

'A SNAKE GIVES BIRTH TO A SNAKE':

Politics and Crime in the Transition to
Democracy in South Africa

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1

1 INTRODUCTION

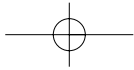
'A snake gives birth to a snake.' This Zulu proverb was quoted by Victor Mtembu, a member of the Inkatha Freedom Party (IFP), during the course of his amnesty application for his involvement in the infamous Boipatong Massacre. He proffered this in partial explanation of the political motivation for the murder of an eight-month-old baby along with the baby's mother in the course of the massacre. Mtembu and his 16 co-conspirators were granted amnesty on the basis that they were deemed by the Truth and Reconciliation Commission's Amnesty Committee to have satisfied the requirements of the Promotion of National Unity and Reconciliation Act 34 of 1995 (hereafter referred to as 'the Act', or 'the TRC Act'). These included the critical requirements that applicants must make full disclosure of what they had done, and demonstrate that the acts for which amnesty was sought had been committed with a political motive, and in the name of a known political organisation.

In and of itself, this brief account of but one case gives ample substance to the moral and legal controversy that surrounded the TRC's amnesty process in South Africa. In particular, it draws attention to the argument that this process compromised rather than enhanced endeavours to rebuild the credibility and integrity of a justice system inherited from apartheid. On the face of it, the concern was simply that, in the name of political reconciliation, this process may have fostered a sense of impunity based on an alleged failure to respect the norms and standards of international law regarding such gross violations of human rights (Orentlicker, 1991; Roht-Arriaza, 1990; Cachalia, 1992; Africa Watch, 1992). However, it is arguable that the amnesty process also created a situation in which

it was unreasonable to expect post-apartheid South Africa's criminals miraculously to acquire a respect for the rule of law when political assassins from the past were seen – quite literally – to have got away with murder. Of course, it might equally be argued – as indeed it was in the judgment of the Constitutional Court in the case of *AZAPO and Others v The President of the Republic of South Africa and Others* (1996) – that the remote prospect of achieving a successful prosecution in most cases might well have resulted in an even worse state of affairs, and that, in any event, these compromises of principle were essential to the very birth of South Africa's new democracy.

However, the Boipatong massacre, and the role of Victor Mtembu and his co-conspirators in it, demands an even closer scrutiny of the TRC's amnesty process and the legislation that underpinned it. This analysis must reach beyond the somewhat sterile debates over the relationship between the need for national reconciliation and the demands of retributive justice that dominated the early literature on the TRC and transitional justice in South Africa more generally.¹ In particular, this controversial tool of transitional justice was designed to serve a process of political reconciliation in South Africa. As such, it relied on an ability to distinguish clearly between politically motivated and *purely* criminal violence during the apartheid era. What the Boipatong massacre example clearly demonstrates are the dramatic dilemmas presented by the reality that the dividing line between politics and crime under apartheid was blurred and cannot easily be navigated either by reference to neat theoretical distinctions or by means of the clumsy quasi-judicial proceedings of the TRC's Amnesty Committee. Indeed, it is arguable that such a clear distinction between political and criminal violence was only sustainable by constructing a somewhat sanitised version of the past. And this in turn was often heavily dependent on accepting the existence of a deep chronological divide – drawn along the line of South Africa's first democratic elections in April 1994 – separating an era of brutal political conflict from a new age in which political strife had all but ceased, only to be replaced by equally pervasive violence of a strictly anti-social and criminal nature.

This chapter will critically analyse the South African TRC as an innovative approach within the evolving field of 'transitional justice'.² By reference to the commission's amnesty process, it will be argued that, in its attempts to separate politics and crime for the purposes of building reconciliation at a political level, one of the greatest flaws of the TRC was its failure properly to engage with the complex nature of criminality. Not only did the amnesty process ignore many of the complexities consequent upon the historical criminalisation of political activity, but it was also

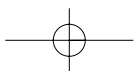
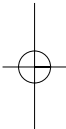
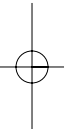


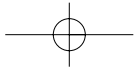
incapable of accommodating the extent to which the politicisation of crime represented the other side of the same coin.

1.1 Transitional Justice and Criminal Justice Reform

This analysis has vital implications for the interface between the fields of criminal and transitional justice. Indeed, these competing approaches to justice – dominated by debates over the respective merits and priority of punitive and restorative models of justice – lie at the heart of South Africa's negotiated transition to democracy. These sometimes facile but occasionally fascinating debates have played themselves out most overtly as South Africa's attempts at national reconciliation have progressed, particularly through the work of the TRC. However, these discourses have been less obvious – but equally central – to the workings of South Africa's criminal justice system, and within the country's criminal courts. Thus, within the broad national endeavour of post-apartheid reconstruction, two fundamentally integrated challenges have faced South Africa's embryonic democracy. The first of these has been viewed largely as a retrospective exercise in building reconciliation in the field of *transitional justice*, while the other has focused on dealing with current (or future) crime problems by means of *criminal justice* reform. On one hand, the transitional justice enterprise has been framed by a supposedly victim-centred process of reconciliation based on truth recovery, public victim testimony, reparation and a highly controversial conditional amnesty for perpetrators of past human rights abuses. On the other hand, the aim of the criminal justice reform agenda has been to restore the rule of law and render the delivery of criminal justice and crime prevention more efficient in the face of excessively high rates of violent crime by overcoming the legacy of public mistrust in the justice system inherited from the undemocratic regime of the past and rebuilding the credibility of politically compromised institutions. Needless to say, these two distinct challenges have frequently given rise to potentially competing priorities. Yet it is not merely on the basis that one is seen as retrospective and the other as forward looking that the priorities of transitional justice and criminal justice reform have been dealt with as if they were entirely detached from each other. It is perhaps more significant that this detachment is also based on the implicit assumption that, while one is concerned with dealing with past violence of a political nature, the other is viewed as the solution to current problems of crime in general, and criminal violence in particular.

It is contended here that such artificial boundaries are entirely dysfunctional to the task of learning what can truly be learned from attempts to achieve justice within South Africa's transition to democracy. More importantly, it is argued that the neat

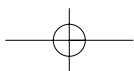


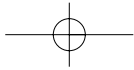


dividing line between political and criminal violence is a crude one that is difficult to sustain in a manner helpful either to criminologists or political scientists (see Cohen, 1996). It is also interesting that in another context – that of an analysis of South Africa's so-called Third Force – Stephen Ellis (1998: 296) reaches much the same conclusion: 'One of the conclusions we may draw from a survey of the last 30 years of South African history is that politics and crime are inter-connected and are not always amenable to conventional analyses, one in the discipline of political science, the other in that of criminology'.

The implicit challenge of this chapter is, therefore, to force criminologists and criminal justice reformers to engage more fully with all the dilemmas of justice in transition, and particularly with the manner in which the legacy of politically motivated and state crimes is understood. By the same token, those primarily concerned with mechanisms of transitional justice designed to build lasting reconciliation are confronted with continuities in the violence that still disfigures South African society, even though, in the current post-democratisation phase, it is largely dismissed as criminal rather than political. It demands that those who frame their engagement as exclusively dealing with past violence of a political nature define the boundaries of transitional justice more broadly, if they are to make the most of their confrontation with the challenges of transition from autocracy and civil conflict to emergent democracy. Indeed, it is argued here that the distinction between political and criminal violence, which often provides the rationalisation for the impermeability of the boundaries between criminology and political science (and criminal and transitional justice), is itself largely illusory and premised upon versions of history that have purged a politically fraught past of its inherently criminal pathologies.

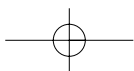
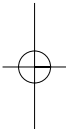
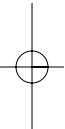
These dilemmas of justice in transition are exacerbated by some of the hidden liabilities embedded in the very nature of South Africa's negotiated political settlement. Firstly, as has already been noted, the new democratic government inherited its criminal justice institutions (along with a legacy of popular mistrust and a history of human rights violations) largely intact from its undemocratic predecessor. This went hand in glove with a fundamental compromise in the negotiations process summed up in agreement on a sunset clause that protected the jobs of all incumbent civil servants for at least the first five years of democratic rule, but left the post-apartheid government dependent on the whims, (in)competence and (non)co-operation of old-order bureaucrats for the implementation of its new vision-based policies. To this must be added the agreement on a conditional amnesty for past violators of human rights, administered by the TRC, which is the primary

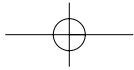




focus of this essay. A fourth factor was that the transformation of state institutions had to take place in a context of fiscal constraint and negative economic growth in which budgets that had previously been used to service the minority white population now had to be stretched to meet the needs of over 40 million South Africans of all races. Fifthly, the political dynamics of the negotiated post-apartheid settlement frequently served to define reconciliation by reference to the party-political process associated with formal democratisation. Implicit in this was the danger that such political processes might dismantle the scaffolding of apartheid society, yet fail to engage directly enough with the socio-economic needs, the experiences of race, class and gender, and the complex identities and historical traumas of ordinary South Africans. Finally – and as if to add insult to injury – far from this political settlement resulting in an end to violence, the negotiations process and the eventual transition to democracy brought little respite from the high levels and cyclical patterns of violence experienced in the final years of apartheid. Thus, in all these respects, the conditions that face South African society in the transition from autocracy to democracy present some unique challenges, which demand a sustained effort to reach beyond the frame of reference of conventional, narrowly construed criminological paradigms.

Considering the magnitude of the task of transforming and rebuilding popular confidence in inherited criminal justice institutions, it is particularly clear that strategies to deal with violent victimisation cannot operate exclusively within the sphere of criminal justice. Such a narrow approach cannot effectively begin to address the more generalised experiences of victimisation premised on more than mere perceptions of state institutions as remaining illegitimate or unaccountable. In South Africa, attempts to address the experiences of violent victimisation in the post-apartheid era are conventionally framed by reference to the extent to which the existing criminal justice process either fails or alienates those victims who encounter it. This is usually understood in terms of the experiences of people inside the criminal justice process, rather than by reference to the wider impact of unresolved residual trauma, ongoing cyclical patterns of violence, shifting patterns of social conflict and the embedding of identities in which violence is a way of life. The more expansive popular perceptions of the role of the institutions of criminal justice must be situated in this wider context. In contrast to the narrow approach adopted by criminal justice reformers, it is argued here that, in South Africa, violent victimisation must be understood as a societal problem rather than a purely individual experience. It is not solely the product of institutional failings and cannot, therefore, be remedied by institutional transformation or formal political processes alone.

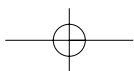




2. THE POLITICS FITS THE CRIME

From the pages above, it is clear that – in the wake of the TRC, and the party political settlements and democratic election that paved the way for it – there are serious pitfalls in simplistically describing South Africa as a ‘post-conflict’ society. Instead, the real challenge in assessing transitional justice interventions lies in monitoring and grappling with both the changing patterns of violence and social conflict that dominate post-apartheid society, and the easy slide across the boundaries between political and criminal violence that have always complicated analysis of South African life. Therefore, by penetrating the veil of continuity and change in the patterns of violent social conflict in South Africa, this chapter points to some of the (perhaps inevitable) limitations of the TRC as a mechanism of *restorative justice* in the true sense of the term. These limitations are embedded in its historical imperative and its explicit mandate to deal with the issues of violence and reconciliation exclusively by reference to issues of political responsibility, narrowly defined. To the extent that the TRC is seen as one of the founding moments in the building of a new nationhood in South Africa; to the extent that the commission is understood as a primary mechanism for resolving past conflicts and ending violence; and to the extent that it is promoted as the pre-eminent means of achieving national reconciliation, this chapter will argue that the TRC has, at best, only begun a process that still confronts a range of unresolved challenges. At worst, it is suggested that the political context that gave rise to the remarkable creativity and innovation embodied in the South African TRC may nonetheless have contributed to framing a somewhat narrow understanding of restorative justice and violence prevention, based on a rather static perspective on the nature of violent conflict in South African society.³

It is, therefore, my view that proper evaluation of the efficacy of various transitional justice mechanisms in South Africa must be situated within the specific context of transmuting patterns of political and criminal violence. This demands that we shift the debate on transitional justice from the exclusively retrospective scrutiny of past injustices (important as this is), to a strategic and proactive engagement with the challenges that face all justice institutions in newly emerging democracies. This in turn demands a recognition that, rather than simply ending once a political settlement has been reached, patterns of violence and social conflict change. Nor do the lines of social cleavage that lie at the heart of historical violence stay the same, but are reframed and redefined under new political conditions. Thus, such an approach calls for an engagement both with the past and with the future, and insists on not only a scrutiny of justice in transition, but of violence in transition as well.

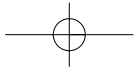


Orthodox histories of political conflict in South Africa often risk sanitising the consequences of the criminalisation of an urban working class through a succession of laws that were themselves illegitimate, but which increasingly sanctioned, and indeed rendered it noble, for the black majority of South Africans to be on the wrong side of the law. The social history of the apartheid era is in fact an account of massive and widespread dislocation in which human beings were forced to endure lives in the most precarious and deprived of settings, punctuated by daily violence and violation. By comparison, orthodox political history tends to portray a twentieth century in which the polite voices of protest continued to fall on deaf ears until, rationally, and in sober knowledge of the gravity of the decision, this protest turned to violent resistance. This version of history frames a liberation discourse which then reached out to the popular classes – the industrial working class, the urban youth and the rural poor – with the result that, eventually, most of black South Africa was galvanised in a moral and well-orchestrated struggle against the apartheid regime, which, in turn, systematically mobilised the full force of the state against the politically voiceless majority. This simple political narrative is particularly striking in the way that it cleanses both liberation politics and state violence – associated as they were with the fortunes of particular political parties and movements – of the criminal pathologies of South Africa's distinctive social development. The pervasive violence of everyday social life finds little complex expression here and the extent to which the criminalisation of politics and the politicisation of crime have been – and still are – two edges of the same sword is too readily ignored.

Of course, these competing visions of history – each with its own version of the truth – predated the TRC process. Indeed, as Posel and Simpson (2002) point out in the introduction to their edited volume evaluating the commission, the TRC took the sorts of questions familiar to scholars of the past about the nature of truth, evidence and representation out into a much more heated public and political domain.⁴ However, the TRC's pursuit of truth in the interests of nation-building did prompt an important narrowing of focus in its work to that relatively restricted category of gross human rights violations deemed to be 'political'. And nowhere was this narrowing more evident than in the criteria required to apply for, and receive, amnesty under the Promotion of National Unity and Reconciliation Act.

2.1 The TRC's Mandate and the Criteria for Amnesty

The TRC's mandate was first framed in the post-amble to the (interim) Constitution, which stated that, '[i]n order to advance ... reconciliation and reconstruction,

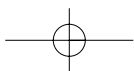
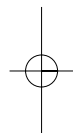
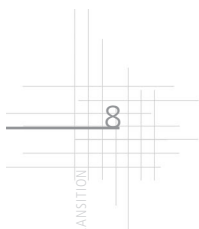
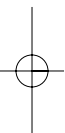


amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past'.⁵

This imperative was elaborated in the Promotion of National Unity and Reconciliation Act 34 of 1995, which provided that a recipient of amnesty would be released from all criminal and civil liability.⁶ However, the Act also set out a number of conditions that had to be met for the applicant to be granted amnesty. Firstly, in terms of section 20(1)(b), the actions of the applicant must have amounted to a delict or an offence. Secondly, and more importantly, amnesty applicants were required (section 20(1)(c)) to give a full and truthful account of the incidents in respect of which they were seeking amnesty – the critical requirement of full disclosure as a *quid pro quo* for indemnification. The third condition, and the most important of all for the purposes of this chapter, was the requirement under section 20(3) of the Act that the incident in question had to constitute an act associated with a political objective. Thus, drawing heavily on the principles of the 'political offence exception' in extradition law, and the concomitant definition of a political offence within the international context, the Act sought to ensure that only conduct associated with the past political conflict in the country would qualify for amnesty. Beyond this, the Act also provided some detailed criteria for assessing whether an applicant's conduct would qualify as being politically motivated or not. These included the motive of the perpetrator; the context in which the incident took place; the nature and gravity of the incident; the object or objective of the conduct (and, in particular, whether the targets were political enemies or innocent parties); evidence that the act in question had been committed in the name of a known political party or organisation, such as the existence of any orders or expressions of approval relating to it; and, finally, the proportionality of the act to the objective pursued. Finally, the Act also provided that, where a perpetrator acted for personal gain, or out of spite or malice towards the victim, the conduct in question would not qualify as an act associated with a political objective.

2.2 Procedural Issues

There are three further procedural issues that were important in shaping the manner in which the Amnesty Committee adjudicated on this key issue of political motive, and the question of whether acts were undertaken in the name of a known political organisation. Firstly, submissions by a political party regarding what it defined as an acceptable political action or strategy were largely accepted and used by the commission to assess whether or not applicants were acting in furtherance of their party's interests. To quote the TRC's final report:



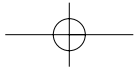
In order to facilitate its proceedings, the Committee accepted the submissions made by the leadership of some of the structures involved in the past political conflict as duly established for the purposes of subsequent hearings. For example, according to the submissions of the Azanian People's Liberation 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 (TRC, 2003: 13).

Secondly, the view of the Amnesty Committee was that, as an administrative tribunal, no formal system of precedent applied to its activities. In other words, the reasoning underlying a decision of the Amnesty Committee on what did or did not satisfy the requirement of political motive or action taken in the name of a known political organisation was not regarded as binding in other cases.⁷ Indeed, there was no obligation and little apparent interest in even making reference to cases that dealt with similar facts or offences. In the final report of the Amnesty Committee, it was claimed that

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 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 (TRC, 2003: 13).

Thirdly, it is also significant that, where an application clearly did not relate to an act associated with a political objective, section 19(3)(a) of the TRC Act provided that the Amnesty Committee could make a decision to refuse amnesty 'in chambers' and without holding a public hearing.

The adoption of each of these procedures reflects the extent to which, in practice, the blurred dividing line between political and criminal violence plagued the day-to-day work of the Amnesty Committee, and the next section of this chapter turns to look at the impact of all this on its decision-making in more detail.

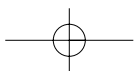


3. AMNESTY THROUGH THE CASES

In the final analysis, a total of 7 116 applications for amnesty were received and administered by the TRC's Amnesty Committees. Of these, only 1 167 applications were successful, and fully 5 143 (more than two-thirds of all applications) were refused administratively in chambers.⁸ Of these refusals, 3 559 (relating to more than half the total number of applications) were based on the fact that no political objective was established.⁹ A further 47 applicants were deemed to be applying for amnesty for offences committed either out of malice or for personal gain, 183 were refused on the basis that they denied guilt rather than admitting it (irrespective of whether they might, as a matter of fact, have been innocent), and 85 were refused for failing to make full disclosure (Coetzee, 2003: 193). From these figures, it is self-evident that a significant majority of amnesty applicants were already convicted offenders seeking retrospectively to define their offences as political. If nothing else, this is already a powerful indicator that the boundaries between political and criminal motivations were subject to considerable debate, and at least potentially open to manipulation from below through the amnesty process. These difficulties were duly acknowledged in the TRC's final report:

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 (TRC, 2003: 37).

The TRC's demand for a neat and clear-cut division between politically motivated violence committed in the name of a known political organisation on one hand, and criminal violence on the other, thus proved much harder to deal with operationally than it had been to frame legislatively. In practice, the TRC's Human Rights Violations (HRV) Committee could not completely ignore the blurred boundary between the history of violence deemed socially understandable by virtue of its definition as 'political' and violence condemned as anti-social because of its purely criminal nature. Thus, the HRV Committee did hold hearings where questions of responsibility were not strictly framed in terms of party-political affiliation. These



included hearings that exposed the role of criminal gangs (such as the Noxie, Koffifi and Three Million Gangs) in political assassinations, as well as a series of sector-based hearings that looked into the role of business, the medical profession and the judiciary under apartheid.¹⁰

However, the most significant problems presented themselves in the daily workings of the Amnesty Committees, where the problem of determining which acts were deemed to be political and which were not proved to be very controversial – and often appeared to be resolved arbitrarily. This has already been illustrated in the case of Victor Mtembu and the Boipatong Massacre, but there were also many other cases that speak to the broader themes tackled in this chapter. In particular, there were three categories of application that presented particular problems for the Amnesty Committees, because, at first glance, the incidents to which they related appeared to be common crimes. As described in the TRC's final report (2003), these three categories were witchcraft killings, the activities of self-defence units (SDUs) and operations (particularly robberies) undertaken by combatants from the Azanian People's Liberation Army (APLA).

3.1 Witchcraft Killings

The issue of witchcraft killings understandably elicited much debate (and obvious confusion) within the Amnesty Committees. It was ultimately decided that all such cases should be dealt with in one cluster and were thus referred to two public hearings. Aggregating these cases and treating them as broadly similar rather than opting to scrutinise the differences between them created problems of their own, but this did not prevent the committee from reaching the somewhat trite conclusion 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 places – 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 (TRC, 2003: 40).

The report goes on to quote the view that apartheid politics had turned traditional leaders into targets for the politicised youth who 'intimidated traditional leaders in such a way that the latter had little or no option but to sniff out so-called witches'. The report also notes that, in Venda in particular, the liberation forces used cases of

witchcraft to politicise communities, and that, where 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 the deaths'. Finally, in what can only be regarded as an admission of its confusion, the report notes that, 'within this framework', each application was decided individually and according to its own merits (TRC, 2003: 40–1).¹¹ It is clear that these broad-based anthropological explanations of witchcraft failed to resolve the fundamental dilemma that, on occasion, these culturally specific practices were manipulated for political purposes. In other cases, a political veneer was used creatively to rationalise killings that actually had their origins in much more local, or even intimate, social and domestic conflicts.

3.2 Self-Defence Units

The cases relating to SDUs proved equally taxing. To begin with, the political argument that these structures were set up in self-defence by communities that were under attack would – on a strict legal interpretation – have rendered such conduct lawful. This would have disqualified the members of such units from applying for amnesty for their actions. Furthermore, as noted in the TRC's final report, many of the incidents in which SDUs were implicated involved crowd or group conflicts that made the assessment of individual motive and accountability nearly impossible to establish. By their own admission, many of the applicants indicated that they attacked 'communities' perceived to be aligned with a rival political organisation without knowing whether individuals were even members or supporters of that organisation. Then there were members of ANC-aligned SDUs who applied for amnesty for robberies undertaken to support their activities, only to fall foul of the ANC's general policy of disavowing such 'fundraising methods'. The result was that these applications failed. After yet another convoluted debate, the Amnesty Committee (TRC, 2003: 42–3) finally acknowledged that, whilst public hearings on SDU-related applications had helped to clarify the political background to these offences, 'they did not always enable the Committee to reach an informed decision on every individual case'. Later in its report, the Amnesty Committee goes even further in recognising the overlap between politically motivated and criminal activities, adding that

[t]he 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

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 (TRC, 2003: 43–4).

3.3 Azanian People's Liberation Army

The APLA cases presented further anomalies. The most obvious of these is that, on the basis of their organisation's formal adoption of a policy that sanctioned robbery as a means of sustaining political activity, APLA operatives could apply for and expect to be granted amnesty for such acquisitive offences, whereas members of ANC-aligned SDUs could not. It was acknowledged in the TRC's final report that APLA's position often made it difficult to distinguish between acts associated with a political objective committed by *bona fide* members of the organisation and purely criminal acts of robbery – often coupled with serious assault and/or murder – committed for personal gain (TRC, 2003: 45–6). In the final analysis, however, rather than offering any sociologically or criminologically credible perspective on the complex and fluid boundaries between political and criminal violence, the committee's findings come down to making a rather formalistic distinction based on party-political 'policy'. APLA's official position on the 'repossession of property' only complicated matters further. Where applications for amnesty were made in relation to the theft or robbery of cash and other valuables used to sustain APLA operatives, their commanders sought to defend such activities politically as the legitimate repossession of goods to which the African people of South Africa were entitled. Yet it was also acknowledged by APLA's parent organisation, the Pan Africanist Congress (PAC), in its submission to the commission, that many APLA 'Task Force' members were recruited from the ranks of known criminals, both in and outside prison, specifically because people with criminal records were best suited to the task of 'repossessing' property by means of theft and robbery (TRC, 2003: 45).

The APLA cases also raised the critical question of whether racial motivation was sufficient to associate a killing with a political objective. In other words, could individuals such as the white American exchange student Amy Biehl, members of the King Williamstown Golf Club, and the patrons of Cape Town's Heidelberg Tavern and the Crazy Beat Discotheque in Newcastle become legitimate targets simply because of the colour of their skin?¹² In her ground-breaking research analysing the inconsistencies and anomalies in over 70 of the first amnesty decisions handed down, Maria Saino (1998) points out that, despite the centrality of race and racism within the South African conflict, some racially motivated killings were deemed to

be sufficiently closely associated with a political objective to warrant amnesty, but others were not.¹³ Saino suggests that these assessments relied heavily on a formalistic analysis of the ideology of particular political parties. So, whilst in the APLA cases, race was deemed to be a sufficiently 'political' motivation to warrant amnesty being granted, the Amnesty Committee refused amnesty for similar attacks by applicants affiliated to political parties that did not publicly sanction such acts. So, for example, ANC SDU member Molefe Tshukudu's application for amnesty for killing a white woman because he perceived whites as the enemy was refused, as indeed were the applications of several other SDU members who killed whites in the townships as part of their wider mandate to protect their communities from outsiders (Saino, 1998: 14).

In addition to this, Saino points to a number of other inconsistencies in the Amnesty Committees' interpretation of the critical requirement of full disclosure. Some of these problems also raise important issues of political accountability, such as the TRC's limited ability to penetrate the shadow cast by the activities of massive networks of informers sowing mistrust within local communities.¹⁴ Others deal with questions about the identification of political chains of command. However, these concerns are less central to the particular focus of this chapter than are the specific inconsistencies in how the Amnesty Committees dealt with the questions of political affiliation, motivation and implied organisational authority, so it is to these that we now turn.

3.4 Political Affiliation, Motivation and Implied Authority

On the question of political affiliation, the committee was very generous in its interpretation of support for the liberation movements (including membership of SDUs and street committees), while at the same time being relatively strict about what constituted a publicly known political organisation, as set out in sections 20(2)(a) and (d) of the TRC Act. Saino (1998) points out that when Jean du Plessis and Cornelius van Wyk sought amnesty for acts committed on behalf of the Nasionale Sosialistiese Partisane, the Amnesty Committee refused their application on the basis that this was not a known political organisation.¹⁵ On the other hand, the committee had previously granted amnesty to Boy Diale and Christopher Makgale, whose only political affiliation was stated as being that they were acting 'on behalf of the Bafokeng people'.¹⁶

More relevant to the sometimes shaky distinctions that the committee was forced to make between political and criminal acts were the interpretations of when applicants were deemed to be acting with the 'implied authority' of a political

organisation. In the case of the United Democratic Front-affiliated Mdantsane 12, members of a township street committee were denied amnesty for the commission of a necklace murder on the grounds that they had acted beyond the scope of their implied political authority. In explaining its decision, the Amnesty Committee ruled that the manner in which the victims had been killed served as proof that the killers had acted out of enmity rather than any political motivation.¹⁷ However, Saino (1998) notes that, in another case of necklacing, amnesty was granted to one Norman Gxekwa on the basis that he had been given a letter of support by the Uitenhage branch of the ANC. She concludes from this that implied authority only seems to be limited in such cases if the perpetrator cannot obtain formal support for his or her actions from the organisation in whose name they were carried out (Saino, 1998: 10).

The most widely known case on the question of implied authority was, of course, that of Clive Derby Lewis and Janusz Walus, who claimed to have acted in accordance with the beliefs of the Conservative Party (CP) in assassinating the then-head of the South African Communist Party, Chris Hani. In his failed appeals against the decision of the Amnesty Committee to refuse him amnesty, Derby Lewis sought to found his claim of implied authority on his own very senior status within the CP. But it would seem that this was outweighed by the testimony of the CP leader, Ferdi Harzenberg, who insisted that the CP neither knew nor approved of the assassination plot. As a result, the murder of one senior politician by a rival – both members of well-known organisations at opposite ends of the political spectrum – was held not to have been carried out in pursuit of an authorised political objective.

3.5 Police Abuse of Power

A final category of cases of particular interest here involved allegations concerning police abuse of power. Here too, the inconsistencies in the findings of the Amnesty Committee are striking, even if the facts of the individual cases can be distinguished from one another. Particularly disquieting in this respect is the relationship between findings that state security officials were, or were not, acting 'politically', and formalistic thinking about police misconduct as the activity of a few 'bad apples'. Thus, South African Police (SAP) officers Harrington, Erasmus and Madlala were refused amnesty for killing an ANC member in the period after the organisation had been un-banned on the grounds that they had used means outside their authority and were attempting to cover up the torture of their victim (cited in Saino, 1998: 12). Yet, in the case of Dirk Coetzee, an alleged order to 'make a plan' concerning his eventual victim, Griffiths Mxenge, was taken to constitute adequate implied authority to warrant the granting of amnesty in respect of his (particularly brutal)

murder.¹⁸ In several cases, the committee challenged police officials to demonstrate that acts of torture were either politically motivated or targeted at political activists. So, for example, Ciskei police officers Thoba, Thompson and Maxom applied for amnesty on four counts of torture. Amnesty was granted on three counts involving political activists, but refused on the remaining count because the victim had no political links and the police could not claim to have had any political objective in carrying out the torture.¹⁹ In other cases, in spite of the careful scrutiny of the victims' political affiliations, the committee also granted amnesty for attacks against innocent civilians in cases of mistaken identity. The best example of this type of decision was the granting of amnesty to Brian Mitchell in relation to the death of 11 people in the course of the so-called Trust Feed Massacre.²⁰

Of course, when it came to motive, the Amnesty Committees frequently bumped up against the near-impossible task of assessing where political motivation ended and considerations of personal revenge, gain or avarice began. The difficulties encountered in dealing with cases involving robbery have already been mentioned. However, according to Saino (1998), for cases of murder, the committee did try to make a distinction between killings where the perpetrators received some financial reward and paid assassinations. The committee thus found that promotions and financial bonuses awarded to state agents for carrying out political murders did not negate a finding that the crime was politically motivated. So the R3 000 paid to the murderers of Griffiths Mxenge did not mean that the perpetrators acted primarily for personal gain. However, in other cases, the Amnesty Committee ruled that the receipt of a financial reward indicated that the perpetrator was no more than a 'hired assassin', and it was on this basis that the committee refused amnesty to two IFP officials who were promised R10 000 by their superiors to murder members of the rival ANC (cited in Saino, 1998: 20). Similar dilemmas were confronted in drawing the line between personal revenge and political motivation, particularly when gang members were brought in to act as surrogate trigger-pullers for hidden political masters (Saino, 1998: 15–16, 20–1).

Unfortunately, space does not permit a fuller examination of the difficulties created either by the Amnesty Committee's decisions on applicants' claims to be acting on orders, or on its interpretation of the principles of proportionality in evaluating the action taken by applicants for amnesty against the political objectives they claimed to have been pursuing. But to conclude this section by returning to a point made earlier, perhaps the most symbolic contradiction that played itself out in the findings of the Amnesty Committee was the question of race (or racism) as a political motive for gross violations of human rights. As pointed out

earlier, in some instances, racially motivated violence was deemed to be inherently 'political' and carried out in the name of a known political organisation, while in others it was not. The result was that some applicants were granted amnesty for such actions, while others were denied it. The issue here is not whether the individual findings in these cases were 'fair' or not. What is essential to point out, however, is that 'privileging' certain acts of political violence, and seeing race, class and gender as subsidiary to party-specific political motivations, had the ironic effect of shrouding rather than illuminating them as intrinsically political and *self-explanatory* characteristics essential to any understanding of the dominant patterns and experiences of violence under apartheid. Indeed, the Amnesty Committee's formalistic approach to defining violent conflict in terms of political responsibility and affiliation also disguised the impact of patterns of marginalisation and exclusion that reached beyond mere party identity in shaping the violent nature of South African society. Against this background, it is inevitable that achieving some kind of reconciliation between political parties in fact has limited efficacy in preventing violence that remains rooted in patterns of exclusion that are not adequately addressed by formal political change. As the nature and distribution of violence itself transmutes through the transition, a frame of reference limited to the party-political sphere simply cannot come to terms with the complex relationship between political and criminal violence embedded in the seismic dislocations wrought by apartheid and their enduring impact down the years since 1994.

4. VIOLENCE IN TRANSITION

On reflection, the greater problem with the work of the Amnesty Committee may well have been that the obsession with individual accountability for the most severe human rights abuses was not offset by a broader historical process of truth recovery that engaged more substantially with the everyday systemic damage done to the social fabric of South Africa and the entrenched collective identities fostered by it. Instead, despite the anomalies embedded in the TRC's amnesty process – and the sometimes unfortunate implications for both the amnesty applicants and their victims – it is arguable that the nature of the political compromises that underpinned that process required that a clear distinction between political and criminal actors be made. The historical and current reality is, of course, both more complicated and less comforting than such a neat distinction implies. The fact is that twentieth century South Africa bore witness to a host of political and social movements that will never find a place in the lexicons of political orthodoxy: movements both politically articulate and chillingly anti-social; and movements

enraged by, and yet symptomatic of, the psychological damage caused by South Africa's particular patterns of dispossession and marginalisation. Perhaps the most striking of these movements are those that adopt the discourse and practices of social banditry. The resilient sub-culture of such movements is disturbing precisely because it tampers with the boundary between acquisitive crime and political nobility.²¹ It hovers ambivalently between an aspiration to social equality and anti-social violence, between disdain for the current order and contempt for social order in general.²² Youth-based social banditry in particular thrives in an environment of widespread upheaval associated with indiscriminate violence, coupled with sustained experiences of marginalisation and an absence of social justice or effective economic redress.

Although space does not allow for it here, an analysis of the trajectories of youth violence in South African society, both before and after its formal democratisation and the constitutionalisation of its politics, illustrates very powerfully the *slide* that was often made by young marginalised men between involvement in political and criminal violence. Elsewhere, I have argued that, in reality, the experiences of marginalisation and alienation that shaped much of young men's engagement in political organisation and the violence of the liberation struggle during the 1970s and 1980s remain largely unchanged as a source of resilient identities that underpin the involvement of the present generation of young men in criminal gangs in the post-1994 period (Simpson, 2001).

In recent research undertaken at the Centre for the Study of Violence and Reconciliation in Johannesburg, comparable trends in the underpinnings of sustained violence present themselves in other arenas as well. Pervasive patterns of vigilante violence illustrate perfectly the continuity and change in activities that are deeply rooted in South Africa's political past, but which increasingly acquire new meaning in the context of popular 'private justice' responses to criminal activity (Harris, 2001a; Dixon & Johns, 2001). Ground-breaking research into the experiences of former combatants, including veterans of both the South African Defence Force (SADF) and the liberation armies, as well as former SDU members, powerfully illustrates the limits of reintegration and demobilisation and the long-term impact of experiences of marginalisation and alienation on these former fighters – many of whom have been 'redeployed' from the political struggle to the criminal underworld (Gear, 2002). Similar issues of continuity and change in organised criminal violence also present themselves in some single-sex migrant hostels, which were historically the organisational flashpoints of political conflict in the 1980s and 1990s.

In South Africa today, sustained racially and ethnically motivated hate crime is dramatically prevalent. Based on an exclusionary politics, the growth of xenophobia and violence directed at foreigners suggests that the nation-building endeavour may well have operated with exclusive rather than inclusive consequences (Harris, 2001b), leading to the development of a dangerous and damaging kind of *rainbow nationalism*. Discriminatory social attitudes remain entrenched and the patterns of violent crime that dominate the current South African landscape have become new vehicles for re-racialising and both physically and emotionally re-dividing the 'new' South Africa. Persistently high levels of violence have also resulted in the popular outrage that has driven the post-1994 government to retreat from many of its earlier commitments to the norms of due process, ostensibly in the name of a tougher 'law enforcement' approach to the fight against crime.

Finally, studies of ongoing patterns of violence in KwaZulu-Natal by Rupert Taylor (2001; 2002) confirm these trends on a regional basis, where it is clear that historical political conflicts have become endemic in 'warlord' fiefdoms and are premised as much upon material investment in ongoing conflict as a particular set of political power relations. For Ellis (1998), the persistence of such localised struggle is the product of a similar blending of politics and common acquisitive crime that historically underpinned much so-called Third Force violence, including that which was perpetrated by the layer of criminal middlemen who owed their existence to political patronage of militias, gangs and other organised crime interests. Indeed, he notes that '[t]he fact that local violence between competing factions is nowadays generally regarded as criminal rather than political in nature should not blind us to the fact that many of the participants are the same as those who were regarded as political actors when Apartheid was still in place' (Ellis, 1998: 297–8).

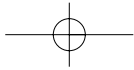
These patterns of violence in transition are further complicated by the dramatic failure of the criminal prosecutions of high-profile apartheid figures such as Wouter Basson (the former head of the apartheid government's chemical warfare programme) and Magnus Malan (a former minister of defence) who did not apply for amnesty through the TRC process. What this suggests is that we cannot afford to be naïve either about the prospects of other prosecutions succeeding or the suitability of the criminal law as a sufficiently sophisticated tool for doing justice in transitional societies. To the specific failure to bring such high-profile figures as Basson and Malan to justice must be added a number of more general weaknesses in the conduct of post-authoritarian government. These include the inability of criminal justice institutions to deliver an effective public service in the face of high

and sustained levels of violence, the non-delivery by government of any meaningful form of reparation to victims who did appear before the TRC,²³ and the fact that a range of socio-economic rights enshrined in the new Constitution have remained abstract and unrealisable, despite the new government's oft-repeated promise of 'a better life for all'.

5. CONCLUSION

It is patently obvious that the sustained fault-lines in South Africa's social fabric cannot be attributed to any specific failings or operations of the TRC. However, there are challenges implicit in this analysis of South Africa that may well serve to enable others who – confronting comparable social and political dilemmas – contemplate similar transitional justice arrangements. To remedy some of the limitations of South Africa's approach to transitional justice in dealing with emerging patterns of violence, others might consider linking that process with a range of other strategies, including a more carefully planned package of measures for redress and reparation for the victims of human rights violations, the closer integration of prosecution mechanisms in the criminal justice system, clearer links with programmes of institutional transformation and a higher and more sustained level of investment in civil society organisations that are critical to the work of repairing the social fabric of a divided and traumatised society.

Whatever the failings of the new democratic government to anticipate and deal with the shifting patterns and root causes of violence by implementing effective transformation and delivery programmes, this chapter's critique of the TRC's amnesty process also offers some insights into the dangers of an engagement with politics that is conveniently suspended at an ideological or party-political level. Such a narrow engagement with the experiences of privilege and powerlessness embedded in South African society fails adequately to scrutinise the ongoing processes of marginalisation (entrenched in institutional practice) that shape the resilient anti-social identities that have become such a feature of contemporary South African society. From this perspective, it is most important that any retrospective justice initiatives avoid detaching their engagement with past conflicts from the forward-looking objective of driving change within the criminal justice system. But if transmuting forms of violence in a transitional democracy are to be addressed strategically, the creation of appropriate processes of transitional justice and the reform of criminal justice must, in turn, be matched by effective programmes of social justice aimed at redressing sustained social and economic inequalities.



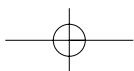
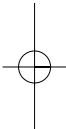
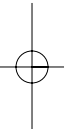
The above analysis has far-reaching implications for how we understand the roles and challenges of transitional justice interventions, including the South African TRC. Such an understanding requires both a sophisticated analysis of the dangers of impunity and a healthy scepticism about the overstated claims that the restorative justice enterprise has worked neatly in preventing further violence through building reconciliation in South Africa. The TRC's amnesty process ultimately (and perhaps inevitably and understandably) denied apartheid's 'common criminal' any form of redress, while the political assassin or torturer was indemnified. Seen in this light, the very nature of the amnesty process may serve, in fact, to obscure rather than elucidate the fundamentally political underpinnings and character of the former's actions – a problem only exacerbated by the absence of effective social and economic justice measures designed to redress the historical race, gender and class-based inequalities that lay at the heart of the apartheid enterprise.

In his fascinating article on crime and politics, Stanley Cohen (1996: 2) anticipates the import – if not the content – of this analysis when he notes that 'transformations are occurring in the way in which political conflicts are understood and sought to be regulated. These transformations – even when exaggerated – call into question the boundary between crime and politics in more disturbing ways than criminologists imagined'.

Cohen begins his argument by mapping the ways in which 'the political' has been inserted into the study of crime and deviance. He points not only to the 'hidden politics of criminology' but also to the inherently political nature of crime (Cohen, 1996: 2–3). Distancing his arguments from 'embarrassing' notions of social banditry that romanticise criminals as 'outlaw/heroes', identify prisons as 'incubators of revolution' or celebrate the 'liberatory violence' of the *lumpen proletariat*, Cohen (1996: 4) nonetheless concludes as follows:

It is unfortunate, however, that the denunciation of these romantic excesses has led to a lack of sensitivity to the political edge that 'ordinary' crime might either take or be attributed with – especially outside its familiar western settings. The question of when crime can be seen as political remains as opaque as ever. We still have no satisfactory definitions of what is a political rather than an 'ordinary' crime, criminal, trial or prisoner.

However, having said this, he goes on to offer an important critique of attempts glibly to apply the criminal law model to political conflict, suggesting that the notion of human rights violations offers clearer criteria for dealing with acts of genocide,

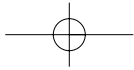


mass political killing, torture and extra-judicial execution. This is a particularly interesting observation considering the subsequent establishment of the International Criminal Court under the Rome Statute, which innovates precisely in extending the definition of crimes against humanity to include such acts as rape and sexual violence that have traditionally been seen as falling within the realm of 'ordinary' crime.

Yet, in moving from an analysis of how politics intrudes into our definitions of crime to one which focuses on how crime features in contemporary political discourse, Cohen makes the critical point that the imperative also shifts from accepting that the dividing line between politics and crime is inevitably blurred, to one that demands that we *must* distinguish between the two if democracy is to be secure and sustainable. The alternative, he argues, is that a crime-driven discourse of 'public order' may easily come to dominate and trump commitments to human rights principles, particularly – but not exclusively – within embryonic democracies (Cohen, 1996: 7–18). Thus, Cohen argues that it would be 'banal' merely to conclude that the boundaries between crime and politics are more complex than criminologists imagined in the past. By the same token, he also rejects the post-modernist conclusion that, beyond a study of the various discourses about crime and politics, no distinction between them is possible. So, when he asks whether 'we really want a social order where there is no distinction between the two', he answers thus:

The atrocities that have become daily life in so many parts of the world are an appalling expression of *precisely* the obliteration of any distinction between political dispute and criminal violence. For these countries, the remote prospect of democracy lies in a radical *separation* between crime and politics. This is one way of expressing the ideal of civil society. ... We were right ... not to separate the study of crime from 'the workings and theory of the state'. But a world in which politics and crime become indistinguishable is something else (Cohen, 1996: 19; original emphasis).

Unfortunately, despite his great insight, Cohen's conclusion still begs the question of how – beyond the imperative that it must be done – this distinction is to be made and sustained in practice. Indeed, his failure to engage with patterns of continuity and change in the nature of violence through the transition to, and consolidation of, embryonic democracies leaves his conclusion somewhat incomplete. In contrast to the conceptual examination offered by Cohen, the empirical study of violence from below suggests further complications by revealing, for example, the more complex



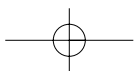
ingredients that make up social banditry, in which many of the protagonists gravitate between the two under-worlds of political and criminal violence.

The fundamental challenge confronting criminologists, criminal justice reformers and transitional justice practitioners alike is to better integrate the analysis of criminal violence and strategies for criminal justice transformation into a wider engagement with past human rights violations. Such integration cannot be achieved through the prism of state crime alone, for it must engage with the negative identities associated with the sustained marginalisation of ordinary people as well. More important still is the need to frame a discourse in which both transitional justice practitioners and criminal justice reformers embrace a social and economic justice agenda as the only vehicle through which volatile embryonic democracies will be able to sustain a principled distinction between political and criminal violence.

These are indeed the critical hurdles that face South Africa's ongoing consolidation of democracy beyond the politically negotiated peace settlement. The analysis presented here points to a sustained crisis in the credibility of the law itself, as well as for justice institutions in South Africa. And it is in this context that it is imperative to understand the nature and challenges of transitional justice, and its implications for South African society after the democratic elections of 1994. The question that must be asked is: How, in the context of what has been argued above, can such interventions contribute more proactively to rebuilding popular respect for the rule of law, transforming the institutions of criminal justice and confronting the sustained violence that continues to scar South Africa's new democracy?

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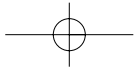
Notes

- 1 For a critical engagement with this debate, see Simpson and Van Zyl (1995); Simpson and Van Zyl (1997); Bassiouni and Joyner (1998); Minow (1998); Van Zyl (1999); Rotberg and Thompson (2000); Hayner (2001); Wilson (2001); and Simpson (2002).
- 2 The boundaries of this field of transitional justice are controversial. For some, it is exclusively concerned with truth-seeking mechanisms designed to deal with past violations of human rights. For others, transitional justice also entails concerns with domestic and international

prosecutions, an engagement with the issue of reparation for victims, and/or broader issues of national reconciliation and institutional reform.

- 3 For a slightly more generous view of the TRC and a fuller discussion of the notion of restorative justice in this context, see Villa-Vicencio (2003) and Zehr (1997).
- 4 Posel and Simpson (2002) note the irony that the renewed political confidence in the pursuit of truth manifested in the establishment of the TRC has emerged at a time when many historians – rushing to embrace post-modern theories in the ascendancy elsewhere in the academy – have abandoned it as a fruitless and impossible project. Indeed, the growing global enthusiasm for truth commissions represents a reassertion not merely of the possibility, but also the profound political importance, of uncovering objective historical truth as a route to resolving conflict and doing restorative justice in societies emerging from authoritarian and violent pasts. The nature and consequences of the truth-finding enterprise in such societies are placed in context by Felipe Fernandez-Armesto (1998: 3), when he laments that, ‘trapped between fundamentalists who believe they have found truth, and relativists who refuse to pin it down, the bewildered majority in between continues to hope there is a truth worth looking for, without knowing how to go about it or how to answer the voices from either extreme’.
- 5 Constitution of the Republic of South Africa Act 200 of 1993.
- 6 Section 20(7)(a) of the Act went on to extend this indemnification to all institutions or persons who would otherwise have incurred vicarious liability for the applicant’s wrongdoing. This is particularly significant, as this had the effect of indemnifying both the state for the actions of its agents, as well as political parties or organisations for the actions of their members. In 1996, the Constitutional Court upheld this provision in the AZAPO case referred to earlier.
- 7 Although there was technically only one Amnesty Committee, in practice, the number of applications demanded that several committees were set up and ran concurrently. This only served to exacerbate the problems created by the lack of any settled system of precedent, since one committee paid little or no attention to the reasoning or findings of the others.
- 8 Only 362 amnesty applications were refused after a public hearing. In a further 139 cases, amnesty was granted for some incidents but refused for others. There were 258 amnesty applications that were entered and then withdrawn without being adjudicated, 40 duplicate applications, one case where amnesty was not applicable due to the applicant having been acquitted in a criminal trial, and six cases where amnesty was granted for certain incidents, but the application withdrawn for others.
- 9 A further 658 applicants were refused on the basis that the incidents fell beyond the cut-off date for amnesty, while 196 failed to specify any relevant offence and a further 409 applications were deemed to be defective or incomplete. It is extremely frustrating, and somewhat bizarre, that the precise racial and gender profile of successful and unsuccessful applicants is nowhere to be found in the TRC’s final report.

- 10 The sector hearings were limited in scope and somewhat selective in their coverage. Their outcome was largely inconclusive and they arguably had little in the way of institutional impact.
- 11 In passing, it is impossible to resist the comment that there were of course those – particularly on the white right of the political spectrum – who considered the TRC process itself to be an elaborate, politically motivated witch-hunt. That said, the evidence of a man mixing concoctions to poison his political enemies that was presented at the trial of Wouter Basson, the government chemist, makes it tempting to conclude that a certain amount of ‘witch-sniffing’ was indeed an essential element in the TRC’s investigations.
- 12 See the final report of the Amnesty Committee (TRC, 2003, chap. 3: 45) for references to the treatment of these cases in the commission’s interim report and for the point that there were also analogous cases to these involving the killing of black people by members of the white right-wing organisation, the Afrikaner Weerstandsbeweging (AWB).
- 13 For a further discussion of cases dealing with racially motivated killings, see Wilson (2001: 84–92).
- 14 One of the most revealing and moving cases in this respect involved the murder of student activist Sicelo Dlhomo, who, it turned out in the course of an amnesty application, was murdered by his own comrades in the belief that he was a spy. Yet even after the confession of his murderer, one of the TRC investigators on the case concluded that ‘[w]e know who killed Sicelo Dlhomo, but we still really don’t know why’ (Pigou, 2002a). It was also alleged that it was his killer rather than Sicelo Dlhomo who was the spy, but the applicants were still granted amnesty for his killing. More generally, it is clear that the quality of ‘disclosure’ in amnesty cases was dependent on the quality or presence of legal counsel for the victims or their families (Pigou, 2002b).
- 15 Amnesty Decisions for applications 1051/96 and 1050/96. In fairness to the committee, it must be acknowledged that the organisation allegedly consisted of no more than four members: the applicants Du Plessis and Van Wyk and two others who had died in the course of the incident for which amnesty was being claimed.
- 16 Amnesty decisions for applications 80/96 and 81/96.
- 17 Amnesty decision for applications 126–137/96.
- 18 Amnesty decision for applications 63–65/96. After being stabbed to death, Mxenge was disembowelled and action taken to disguise his assassination as a case of robbery. It is also worth noting, as Saino (1998) points out, that neither of the senior officers identified by Coetzee as having issued the ‘order’ leading to Mxenge’s death was called to give evidence at the hearing, but both denied any involvement in the incident.
- 19 Amnesty decisions for applications 77/96, 78/96 and 87/96.
- 20 Amnesty decision for application 2586/95.
- 21 See Standing’s contribution to this volume for further discussion of social banditry in the context of gangsterism in the Western Cape.



- 22 I am indebted to Jonny Steinberg for some useful discussion on this, some of which was captured in a draft funding proposal for research on prison gangs to be conducted at the CSV, with which he is still occupied.
- 23 On 15 April 2003, President Thabo Mbeki announced government's commitment to paying R30 000 as a once-off payment to those people (approximately 19 000) who had been found to be victims through the workings of the TRC's Amnesty and Human Rights Violations Committees. This met with mixed public reaction, but victims groups rejected the gesture on the basis that it fell far short of the recommendations made by the TRC. Many civil society organisations also complained that this was a token gesture that not only failed to deal with the needs of the identified victims, but was also inadequate in dealing with the wider community-based experiences of victimisation under apartheid.

