act associated with a political objective' so as to encompass matters of this nature.
32. In many instances, where applications were unopposed and the facts common cause among all interested parties, the Committee was still compelled to hold public hearings merely by virtue of the fact that these matters concerned gross human rights violations. These included, for example, matters related to conspiracies to commit a gross violation of human rights where plans were later aborted, and abductions of persons for a very limited period of a few hours without any physical harm being done to the victim. A wider discretion to grant amnesty in matters where the application was unopposed and the facts common cause, without having had to hold a public hearing, would have contributed to a more expeditious process and cost savings.
33. Applications for amnesty were received from persons in leadership positions in various political groupings, who accepted collective responsibility for (gross) human rights violations committed within the ambit of their policies or resulting from a misguided but bona fide belief that these violations were perpetrated in the implementation of such policies. Often these applications were made pursuant to calls by the Commission on persons in leadership to apply for amnesty. The application of the provisions of the Act to such matters was fully dealt with in the High Court review of the collective amnesty application by ANC leaders.

The latter applications were eventually disposed of on the basis that no act or omission had been disclosed which constituted an offence or delict. The findings of the Committee in these applications were not, therefore, to the effect that an offence or delict had been committed for which amnesty was refused. On the contrary, the findings on the applications *per se* were that none of the applicants had committed any offence or delict.

34. The Committee considers it to be in the interests of justice to clarify the mistaken public impression that these applicants (most of whom occupy key public positions) are liable for prosecution in the light of their unsuccessful amnesty applications. It is arguable whether statutory provision for such applications was necessary or would have benefited the Commission process.

## **Reconciliation and National Unity**

35. The various participants experienced the Amnesty Committee process differently. Victims who attended hearings had to contend, generally speaking, with the reopening of old wounds. Their responses varied from strongly opposing to supporting applications for amnesty; from opposing the principles underlying the amnesty process to embracing them; from frustration with perceived non-disclosure by perpetrators to satisfaction at having learnt the facts; from animosity towards applicants to embracing them in forgiveness and reconciliation. Often they merely stated that they had learnt the truth and now at least they understood how and why particular incidents had happened.
36. Perpetrators' attitudes ranged from taking pride in their past actions, to disavowing any further support for their earlier attitudes, to expressions of deep remorse. Often they had to experience the humiliation of public exposure of their shameful pasts. Others said that they would probably repeat what they had done in similar circumstances.
37. The Committee believes that, in all its many facets, the amnesty process made a meaningful contribution to a better understanding of the causes, nature and extent of the conflicts and divisions of the past. It did so by uncovering many aspects of our past that been hidden from view, and by giving us a unique insight into the perspectives and motives of those who committed gross violations of human rights and the context in which these events took place.

38. By sharing these insights, the Committee hopes that its efforts have made a real contribution to the challenge of ensuring that our country and future generations will continue to build on the process towards unity and reconciliation in which the Commission has played so integral a part. ([... p92](#))