South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation

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SOUTH AFRICA’S AMNESTY PROCESS: A VIABLE ROUTE TOWARD TRUTH AND RECONCILIATION?

Emily H. McCarthy*

The road to democracy for South Africa was based on compromise. One of the most significant compromises made by the negotiators was the acceptance of an amnesty process culminating in the passage of the Promotion of National Unity and Reconciliation Act of 1995. The Act grants full indemnity from criminal and civil prosecution to anyone affiliated with a political organization who committed an “act associated with a political objective” and who fully discloses all relevant facts. The purpose of the Act is twofold: to establish the “truth” about the apartheid past and to promote “reconciliation” among South Africans. Unfortunately, such goals are often in conflict. This Note examines the origin and nature of the Act, how it is being applied, and whether it is meeting the dual goals of “truth” and “reconciliation.”

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This Note is the product of research conducted in South Africa during the fall of 1996 and presented in March 1997 at the symposium, “Constitution-Making in South Africa,” held by the Michigan Journal of Race & Law. Where possible, I have updated information concerning post-March 1997 events. While in South Africa, I attended the amnesty hearings of five men who were members of the Northern Transvaal branch of the Security Police between 1986 and 1989: Brigadier Jack Cronje, Colonel Roelf Venter, Warrant Officer Paul van Vuuren, Captain Jacques Hechter, and Captain Wouter Mentz. Much of the discussion in Parts IV and V is based on testimony given at these hearings.

I would like to thank Professor David Chambers, who oversees the Michigan Law School’s semester in South Africa program, for his help as my faculty advisor. I would also like to thank Crystal Cambanis for her assistance during my internship at the law firm of Nicholls & Cambanis in Johannesburg during the fall of 1996. Finally, I would like to thank Lauren Francis, a recent graduate of the University of Michigan Law School, for her support and insight.
INTRODUCTION

The death of a despotic state is often slow and painful, and the state’s transition to democracy rarely follows a direct or smooth path. When South Africa found itself struggling to dismantle the apartheid regime and create an environment in which free and democratic elections could take place, the nation’s routes toward a peaceful settlement were limited. With military and economic power held primarily by the NP, the African National Congress (“ANC”) and other anti-apartheid organizations had little leverage in the negotiations process other than their sheer numbers and the support of the international human rights community. Desperate to avoid further bloodshed and to establish a constitution that would guarantee fundamental rights and receive the support of rival political factions, the negotiators were forced to make difficult compromises. One of the most significant compromises was made at “the twelfth hour” during the drafting of the interim Constitution in 1993, when an epilogue was added requiring Parliament to pass a law that would make amnesty available to all participants in South Africa’s political

1. The Human Rights Commission reported in a statistical summary that during the three-year period between July 1990 and June 1993, there were 9878 incidents of political violence in South Africa resulting in 9325 deaths. See HUMAN RIGHTS COMMISSION, SUPPLEMENT TO SPECIAL REPORT SR-13 (1994) [hereinafter HRC SUPPLEMENT].

2. Interview with George Bizos, Director of the Legal Resources Center of Johannesburg, South Africa, in Johannesburg, South Africa (Oct. 23, 1996) (on file with author). George Bizos, an advocate at the Legal Resources Center of Johannesburg, helped draft the interim and final Constitutions and the amnesty provisions of the Promotion of National Unity and Reconciliation Act of 1995. He described the decision to establish an amnesty process as the outgrowth of a political compromise made at the “twelfth hour” of grueling negotiations.

3. See infra text accompanying note 55.
war. This concession has been quite costly and controversial, and it is far from clear that the amnesty process will in fact lead to the “truth” about the apartheid past and promote “reconciliation” among South Africans.

This Note examines the amnesty provisions of the Promotion of National Unity and Reconciliation Act of 1995 to determine whether they can be interpreted and applied in a way that will effectively disclose the truth and simultaneously foster reconciliation. South Africa’s political leaders made two critical choices in deciding to offer amnesty in exchange for peace and truth about the nation’s past. The first was to accept the language of the epilogue to the interim Constitution which required the future democratically elected Parliament to pass an amnesty law. The second, made by an ANC-dominated Parliament in June 1995, was to pass the Promotion of National Unity and Reconciliation Act of 1995 ("Truth and Reconciliation Act"), which defines the scope and terms of the amnesty process. This Note begins by assessing the necessity of these decisions and their accompanying risks and alleged benefits.

The requirements for amnesty under the Truth and Reconciliation Act are marginal. In order to obtain amnesty, an applicant must prove a prior affiliation with a known political organization, demonstrate that he committed “an act associated with a political objective” between March 1960 and May 1994, and fully disclose all facts relevant to his political act. Applicants who satisfy these requirements receive protection from both criminal and civil liability. This Note critiques how these requirements have been applied and interpreted in some of the public hearings and decisions of the Amnesty Committee, and questions whether this amnesty process will ultimately foster “reconciliation.” With the aim of achieving a constructive balance between the Act’s dual goals of truth and reconciliation, this Note encourages the Amnesty Committee to interpret the three amnesty requirements narrowly in an effort to distinguish genuine political resistance from

4. The authors of the book RECONCILIATION THROUGH TRUTH define reconciliation as:

the facing of unwelcome truths in order to harmonise incommensurable world views so that inevitable and continuing conflicts and differences stand at least within a single universe of comprehensibility . . . Reconciliation . . . is thus a real closing of the ledger book of the past. A crucial element in that closing is an ending of the divisive cycle of accusation, denial and counter-accusation; not a forgetting of these accusations and counter-accusations, but more a settling of them through a process of evaluation . . .


indefensible human rights abuses. Such distinctions are not only permitted and arguably required by the Act, they are also essential to both the formation of a human rights culture in South Africa and the promotion of national unity among South Africans.

I. AMNESTY: THE BEST WAY TO SECURE PEACE AND CONFRONT THE PAST?

The Promotion of National Unity and Reconciliation Act established the Truth and Reconciliation Commission to investigate human rights abuses committed during the apartheid era.\(^6\) The Commission provides an amnesty process as a means to elicit the truth about South Africa's past.\(^7\) Although the amnesty process has been widely criticized,\(^8\) South Africa was not in a position to establish war crimes tribunals like those in Nuremberg or Tokyo.\(^9\) In contrast to the situations in Germany and Japan at the end of World War II, there was no clear victor in South Africa after apartheid. There was also no incriminating paper trail left behind by the NP as there had been by the Nazi Party.\(^10\) From the start of negotiations in 1990 until the elections of April 1994, the apartheid government retained considerable control over the country's military and economic resources and political violence still ravaged the provinces.\(^11\) Given the substantial risk of violent retaliation,\(^12\)

\(^6\) Id. at ch. 2.
\(^7\) Id. at ch. 4.
\(^8\) See discussion infra Part VII.
\(^9\) See ASMAL ET AL., supra note 4, at 18; Interview with George Bizos, supra note 2; Interview with Hanif Vally, Chief Legal Advisor to the Truth and Reconciliation Commission, in Cape Town, South Africa (Oct. 17, 1996) (on file with author). Justice Goldstone, member of the Constitutional Court in South Africa and prosecutor of the war crimes tribunal at the Hague, has also drawn this conclusion. Justice Goldstone, Address at the University of Witwatersrand (Nov. 11, 1996).
\(^10\) The apartheid government destroyed most of its documentation just prior to the elections. See Brigadier Cronje, Written Statement Submitted to the Truth and Reconciliation Commission 13 (Oct. 22, 1996) (unpublished manuscript, on file with author); see also Jeffrey Herbst, Truth May Do More Than Hurt as Apartheid Crimes Are Told, L.A. TIMES, Feb. 9, 1997, at M2 (noting that "[t]he protracted transition [from apartheid to democracy] afforded [the apartheid officials] plenty of time to destroy the paper trails leading to the brutality and bungling that were once so common").
\(^11\) Violence has been particularly prevalent in what are now referred to as the Gauteng and KwaZulu-Natal provinces. Of the 9325 deaths attributed to political violence between July 1990 and June 1993, 51.0% of these deaths occurred in Gauteng and 39.2% in KwaZulu-Natal. HRC SUPPLEMENT, supra note 1, at 5.
\(^12\) According to Dr. Alex Boraine, vice-chairman of the Truth Commission, negotiations between the apartheid government and the ANC would have collapsed and "hundreds, possibly thousands, more innocent people would have died" had the ANC not agreed to offer apartheid officials amnesty. Tony Freemantle, Crying for Justice, HOUS. CHRON., Nov. 17, 1996, at A1.
anti-apartheid organizations were hardly in a position to put the South African Police ("SAP") and the South African Defense Forces ("SADF") on trial for their human rights abuses. There was also the risk that many members of the SAP and SADF would simply flee the country as many Nazis had after World War II.

Not only were war crimes trials poorly suited to South Africa's situation, but they also consume an enormous amount of time and money, and their results are often disappointing. For example, the two ad hoc tribunals set up in the former Yugoslavia and in Rwanda cost approximately eighty million dollars a year, and have succeeded in holding only one trial in three years.13 Most of the Yugoslav and Rwandan war criminals remain free and are unlikely to be arrested or extradited for prosecution.14 In two years, the court in Rwanda has managed to indict only twenty-one people of a possible 400, and in three years, the tribunal for the former Yugoslavia has indicted only seventy-three people.15 The high cost and ineffectiveness of the tribunals have left the victims angry and weary.16

In light of these discouraging examples, anti-apartheid activists legitimately feared that criminal trials would produce few convictions. This was especially true in South Africa given the continuing presence of apartheid-era prosecutors and judges. In fact, in October 1996, well-known apartheid-era prosecutor Tim McNally failed to convict South Africa's former Defense Minister, Magnus Malan, for a series of apartheid crimes, including murder.17 This disturbing failure suggests that some of the offices of the attorneys general of South Africa are still sympathetic to the old regime and lack the objectivity to pursue the prosecution of former apartheid officials rigorously.18 South Africans are enraged that

14. Id.
15. Id.
16. Id.
17. Tim McNally served as a prosecutor during the apartheid regime and participated in the 1990 investigations of the Harms Commission that concluded there were no government death squads. His record as a prosecutor suggests a history of covering up the apartheid abuses of the SAP and SADF. It is alleged that his recent failure to convict former Defense Minister General Magnus Malan and 17 other members of the SADF and SAP resulted from McNally's refusal to call key state witnesses. See ANC: Strange That McNally Won't Prosecute, CITIZEN, Oct. 29, 1996, at 4; Farouk Chothia, Violence Victims Must Now Look to Civil Courts, BUS. DAY, Nov. 14, 1996, at 2. Malan was charged with the murder of thirteen people, including women and children, and the attempted murder of four others in the KwaMakutha massacre of January 27, 1987. HUMAN RIGHTS COMMITTEE, HUMAN RIGHTS REPORT 25 (Mar. 1996).
18. Of course, prosecutorial loyalty to the apartheid regime may manifest itself in failure to mount the strongest possible case against a former official, or failure to bring charges altogether, despite the weight of the evidence against such an official.
McNally’s six-month prosecution of Magnus Malan cost taxpayers R9 million and resulted in Malan’s acquittal. For the Commission, his acquittal “demonstrate[s] [the Commission’s] conviction that the processes of the Commission offer a better prospect of establishing the truth about [South Africa’s] past than criminal trials.”

The difficulty of bringing successful prosecutions in a criminal justice system largely controlled by members of the former apartheid regime is but one reason for choosing the truth and reconciliation route over war crimes trials. As the authors of a recent book about the Truth Commission, entitled Reconciliation Through Truth, explain:

a judicial process would have focused too much on the perpetrators to the exclusion of the victims; it would have overly individualised the horrors of apartheid and provided merely a piecemeal picture of the past, at the expense of necessary attention to its systemic and collective evils.

South Africa’s amnesty process is implicating more people in apartheid crimes and promoting more reconciliation than individual prosecutions would have allowed, given the latter’s narrow focus and emphasis on revenge and punishment. The victims of apartheid receive more attention in the amnesty hearings than they would during criminal proceedings, and many find their participation in the process cathartic. In addition, the report that the Truth Commission must issue at the end of its term will provide a more


21. ASMAL ET AL., supra note 4, at 19.

22. As of May 10, 1997, the Amnesty Committee had received 7700 applications. 7700 Amnesty Applications Received by Midnight Deadline Saturday, Reports from SAPA, May 10, 1997, available at <http://www.truth.org.za/sapa9705/s970510g.htm> [hereinafter Amnesty Applications].

23. For example, Thokozile Legina Dlamini found it helpful to the healing process to testify about a shooting that occurred in her house in which six Inkatha Freedom Party (“IFP”) youths, including her daughter, died. See ‘Why We Testified’—witnesses, TRUTH TALK, THE OFFICIAL NEWSLETTER OF THE TRUTH AND RECONCILIATION COMMISSION (Truth and Reconciliation Commission, Cape Town, South Africa), Nov. 1996, at 3.

24. The Commission is required to produce a final report three months after the Commission has completed its work. § 43(2) of Promotion of National Unity and Reconciliation Act 34 of 1995. The date was originally scheduled to be in March 1998, but it has been postponed until July 30, 1998, due to the large volume of applications.
detailed and comprehensive account of South Africa's past than any criminal court records could have provided.

There are other more practical justifications for an amnesty process. The prosecution of crimes committed during a thirty-year period would consume immense amounts of time and money from a new country struggling to rebuild itself. Civil actions for monetary damages likely would bankrupt political organizations and the newly elected government. Forcing the new democratic government to pay for the crimes of the apartheid regime would consume resources needed to improve the country's economy, housing, education, and health systems. In addition, there is the risk that criminal prosecutions would target not only apartheid supporters, but also "freedom fighters," which gave participants on all sides of the struggle a pragmatic reason to support an amnesty process.

Unlike criminal proceedings, South Africa's amnesty process forces the apartheid regime to admit its abuses publicly and requires perpetrators to reveal and discuss their crimes. Such confessions compel the White population to acknowledge the atrocities committed by the government they continuously re-elected. Victims of the apartheid struggle also benefit from the process by confronting their abusers, discovering what happened to their loved ones, and telling their own stories. Entire communities may benefit from the reparations process through improvements to their education and health services. The final report of the Truth Commission will create a public record of the human rights violations, the violators, and the victims of the apartheid struggle. As a result, no one will be able to make credible claims that the reported incidents never happened.

Unfortunately, the Truth Commission's record to date arouses skepticism about the likelihood of realizing these advantages. Though the Amnesty Committee had received roughly 3500 applications by December 1996, about eighty percent of them had come from prison inmates who had nothing to lose by applying. As of

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25. For a discussion of why South Africa's resources are better spent on building a solid future than compensating victims of the past struggle, see infra notes 82, 106.


May 10, 1997, the extended deadline for applications, the Committee had received over 7700 applications and was having trouble processing them all. The Committee’s size has been expanded from five to thirteen members, and the March 1998 deadline for the Committee’s report has been extended until July 1998. The NP has voiced its opposition to any time extensions of the amnesty process, and much of the public may find itself too emotionally exhausted to let the process continue much longer than scheduled.

In addition, relatively few applications have been received from senior members of the parties involved in the struggle. Some of apartheid’s key leaders, such as P.W. Botha, F.W. de Klerk, and former Minister of Defense, Magnus Malan, as well as the leader of the IFP, Mangosuthu Buthelezi, have refused to apply for amnesty and have insisted on their innocence. By contrast, more than forty senior ANC leaders, including Deputy President Thabo Mbeki, Defense Minister Joe Modise, and Justice Minister Dullah Omar, have applied for amnesty. President Mandela’s extension of the deadline for amnesty applications from December 14, 1996, until May 10, 1997 and his extension of the cut-off date for acts eligible

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31. See Amnesty Committee Faces Mammoth Task, Reports from SAPA, May 11, 1997, available at <http://www.truth.org.za/sapa9705/s970511a.htm> [hereinafter Mammoth Task] (noting that Amnesty Committee chairman Judge Hassen Mall was “not confident at all” that the Committee could process the applications in the 99 working days left before the Committee’s term ended in December 1997).


34. As of December 31, 1996, only two of the top leaders of the police and military had applied for amnesty: former law and order minister Adriaan Vlok, and former police commissioner Johan van der Merwe. Robert Brand, TRC Worried as Deadline for Amnesty Nears, STAR, Dec. 3, 1996, at 3. As of May 10, 1997, the final deadline for amnesty applications, only two former NP cabinet members had applied for amnesty, namely Vlok and Piet Koornhof. Mammoth Task, supra note 31.


36. See Amnesty Applications, supra note 22.

37. See Mammoth Task, supra note 31.

38. Lynn Duke, Mandela Buys Truth Commission; Amnesty-for-Testimony Offering Extended: Ex-General to Apply, WASH. POST, Dec. 14, 1996, at A21. Although only Parliament can extend the application deadline and the cut-off date, Parliament is expected to follow Mandela’s wishes by amending the Act. The Cabinet agreed to
for amnesty from December 6, 1993, until March 10, 1994\(^3\) may have brought forward a handful of prominent men such as the Conservative leader of the Freedom Front,\(^4\) but the vast majority of new applications came from lower-level officers and activists.\(^4\) However, the Committee is beginning to hear disclosures from amnesty applicants that are helping to solve past crimes\(^4\) and implicating some of the top apartheid leaders.\(^4\)

Many of the “acts” the Amnesty Committee has considered since it began sitting in May 1996 have involved known crimes.\(^4\) This fact is disappointing given that one of the main justifications for granting full criminal and civil indemnity is to uncover the “truth” about the past. Letting the perpetrators of known crimes go free does nothing to advance the goal of truth and often evokes feelings of bitterness rather than reconciliation. Victims have found the hearings particularly frustrating because they are seeking new information about the fate of their loved ones, the whereabouts of

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40. See id. General Constand Viljoen, leader of the Freedom Front and former commander of the armed forces under apartheid, wanted to apply for amnesty for plotting a coup against democracy in the spring of 1997, but was barred by the December 6, 1993, cut-off date. Now that the date has been extended, he intends to apply for this act only. Id. He believes it is not “necessary” for members of the SADF to request amnesty for acts committed under “lawful orders” during “genuine military operations.” Viljoen Says He Won’t Apply for Amnesty from the TRC, STAR, Nov. 18, 1996, at 2.

41. While the vast majority of applications filed just before the May 10, 1997, deadline came from anti-apartheid activists, only 20 to 30 of them came from former apartheid police and defense force members. See Amnesty Applications, supra note 22. Over 375 ANC applications and at least 140 Pan African Congress (“PAC”) applications were submitted in time for the May 10, 1997, deadline, but neither the 500 applications promised by the ANC’s KwaZulu-Natal structure, nor the 100 applications expected from the IFP materialized before the deadline passed. See ANC Submits Amnesty Applications in Box, Reports from SAPA, May 10, 1997, available at <http://www.truth.org.za/sapa9705/s97051c.htm>; Applications Reach 7000 Mark, Reports from SAPA, May 10, 1997, available at <http://www.truth.org.za/sapa9705/s97051d.htm>.

42. By the end of January 1997, the Amnesty Committee had received 135 confessions from former apartheid policemen regarding over 200 murders. South African Police Admit to 200 Apartheid-Era Killings, Agence France Presse, Jan. 30, 1997, available in LEXIS, World Library, AFP File.

43. On some occasions, these instructions came from the highest ranking officials, including P.W. Botha. Cronje, supra note 10, at 7.

their remains, and the names of those responsible,\textsuperscript{45} rather than confirmation of what they already know. In addition, it is estimated that the reported incidents will expose only twenty percent of apartheid’s worst crimes.\textsuperscript{46} Many South Africans may conclude that listening to emotionally grueling testimony for a year and a half and watching violent criminals go free was too high a price to pay for such a small percentage of the “truth.”\textsuperscript{47}

Many victims would rather see their abusers pay for their crimes through prison time and monetary damages and have actively opposed their abusers’ amnesty applications.\textsuperscript{48} Unfortunately, victims and their families must wait until at least July 1998 to see if the Commission’s final report designates them as “victims of gross human rights violations” entitled to reparations.\textsuperscript{49} Victims must then wait until the President reviews the report and Parliament passes implementing regulations.\textsuperscript{50} Given the government’s budgetary problems, victims are likely to find what reparations they do receive grossly inadequate. Without sufficient reparations, victims may question the value of the amnesty process, as “truth” alone hardly compensates for or relieves their suffering. Many South Africans, including one spokesperson for the Azanian People’s

\textsuperscript{45} Id.

\textsuperscript{46} Journalist Max Dupre made this estimate during a National Public Radio broadcast. All Things Considered (NPR radio broadcast, Dec. 13, 1996).

\textsuperscript{47} Every Sunday evening, the media televises a 30-minute program showing the highlights of the amnesty hearings in which applicants explicitly discuss their crimes and victims describe their ordeals. Jonathan Steele, Mandela: Three Years On, OBSERVER, May 4, 1997. One conservative editorial noted that “[i]t would be difficult to imagine anything more calculated to exacerbate race relations and create hatred among blacks who daily hear of the atrocities committed by the white security forces.”

\textsuperscript{48} Gwen Baragwanath, TRC Exacerbating Race Relations, CITIZEN, Nov. 22, 1996, at 19.

\textsuperscript{49} For example, Mrs. Elizabeth Maake opposed Officer van Vuuren’s amnesty application regarding the murder of her 18-year-old son in 1987. She contested that van Vuuren’s claim that her son was a double agent for the SAP and the ANC and dismissed his testimony as “complete lies.” Testimony of Brigadier J. Cronje, Colonel R. Venter, Captain J. Hechter, Captain W. Mentz, and Warrant Officer P. van Vuuren Before the Amnesty Committee (Oct. 22–Nov. 1, 1996) (unpublished transcript, on file with author) [hereinafter Testimony of Security Police]. For a description of the murder of Jackson Maake and his mother’s opposition, see infra text accompanying notes 228–245.

\textsuperscript{49} According to § 26(1) of the Promotion of National Unity and Reconciliation Act 34 of 1995, any person who believes he or she has suffered harm as a result of a gross violation of human rights may apply to the Reparations and Rehabilitation Committee for reparations. By reparations, the Act does not contemplate the kind of compensation a court would order, but rather some rehabilitative measure for the victim, his or her family, or the community. Such measures could include on-going traumatic stress counseling, funding for the education of the children of the victims, or the building of a school or community center. See § 26(1) of Promotion of National Unity and Reconciliation Act 34 of 1995.

\textsuperscript{50} § 27 (1)–(3) of Promotion of National Unity and Reconciliation Act 34 of 1995.
Organization ("AZAPO"), a predominantly Black anti-apartheid movement, already question the process and believe it shows that "[t]he government has seen fit to sacrifice black people for the false and flimsy peace of the white power structures."\(^{51}\)

It is difficult to declare unequivocally that an amnesty process and a truth commission constituted the best way for South Africa to secure peace and confront its past. There are risks associated with choosing amnesty proceedings: (1) many of the worst human rights abusers will not come forward; (2) some of apartheid's most heinous crimes will remain unsolved; (3) without substantial reparations, victims will become more embittered rather than less; and (4) South Africans from all ethnic and political groups will question the legitimacy of their democratic government and find reconciliation impossible without receiving some form of justice. Though these risks are daunting, there were equally high if not higher risks associated with establishing an international war crimes tribunal or pursuing domestic prosecutions. Now that the deadline for amnesty applications has passed, South Africa's Minister of Justice has declared the attorneys-general "duty-bound to prosecute perpetrators of apartheid-era crimes who have not applied" to the Amnesty Committee "if sufficient evidence for a case to be made exist[s]."\(^{52}\)

The Human Rights Commission of South Africa "urges the Truth and Reconciliation Commission to throw its weight behind the prosecuting authorities in bringing to account those responsible for undeclared human rights violations."\(^{53}\) Given the political choices facing South Africa and its military and financial realities, this Note concludes that some form of an amnesty process was the most viable means of bringing the nation to terms with its past and securing peace and democracy for the future.

II. THE TRUTH AND RECONCILIATION ACT: A WISE OR NECESSARY INTERPRETATION OF THE EPILOGUE TO THE INTERIM CONSTITUTION?

During the final drafting of the interim Constitution in 1993, the negotiators agreed to commit South Africa to an amnesty process in order to secure passage of the much awaited Constitution.\(^{54}\) This commitment was incorporated into the epilogue of the interim


\(^{54}\) Interview with George Bizos, supra note 2.
Constitution, which explicitly requires Parliament to pass an amnesty law without prescribing a particular amnesty process.

This Constitution provides a historic bridge between the past of a deeply divided society characterized 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 victimization.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses 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.55

The idea expressed in the epilogue originated in early 1990 when de Klerk's government agreed to consider the release of

55. S. AFR. CONST. of 1994 National Unity and Reconciliation (emphasis added).
political prisoners who had been convicted of common law crimes.56 The government began formally discussing the release of political prisoners with the ANC at Groote Schuur in May 1990. In the Groote Schuur Minute that came out of the meeting, the parties agreed that political prisoners would be released and established a working group that would make recommendations on how to define political prisoners and establish procedures for their release.57 The Indemnity Act of 199058 and the November 1990 Guidelines for Defining Political Offences in South Africa,59 issued by the apartheid government, adopted many of the working group's recommendations,60 many ANC prisoners were released under their terms and those of subsequent regulations61 issued by the apartheid government.62 The Act offered either temporary immunity or permanent indemnity to persons who committed political acts prior to October 8, 1990, and who were in prison, undergoing prosecution, or likely to face prosecution in the future. Many political exiles sought and obtained temporary immunity from prosecution to permit their safe return to South Africa.63

The 1990 indemnity provisions were passed under the rationale that effective political negotiations between the apartheid government and its opposition could not take place without releasing anti-apartheid leaders from prison and allowing prominent political exiles to return. This rationale differs markedly from the rationale behind the amnesty provisions of the Truth and Reconciliation Act. These amnesty provisions are designed to encourage people to come forward and disclose the criminal acts that they committed during the apartheid era so that the nation may know the truth about its past. Without the inducement of indemnity from criminal and civil liability, few people would voluntarily reveal such information. While members of the resistance movement, many of whom had

59. GN R2625 of 7 November 1990.
60. See discussion of the working group's recommendations, infra notes 146, 147, 150.
62. Under de Klerk's program of general remission for first-time offenders, an estimated 60,000 prisoners were released. Keightley, supra note 56, at 349 n.89. These figures "probably incorporated all those released under three separate amnesties on 10 December 1990, 30 April 1991, and 1 July 1991." Id.
63. For instance, the apartheid government granted temporary immunity from prosecution to 117 formerly exiled ANC members. HUMAN RIGHTS COMMITTEE, HUMAN RIGHTS REPORT 32 (May 1995).
only committed the “crime” of opposing the apartheid government, primarily benefited from the Indemnity Act of 1990, members of the SAP and SADF who committed atrocious crimes in the name of the NP are likely to benefit most from the amnesty provisions of the Truth and Reconciliation Act. In effect, the concept of indemnity or amnesty, once used to rectify injustices committed against the ANC, has become a mechanism for ensuring that many of apartheid’s functionaries will never have to pay for those injustices.

As negotiations between the apartheid government and the resistance movements led by the ANC progressed during 1991 and 1992, the idea of a political amnesty became a much discussed component of a political settlement. In October 1992, the resistance movement asserted that it would not accept a settlement predicated on the apartheid government granting its officials a blanket, automatic amnesty. That same month, the apartheid government had passed the Further Indemnity Act of 1992 which gave de Klerk almost unlimited discretion to grant amnesty to whomever he chose. This Act sent a warning to the resistance movement that the apartheid government was attempting to achieve reconciliation through a forgetting of the past and an exoneration of apartheid functionaries. Throughout the constitutional negotiations of 1993 and the parliamentary debates of 1994 and 1995 which led to the passage of the Truth and Reconciliation Act, the NP continued to demand an automatic amnesty for members of the apartheid regime. In the end, the NP’s pressure resulted in the inclusion in the interim Constitution of the requirement that Parliament pass an amnesty law, but the resistance movement managed to defeat the Party’s attempts to secure a general automatic amnesty in the text of the interim Constitution and the Truth and Reconciliation Act.

When it came time to establish the required amnesty law, members of the new Cabinet and Parliament found themselves deeply divided. Getting the Act passed took months and required intense debates and tough compromises. The length of time needed
to pass the Act reflects the contentious nature of its provisions. Some of the more controversial issues surrounding the amnesty provisions were: who should be eligible for amnesty; how to define “acts associated with a political objective;” whether perpetrators who made full disclosure would receive an automatic amnesty; and whether the amnesty hearings would be open to the public. At one stage, the NP’s opposition to public amnesty hearings led to a Cabinet compromise that the hearings would be closed to the public. The Act which eventually passed in June 1995 kept the amnesty hearings open to the public unless the Committee determined that it would not be safe or “in the interest of justice” to hold a public hearing. Had Parliament succumbed to the pressure of the NP and permitted closed hearings, it would have undermined the whole purpose of the Truth and Reconciliation Act which is to expose the truth to the general public.

The drafters, who included prominent advocates such as George Bizos and Wim Trengove from the Legal Resources Center, wanted to ensure that the Truth Commission, particularly its Amnesty Committee, would have real power, and that the amnesty criteria would not be mere formalities but would have “teeth.” Although the Truth and Reconciliation Act does not offer a blanket amnesty, the amnesty it provides is quite broad. Pursuant to the epilogue’s vague instruction that amnesty be granted for “acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past,” Parliament established three relatively simple criteria for amnesty applications. In order to obtain amnesty, an applicant must fall within one of several categories of eligible applicants, demonstrate that he has committed “an act associated with a political objective” between March 1, 1960, and May 10, 1994, and fully disclose all the relevant

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70. See MONTHLY REPORT 1–2 (Nov. 1994), supra note 69.

71. § 33(1)(b)(i) of Promotion of National Unity and Reconciliation Act 34 of 1995.

72. Interview with George Bizos, supra note 2.

73. See discussion infra Part III.

74. See discussion infra Part IV.
facts pertaining to this "political" act. If an applicant satisfies these three requirements, he is entitled to a grant of amnesty that will indemnify him against all criminal and civil liability arising from the "political" act.  

The effect of a grant of amnesty depends on whether the applicant had been convicted of a crime or held liable for a civil judgment. If an amnesty recipient has already been convicted and sentenced for a crime, the conviction is erased from the record and the applicant is released from jail immediately. If a civil judgment has already been entered against the applicant and the applicant subsequently receives amnesty, the civil judgment remains valid and the applicant must comply with its terms. If the applicant faces criminal prosecution, the prosecution is usually postponed until the outcome of the amnesty proceedings; if the applicant receives amnesty, the prosecution is dropped. If the applicant has been sued for civil damages, the judge overseeing the civil case has the discretion to postpone the proceedings until the Amnesty Committee has reached a decision. Should the applicant receive amnesty during a postponement, the civil case is dismissed and the victim is barred from recovering any civil damages from the applicant.

Although the amnesty provisions of the Act offer both criminal and civil indemnity to human rights abusers, nothing in the language of the epilogue required this, and other sections of the interim Constitution arguably forbid it. In Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa, several victims of the apartheid struggle challenged the criminal

75. See discussion infra Part V.
76. § 20(7)(a) of Promotion of National Unity and Reconciliation Act 34 of 1995.
77. Id. §§ 20(8), (10).
78. Id. § 20(9).
79. Id. §§ 19(7), 20(8).
80. Id. § 19(6).
81. Id. § 20(7)(a).
83. Those bringing the case included the families of Steven Biko, Griffiths Mxenge and Fabien and Florence Ribeiro. Steven Biko, leader of the Black Consciousness Movement, was taken into custody by the SAP in early September 1977 in Port Elizabeth. He was driven, naked, and unconscious in the back of a Land Rover from Port Elizabeth to Pretoria prison, a distance of 750 miles, and died on Sept. 12 from brain damage. Tony Freemantle, Crying for Justice; Widow of Steven Biko Has Not Found Rest, HOUS. CHRON., Nov. 18, 1996, at A13. Griffiths Mxenge was an ANC human rights lawyer from Durban killed in 1981 by members of Vlakplaas, including Dirk Coetze, Almond Mofomela, and David Tshikilange. The Durban High Court convicted the three men for Mxenge's murder on May 15, 1997, but on August 4, 1997, they were granted amnesty. The family of Mxenge is seeking a review of the case and a recusal of the whole amnesty committee. Coetze gets amnesty, but Mxenge murder
and civil indemnity provisions of the Truth and Reconciliation Act as violations of section 22 and section 35(1) of the interim Constitution. Section 22 provides that “[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum.” Section 35(1) requires all South African courts to consult applicable international law when interpreting the Bill of Rights of the Constitution, which includes section 22. The petitioners in the AZAPO case argued that the Amnesty Committee was neither “a court of law” nor an “independent forum” as required by section 22 and therefore the Committee was not authorized to settle “justiciable disputes.” In addition, the petitioners claimed South Africa had international legal obligations under the Geneva Conventions of 1949 and Protocol I of 1977 to prosecute “war crimes, crimes


84. S. AFR. CONST. § 22 (1994).
85. Id. § 35(1). This section permits, but does not require, courts to consult comparable foreign case law as well. According to § 39(1)(b)-(c) of the final Constitution, courts “must consider international law” and “may consider foreign law.”
86. AZAPO, 1996 (4) SALR at 681.
against humanity, crimes of apartheid and crimes of genocide.\textsuperscript{89} The Constitutional Court rejected both of petitioners' arguments, holding that the amnesty provisions violated neither section 22 nor applicable international law under section 35(1).\textsuperscript{90}

The Court's analysis of South Africa's international legal duties was both dismissive and slightly disingenuous. The Court concluded that the Geneva Conventions of 1949 and Protocol I did not apply to the apartheid struggle\textsuperscript{91} even though Protocol I refers explicitly to apartheid as a "grave breach"\textsuperscript{92} and the U.N. General Assembly had passed resolutions urging states to apply the Geneva Conventions to persons in the struggle against apartheid.\textsuperscript{93} The Court pointed to the different truth and reconciliation approaches adopted by Chile, El Salvador, and Argentina as evidence that international law does not forbid South Africa's amnesty process.\textsuperscript{94} However, the Court failed to mention that in 1992, the Inter-American Commission on Human Rights ruled that the amnesty laws in El Salvador, Argentina, and Uruguay violated international

\begin{itemize}

  \item \textsuperscript{90} Azanian Peoples Org. (AZAPO) v. President of Republic of South Africa, 1996 (4) SALR 671, 691–93 (CC).

  \item \textsuperscript{91} Id. at 689 n.29.

  \item \textsuperscript{92} Protocol I, \textit{supra} note 88, art. 85(4)(c) (defining grave breaches to include "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination"); Applicants' Heads of Argument, \textit{supra} note 88, at 22.


  \item \textsuperscript{94} \textit{See} Applicants' Heads of Argument, \textit{supra} note 88, at 22–23.
\end{itemize}
law and that Chile’s amnesty decree barred only criminal prosecutions, not civil damage actions by victims. More importantly, the fact that other countries have violated their international duty to prosecute war crimes by passing sweeping amnesty laws does not render South Africa’s amnesty process valid under international law.

Like the Constitutional Court, the authors of Reconciliation Through Truth defend South Africa’s amnesty process on the basis of “the diversity of approaches” nations have pursued in order to come to terms with their past. The authors claim that nothing in international law obliges states to prosecute human rights abusers when doing so would risk “reducing the body politic to ashes.” This contention contradicts the finding of the Inter-American Commission on Human Rights that El Salvador’s amnesty violated El Salvador’s international legal obligations “regardless of any necessity that the peace negotiations might pose.” Diane Orentlicher agrees with the authors of Reconciliation Through Truth that “international law does not... require states to take action that poses a serious threat to vital national interests,” but she adds that “a state cannot evade its duty to punish atrocious crimes merely to appease disaffected military forces or to promote national reconciliation.” While it is quite possible that South Africa would have gone up in flames in 1993 if the resistance movement had not agreed to some form of amnesty process, it is less clear that the ANC-dominated Parliament’s decision to pass a sweeping amnesty law in June 1995 and the Amnesty Committee’s current decisions to release brutal murderers from jail were necessary to ensure South Africa’s survival. Since these latter decisions seem to be motivated more by concerns for political expediency and national reconciliation, they render the Constitutional Court’s finding that


96. See Jorge Mera, Chile: Truth and Justice Under the Democratic Government, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, supra note 64, at 171, 179. The Chilean decree granted amnesty for crimes, including “all murders, mayhem, batteries, unlawful detention, kidnappings, disappearances, and torture committed by agents of the state during the period of martial law imposed after the coup, which lasted from September 1973 until March 1978.” Id. at 179.

97. ASMAL ET AL., supra note 4, at 20.

98. Id.

99. Margaret Popkin, El Salvador: A Negotiated End to Impunity?, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, supra note 64, at 198, 212.

100. Orentlicher, supra note 89, at 2595.
international law permits South Africa’s broad amnesty provisions questionable.

The Constitutional Court’s conclusion that the amnesty provisions do not violate the terms of the interim Constitution is also subject to criticism on substantive constitutional grounds. Granting criminal and civil indemnity to human rights abusers arguably violates the section 22 right of every South African “to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum.” The Constitution does not tolerate this kind of violation unless, as section 33(2) explains, some other provision in the Constitution permits the violation, or the violation can be justified under section 33(1) as “reasonable and justifiable in an open and democratic society based on freedom and equality.”

The Constitutional Court found that the epilogue of the Constitution permitted the section 22 violation and therefore concluded that the Court did not need to do a section 33(1) analysis. The key issues in the AZAPO case were whether the Constitution authorized Parliament to indemnify individuals from both criminal and civil liability and to indemnify the state of any potential civil liability. The Court held that the epilogue gave Parliament constitutional authority to pass these broad amnesty provisions because the epilogue envisioned an amnesty “in its most comprehensive and generous meaning” in order to promote national union and reconciliation.

Justice Mohamed, the author of the AZAPO opinion, concedes that the negotiators of the Constitution, the leaders of the nation, and ultimately Parliament did have choices and could have drafted an amnesty law in many different ways:

[t]hey could have chosen to insist that a comprehensive amnesty manifestly involved an inequality of sacrifice

102. Id. § 33(1), (2).
104. See id. at 683–91. The Court concludes that this type of amnesty is permissible under the Constitution and that international law is therefore irrelevant to the constitutional inquiry. The Court goes on to say that even if international law were relevant to the constitutional analysis, indemnifying persons from criminal liability is permissible under international law.
105. Id. at 691–94. The Court rejects the argument that § 20(7) violates the victim’s right to recover damages from a wrongdoer for unlawful acts committed between 1960–1993.
106. Id. at 694–97 (Concluding that Parliament was authorized by the Constitution to relieve the state of any civil liability especially given South Africa’s scarce resources).
107. Id. at 698.
between the victims and the perpetrators of invasions into the fundamental rights of such victims and their families, and that, for this reason, the terms of the amnesty should leave intact the claims which some of these victims might have been able to pursue against those responsible for authorising, permitting or colluding in such acts, or they could have decided that this course would impede the pace, effectiveness and objectives of the transition with consequences substantially prejudicial for the people of a country facing, for the first time, the real prospect of enjoying, in the future, some of the human rights so unfairly denied to the generations that preceded them . . . . They could conceivably have chosen to differentiate between the wrongful acts committed in defence of the old order and those committed in the resistance of it, or they could have chosen a comprehensive form of amnesty which did not make this distinction.\textsuperscript{108}

The Constitutional Court unanimously concluded that Parliament was entitled to make the choices that it did: to indemnify amnesty recipients against both criminal and civil liability even though such indemnity deprives victims of their rights; to make all wrongful political acts eligible for amnesty regardless of the political affiliation of the actor; and to indemnify the state against all civil liability arising out of such acts even when the state is the only potential source of financial compensation for the victims. Because nothing in the language of the epilogue compelled the Court to reach this result, the Court's conclusions were clearly based on political rather than legal grounds. For this reason, many, including the author of this Note, still question the necessity and appropriateness of these conclusions.

III. Who Should Be Eligible for Amnesty?

One of the choices that faced the drafters of the Truth and Reconciliation Act was who should be eligible for amnesty. According to section 20(2), a person is eligible for amnesty if he or she "advised, planned, directed, commanded, ordered or committed" an "act associated with a political objective"\textsuperscript{109} "within or outside the Republic"\textsuperscript{110} during the period between March 1, 1960, and May 10,

\textsuperscript{108. Id.}
\textsuperscript{109. See discussion infra Part IV.}
\textsuperscript{110. Section 20(2) makes eligible for amnesty acts that were committed or planned "within or outside the Republic." § 20(2) of Promotion of National Unity and
1994, and he or she fits into one of the group of persons defined in subsections 20(2)(a)-(g). The Act explicitly makes eligible all persons who were in any way involved in the commission of a political act that constituted a criminal offense or delict. The people who gave orders and those who followed them are equally eligible for amnesty.

Subsections 20(2)(a)-(g) list the seven groups of persons eligible for amnesty. The first eligible group of persons includes "any member or supporter of a publicly known organisation or liberation movement" who either planned, ordered, or committed a political act "on behalf of or in support of such organisation or movement, bona fide in furtherance of a political struggle waged by such organisation or movement against the State or any former state or another publicly known political organisation or liberation movement." This subsection covers not only freedom fighters and supporters of apartheid, but also members of political organizations such as the IFP who committed crimes against other political organizations such as the ANC. Arguably, these latter acts could have been excluded from the amnesty process because they did not

Reconciliation Act 34 of 1995. The fact that the amnesty provisions extend to acts committed outside of South Africa has generated heated debate. Some critics argue that South Africa cannot indemnify persons who committed crimes in foreign territory from all criminal and civil liability. They claim that if a foreign country desires to prosecute or a foreign citizen intends to sue for damages, under international law South Africa cannot deny the foreign state, nor its citizens, the right to bring an action by refusing extradition. Supporters of the provision argue that South Africa could legitimately refuse to extradite persons found to have committed political acts under the amnesty criteria if they fall within a political offenses exceptions in an extradition treaty.

Although the terms of the Act appear to authorize a refusal to extradite, in November 1996, Minister of Justice Dullah Omar signed an extradition order for two right-wing activists wanted for murder and other crimes committed in Namibia. He explained that "South Africa cannot grant amnesty for offenses committed in other countries" and that international law obliged South Africa to comply with Namibia's request because both countries belong to the Commonwealth and the Southern African Development Community which have automatic extradition agreements. Prakash Naidoo, Apartheid Agents Face Extradition for Their Crimes Abroad, SUNDAY INDEPENDENCE, Dec. 1, 1996, at 3. While Omar's statements suggest that South Africa is willing to extradite persons who have committed crimes abroad even if they receive amnesty, there is reason to believe that the response might be different under an extradition treaty with a political offense exception.

111. § 20(2)(a) of Promotion of National Unity and Reconciliation Act 34 of 1995. This group of persons clearly includes members and supporters of well-known political groups such as the ANC, the PAC, the IFP, AZAPO, the South African Communist Party ("SACP"), the United Democratic Front ("UDF"), the South African Students Congress ("SASCO"), the African Democratic Christian Party ("ADCP"), the Democratic Party ("DP"), the Afrikaner Weerstandbewiging ("AWB"), the Freedom Front ("FF"), the Conservative Party ("CP"), and the NP.
arise from a direct confrontation between apartheid supporters and resisters.

The second category of eligible persons includes "any employee of the State or any former state or any member of the security forces of the State or any former state" who committed a political act in the course and scope of his or her duties and within the scope of his or her express or implied authority... against a publicly known organisation or liberation movement engaged in a political struggle against the State or a former state or against any members or supporters of such organisation or movement,... bona fide with the object of countering or otherwise resisting the said struggle."

This category of persons includes officials of the apartheid government and members of the SAP and SADF who planned, ordered, or committed crimes or delicts against the property or membership of resistance groups. While the language of this section excludes the crimes of rogue officials, (i.e., state personnel who acted outside of their authority and abused their power to commit crimes against people on the basis of their skin color or their real or perceived affiliation with liberation groups), it remains to be seen whether the Amnesty Committee will interpret the language to permit such distinctions. Presumably, an applicant can easily argue that he or she was acting on the basis of "implied" authority and with the "bona fide" goal of protecting the state.

Subsection 20(2)(f) makes this argument easier by extending eligibility to "any person referred to in paragraphs (a), (b), (c) and (d), who on reasonable grounds believed that he or she was acting in the scope of his or her duties and within the scope of his or her express or implied authority." Subsection 20(2)(d) is basically identical to subsection 20(2)(b) regarding state employees except that it covers "any employee or member of a publicly known political organisation or liberation movement" who acted within his or her duty or authority to further a struggle against the State or any former state or any publicly known political organization. Subsection 20(2)(c) covers employees of the State or any former state who acted within their duty or authority against each other (e.g., employees of the apartheid regime acting against Lesotho or the

112. Id. § 20(2)(b).
113. Examples include the ANC, PAC, SACP, AZAPO, SASCO, and UDF. See supra note 111.
114. § 20(2)(f) of Promotion of National Unity and Reconciliation Act 34 of 1995 (emphasis added).
115. Id. § 20(2)(d).
Ciskei or vice versa). Even though subsection 20(2)(f) gives the Committee the discretion to decide if the employee or member of the political organization, State, or former state indeed had "reasonable grounds" for believing their crime fell within the scope of their duties and authority, State employees should have little trouble making this argument given the wide range of powers permitted and exercised by the apartheid State. The Amnesty Committee should interpret "reasonable grounds" narrowly to ensure that people who abused their power remain criminally and civilly liable.

Subsection 20(2)(e) includes eligibility for "any person in the performance of a coup d'etat to take over the government of any former state, or in any attempt thereto." This section arguably includes any MK guerrilla action against the State or anything comparable to General Viljoen's planned, though never executed, coup against democracy in the spring of 1994. Subsection 20(2)(g) is a catch-all provision which covers "any person who associated himself or herself with any act or omission committed for the purposes referred to in paragraphs (a), (b), (c), (d), (e), and (f)." Anyone who can establish an "association" with any publicly known organization, liberation movement, State or former state, coup d'etat, or person who had reasonable grounds for believing they were acting within the boundaries of their duties and authority may qualify for amnesty. It is unclear whether "associating" oneself with a group requires more than mere self-identification. If the Act requires only self-identification, such claims will be nearly impossible to refute.

George Bizos, who helped draft the provisions in question, maintains that the Act does not permit individuals to make such claims. In fact, the requirement that the alleged political acts have been committed on behalf of a publicly known--as opposed to secret or fictitious--organization was included explicitly to disallow such mala fide applications. In a recent decision of the Amnesty Committee, two far right-wing Afrikaners who claimed they belonged to the National Socialist Partisans were denied amnesty because the group consisted of only four members and did not constitute a public organization.

116. Id. § 20(2)(c).
118. § 20(2)(e) of Promotion of National Unity and Reconciliation Act 34 of 1995.
119. Id. § 20(2)(g).
120. See Interview with George Bizos, supra note 2.
121. Id.
"publicly known organization." Subsection 20(2)(f), however, still appears to allow an individual or a group of individuals to feign an "association" with one of the legitimate groups or political purposes listed under subsections (a)-(g).

The eligibility criteria in section 20(2) have been criticized for not drawing a distinction between freedom fighters and the perpetrators of apartheid's human rights abuses. The authors of the book Reconciliation Through Truth insist that the Act requires the Commission to make "moral" distinctions between apartheid supporters and resisters in order to fulfill the goal of "restoration of the human and civil dignity of victims of human rights violations." Furthermore,

[i]to decline a moral condemnation when the full facts scream exactly for that is to join in a business of exculpation; it is to put on intentionally or otherwise, the garb of the apologist. It is to enter upon not merely a moral dilemma, but actual immorality. . . . This cannot be achieved by suggesting to victims of apartheid abuses that the thing they were fighting against was morally indistinguishable from what they were fighting for. The world was certainly under no such illusion.

While the Act certainly permits the Truth Commission to make moral judgments and distinctions in its written account of the past, it is less clear that the Act allows the Amnesty Committee to make such distinctions in its decisions to grant or deny amnesty. The authors of Reconciliation Through Truth argue that the Committee could and should impose a contrition requirement in order to make such distinctions.


123. See generally ANC: We Don't Owe Apology to FW, CITIZEN, Nov. 4, 1996, at 1–2 (noting that AZAPO and members of the ANC have resisted attempts to equate the struggle against apartheid with the struggle to maintain apartheid and do not think freedom fighters should have to appear before the Truth Commission); Sharon Chetty, The Amnesty Squabble, SOWETAN, Nov. 8, 1996, at 10 (quoting ANC Mpumalanga Premier Mathews Phosa, "It is a matter of commonsense about how this should be looked at, . . . you cannot equate the two sides in any way."); Dr. Motsoko Pheko (Deputy Pres., PAC), Don't Equate APLA with Right-Wing, CITIZEN, Nov. 6, 1996, at 19 (arguing that "[i]t is a travesty of justice and a misrepresentation of facts, both historically and legally . . . to equate [Azanian People's Liberation Army] activities with those of the Right-wing").

124. ASMAL ET AL., supra note 4, at 16 (quoting the S. AFR. CONST. preamble).

125. Id.

126. See id. at 17. In their view, "the Act leaves it ample room, in practice and should the need arise, to ensure that victims are not subject to the indignity and new pain of
The position of author Kader Asmal regarding the treatment of freedom fighters and apartheid perpetrators has recently changed. During his twenty-seven years in exile, Asmal "campaigned for a South African equivalent of the Nuremberg trials..." As recently as 1992, he asked South Africans to "guard against the government-sponsored attempts to extend the idea of a general amnesty for those who opposed apartheid to cover the liability of those who maintained apartheid through killings, disappearances and torture." He called this attempt "an unconscionable effort to equate acts and motives which were protected by international law and morality with the deeds of an immoral system." Asmal even predicted that the settlement between the NP and the resistance groups could involve granting amnesty to the military and police for murder and torture and warned that this type of settlement "cripples the principle of equality before the law which must underlie a future democracy... perpetuates the culture of fear and intimidation that has prevailed in our country since 1948, ... [and] has debased the coinage of the criminal law and encouraged state lawlessness." Asmal's call for Nuremberg-type trials and his vehement resistance to equating freedom fighters with perpetrators in an amnesty process have essentially disappeared from his recent book. While he continues to insist that the final report of the Commission should not treat the two groups the same, he shies away from saying that the Amnesty Committee should treat them differently. He claims that "his experiences as an ANC constitutionalist during the negotiated transition changed his mind, and he became a protagonist of a South African Truth and Reconciliation Commission." While this may be true, it is also possible that as a current cabinet minister of President Mandela's government, Asmal is reluctant to criticize a delicate process in which his government has invested much money, time, and hope. Although Asmal's position may have changed, the problems that he highlighted regarding granting amnesty to former apartheid police and military personnel remain real. History has shown that the indemnity granted by the apartheid regime to its members during

unrepentant perpetrators exploiting the Act's amnesty mechanisms while openly flouting its goals of reconciliation." Id. at 17–18; see discussion infra Part VII.

127. Id. at 3.
129. Id.
130. Id. at 498.
131. ASMAL ET AL., supra note 4, at 3.
132. Asmal is the current minister of Water Affairs and Forestry. Steele, supra note 47.
the years of the armed struggle lead to additional crimes. It remains unclear whether the current amnesty process will foster respect for the law and a commitment to democracy or whether it will also "create a precedent for future crimes." Fortunately, section 20(3), which further defines "an act associated with a political objective" gives the Amnesty Committee leeway to distinguish certain crimes.

IV. WHAT POLITICAL ACTS SHOULD QUALIFY FOR AMNESTY?

Section 20(3) of the Truth and Reconciliation Act lays out six criteria that the Amnesty Committee must consider in deciding whether an applicant's act was associated with a political objective. Because the epilogue to the interim Constitution did not stipulate any specific criteria, the drafters of the Act and Parliament had considerable discretion in determining the requirements of amnesty. The six criteria ultimately endorsed by Parliament essentially mirror what are known as the six Norgaard factors. Professor Norgaard is an independent jurist from Denmark who was called upon in June 1989 to interpret the terms of the Namibian Settlement Proposal, which provided for the release of all Namibian political prisoners and political detainees held by the South African authorities.

Specifically, Professor Norgaard was asked to define the term "political offences" and to advise a United Nations Special Representative whether sixteen prisoners held by South African authorities were political prisoners entitled to release under the terms of the proposal. After a thorough examination of both international and extradition law, he concluded that while certain offenses, such as treason or "sedition directed solely against the state and not involving the commission of common or ordinary crimes such as murder or assault," are "classical" or "pure" political offenses, the more "common" crimes, such as murder or assault, must be committed under specific circumstances in order to constitute political offenses. He devised a list of six factors that a court must

133. Asmal, supra note 128, at 498.
134. Id.
136. Id.
137. Id. at 2.
138. Id. at 4.
take into account to determine whether an individual’s otherwise common crime qualifies as a “political offence.”

First, the court must look at “the motivation of the offender” to determine whether the act was committed for political or personal reasons. Second, the court must examine “the circumstances in which the offence was committed; in particular whether it was committed in the course of or as part of a political uprising or disturbance.” Third, the court must consider “the nature of the political objective;” that is, whether the political goal was to overthrow the government or force a change in government policy. Fourth, the court must evaluate the “legal and factual nature of the offence, including its gravity.” Fifth, the court must take into account the “object of the offense, e.g. whether it was committed against government personnel or property or directed primarily against private citizens.” Finally, the court must assess the “directness” and “proportionality” of the relationship between the offense and the political objective sought.

The Norgaard factors became the subject of much debate during the 1990 negotiations between the apartheid government and the ANC regarding the release of ANC political prisoners. The working group established by the Groote Schuur Minute not only recommended consideration of the six Norgaard factors, but also added a seventh: “whether the act was committed in the execution of an order or with the approval of the organization, institution or body concerned.” Significantly, the working group elaborated on the fourth Norgaard factor regarding the “legal and factual nature of the offense,” by stipulating that rape could never constitute a “political offense.” Unfortunately, this stipulation was left out of the Guidelines for Defining Political Offenses in South Africa released by the Department of Justice in November 1990 and the criteria listed under section 20(3) of the Truth and Reconciliation Act. The omission seems especially questionable given the gravity, disproportionality, and possible “personal gain or personal malice”

139. For an explanation of how Norgaard devised the six factors see *id.* at 3–5 and Keightley, supra note 56, at 340–46.
141. *Id.*
142. *Id.* at 5.
143. *Id.*
144. *Id.*
145. *Id.*
146. REPORT OF THE WORKING GROUP ESTABLISHED UNDER PARAGRAPHS 1 OF THE GROOTE SCHUUR MINUTE, ¶ 6.5.2(c)(i)-(vii) (1990) [hereinafter WORKING GROUP REPORT].
147. *Id.* ¶ 6.5.2(c)(iv).
associated with the crime of rape.\textsuperscript{148} For instance, an ANC leader who was vocal in the struggle against the community council system in Worcester testified on June 24–25, 1996, at hearings before the Committee on Gross Violations of Human Rights that she had been sexually assaulted during her detention.\textsuperscript{149} If the political motive of the state actor who assaulted her was to combat ANC activists, the detention alone should have served that purpose and the sexual assault was gratuitous and disproportional to the political objective.

Although the working group report explicitly acknowledged that “in certain circumstances a ‘common crime,’ even as serious a one as murder, may be regarded as a political offence,”\textsuperscript{150} no mention of this is made in the November 1990 Guidelines. Without explicit permission to regard murder as a political offense, the indemnity committees which advised then President de Klerk on indemnity applications might have assumed that violent crimes were too “grave” and “disproportional” for consideration.\textsuperscript{151} In fact, the indemnity committee responsible for the Jacob Rapholo case did just that when it rejected parts of Rapholo’s application on the grounds that “in no civilised society could or would the killing of a political opponent be accepted or justified to further political ends.”\textsuperscript{152}

It is ironic, but hardly surprising, that members of the apartheid government who were unwilling in 1990 to recognize violent crimes as political offenses, presently insist that the murders committed by the SAP and SADF were “acts associated with political objectives” and are therefore worthy of amnesty.\textsuperscript{153} In 1990, the apartheid

\textsuperscript{148} An otherwise “political act” is ineligible for amnesty if committed “for personal gain” or “out of personal malice, ill-will or spite, directed against the victim of the acts committed.” § 20(3) of Promotion of National Unity and Reconciliation Act 34 of 1995.

\textsuperscript{149} HUMAN RIGHTS COMMISSION, HUMAN RIGHTS REPORT 12 (June 1996).

\textsuperscript{150} WORKING GROUP REPORT, supra note 146, ¶ 6.5.2(c).

\textsuperscript{151} Keightley, supra note 56, at 338.

\textsuperscript{152} Rapholo v. State President, 1993 (1) SA 680, 686 (T). Rapholo headed an MK ambush of security forces in December 1988, which resulted in one murder and four attempted murders. \textit{id.} at 682–83. On Jan. 9, 1990, he participated in an attempted armed robbery which resulted in two attempted murder charges. \textit{id.} On January 12, 1990, he was involved in the attempted murder of a policeman. \textit{id.} Rapholo submitted an application under the 1990 Indemnity Act for these and other crimes. The indemnity committee and de Klerk denied Rapholo indemnity for the one count of murder and the three counts of attempted murder in which “dangerous wounds were inflicted.” \textit{id.} at 690. The court upheld the decisions to deny indemnity. \textit{id.} at 690–95.

\textsuperscript{153} De Klerk had rejected the possibility of granting amnesty for “cold-blooded murder” during the NP’s multiparty negotiations with the ANC, but ultimately agreed to it when the ANC pressured the apartheid government to release an ANC activist named Robert McBride, who was responsible for bombing Magoo’s Bar, a bar frequented by security policemen. \textit{De Klerk Distances NP from Atrocities}, Reports from
government was only willing to consider indemnity applications involving violent crimes once the ANC had demonstrated compliance with its promises under the Groote Schuur and Pretoria Minutes to suspend the armed struggle.\textsuperscript{154} In 1994 and 1995, the ANC-dominated Parliament was in a position to extract similar political concessions from the NP in the language of the amnesty provisions of the Truth and Reconciliation Act, but refrained from doing so. Perhaps if the ANC had threatened to do this in 1993 and early 1994, the IFP and the Third Force would not have collaborated in the armed demonstration, held on March 28, 1994, to oppose the April 1994 democratic elections, that claimed over fifty lives.\textsuperscript{155}

In the end, the ANC-dominated Parliament passed an amnesty law that differed little from the Indemnity Acts of 1990 and 1992 passed by the apartheid government. Parliament incorporated all seven of the criteria listed in the November 1990, Guidelines into section 20(3) of the Truth and Reconciliation Act. Although the six criteria closely resemble the Norgaard principles and the November 1990, Guidelines, there are a few distinctions. Section 20(3) of the Act entirely omits from consideration the “nature of the political objective,” rejecting both the Norgaard formulation, which focused on whether the political objective was to overthrow the government, and the apartheid formulation, which broadened the “nature of the political objective” to include acts taken to overthrow political opponents.\textsuperscript{156} The Amnesty Committee arguably may still consider the “nature of the political objective” when looking at the first factor which is “the motive of the person who committed the act, omission or offence.”\textsuperscript{157} Presumably, the Amnesty Committee looks to see if the motive was political and not personal, and if so, what the political motive

\textsuperscript{154} See GN R2625 of 7 November 1990 § 4.2.

\textsuperscript{155} On March 28, 1994, the Inkatha Freedom Party held a demonstration in Johannesburg, South Africa, to protest the impending April 1994 elections. See M.S. Prabhakara, ANC, Inkatha Differences in the Open, The Hindu, July 19, 1996, available in LEXIS, News Library, CURNWS File. Fearful that the demonstration would lead to violence against the ANC, members of the ANC asked the SAP to protect the ANC headquarters known as Shell House. \textit{id.} The SAP failed to do so, and there is strong reason to suspect that the apartheid government’s Third Force collaborated in the IFP protest of the elections. \textit{id.} When a large group of armed IFP demonstrators descended on Shell House on the day of the protest, ANC security guards shot at the crowd, killing eight demonstrators. \textit{id.} The ANC claimed that the guards fired in self-defense and is currently involved in litigation pertaining to the incident. \textit{id.} The eight IFP demonstrators shot in front of Shell House were among some 50 people who were killed during the IFP demonstration of March 28, 1994. \textit{id.}

\textsuperscript{156} The apartheid government had altered the third Norgaard factor by replacing the word “government” with “political opponent.” Keightley, \textit{supra} note 56, at 346.

\textsuperscript{157} § 20(3)(a) of Promotion of National Unity and Reconciliation Act 34 of 1995.
was; that is, whether it was to overthrow the apartheid government or destroy a rival political party.

The Amnesty Committee can interpret the six criteria listed under section 20(3) in two ways. Section 20(3) reads "whether a particular act, omission or offence... is an act associated with a political objective, shall be decided with reference to the following criteria" and then lists the six criteria described above. Section 20(3) also stipulates that an act associated with a political objective "does not include any act" committed "for personal gain" or "out of personal malice, ill-will or spite, directed against the victim of the acts committed." The language and structure of section 20(3) suggest that the Committee should look at each of these factors first separately, and then together, to determine whether an act was associated with a political objective. The drafters could have included the six factors and the two grounds for exclusion to help the Committee determine whether an act was actually "political" or "personal." Assuming this was the drafters' intent, it is not clear why the Committee must consider the "gravity" of the act under the third factor and the proportionality of the act under the sixth factor to decide if the act was "political."

While the gravity and proportionality factors may shed light on the "political" nature of an act, they will not always assist the Committee with its overall analysis. Whether an act constitutes a particularly grave crime or is disproportional to the political goal does not necessarily render the act any less "political." Conceivably, section 20(3) gives the Committee the discretion to deny amnesty for certain acts, even if they served a political goal, on the grounds that the "political" act in question was too horrific or disproportional to the goal pursued to qualify for amnesty. This less generous interpretation of section 20(3) gives the Committee the discretion to refuse amnesty for the worst human rights abuses, thereby allowing the Committee to show respect for international human rights law and to restore a sense of justice to the victims of apartheid's worst crimes. Diane Orentlicher believes amnesty laws can be used to foster reconciliation "provided they do not cover atrocious crimes which international law requires states to punish." She offers the amnesty law in Colombia as a model example because it excluded murders of noncombatants and other "brutal" crimes. If the gravity and proportionality factors had been listed separately from the other factors as explicit grounds for denying amnesty, South Africa's

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\begin{align*}
158. & \text{Id. § 20(3).} \\
159. & \text{Id.} \\
160. & \text{Orentlicher, supra note 89, at 2550.} \\
161. & \text{Id. at 2550 n.46.}
\end{align*}
\]
Amnesty Committee would have had to interpret the amnesty criteria more stringently and would have to deny amnesty for particularly egregious international crimes.

This Note strongly supports a narrow interpretation of the section 20(3) criteria that would allow the Committee to deny amnesty for "political" crimes that are too grave or disproportional to permit the applicant to escape all criminal and civil liability. Justice Mohamed, in his opinion in the AZAPO case, emphasized the importance of the proportionality factor in the amnesty analysis and noted that this factor distinguished South Africa's amnesty process from other automatic amnesties.\textsuperscript{162} A stricter interpretation of the criteria may lead to fewer revelations about South Africa's past, but is more likely to foster "reconciliation" and respect for the law and democracy. The amnesty decisions rendered thus far, however, show that the Amnesty Committee is adopting a liberal, rather than a narrow, reading of the six criteria under section 20(3). The Committee has decided to look at the six factors collectively to determine if an act was truly "political" and as a result has granted amnesty for extremely grave and disproportional "political" crimes.\textsuperscript{163} This decision may compromise the goal of reconciliation as many South Africans, particularly Black South Africans, feel they are being asked to pay an exorbitant price for "the truth."\textsuperscript{164}

\section*{A. The Motive for Committing the Act}

The first factor the Amnesty Committee must consider under section 20(3) is "the motive of the person who committed the act, omission or offense."\textsuperscript{165} The drafters did not include specific examples of what they considered to be political motives, possibly because they wanted the Committee to be able to consider political motives not directly related to continuing or ending the apartheid government. However, if Parliament intended the amnesty provisions to cover such motives, it could have retained the language in the November 1990 Guidelines which explicitly recognized political objectives designed to "force a change in the

\begin{footnotesize}
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  \item \textsuperscript{162} Azanian Peoples Org. (AZAPO) v. President of Republic of South Africa, 1996 (4) SALR 671, 691 (CC) (emphasizing that the "amnesty contemplated is not a blanket amnesty . . . granted automatically" but rather requires "regard to the careful criteria listed in section 20(3) of the Act, including the very important relationship which the act perpetrated bears in proportion to the object pursued").
  \item \textsuperscript{163} See discussion of Diale decision, infra notes 278–287, and discussion of Mitchell decision, infra notes 291–302, and accompanying text.
  \item \textsuperscript{165} § 20(3) of Promotion of National Unity and Reconciliation Act 34 of 1995.
\end{enumerate}
\end{footnotesize}
policy of or to overthrow or destroy the political opponent" as legitimate. 166

Parliament did not resurrect the third Norgaard factor because this language would have restricted the list of legitimate "political objectives or motives" to those directly involving the "government" (e.g., the motives of the ANC, SACP, PAC, and UDF to overthrow the NP government and/or change its apartheid policies). This interpretation of political motive is more closely related to the practices of states in extradition law than the virtually limitless range of political motives and objectives permitted under the amnesty provisions of the Truth and Reconciliation Act. For instance, the extradition practices of Great Britain, France, and Switzerland restrict the definition of political offenses to acts committed against the government. 167 The Apartheid and Genocide Conventions impute criminal responsibility "irrespective of motive involved, to individuals, members of organizations and institutions and representatives of the state, whether residing in the territory of the state in which the acts are perpetrated or in some other state." 168 On the other hand, Chile, El Salvador, Uruguay, and Argentina did not distinguish between legitimate and illegitimate political motives in their amnesty processes. 169 Thus, South Africa's refusal to make such distinctions does have some support among international state practices.

Although the first amnesty factor is vague, at a minimum it requires that the motive have a political component. For example, the Amnesty Committee found that amnesty applicants, Johan van Eyk and Hendrik Gerber, lacked a political motive for torturing and murdering Samuel Kganakga on May 21, 1991. 170 Van Eyk and Gerber were ex-policemen working at a private security service called Fidelity Guards along with the deceased. 171 They suspected the deceased was involved in the theft of sixty thousand rand from the cellar of the building where Fidelity Guards was located and the theft of several million rand from Fidelity Guards. 172 The applicants abducted the deceased, hung him upside down from a tree, and

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166. GN R2625 of 7 November 1990 § 3.2(iii).
168. See Apartheid Convention, supra note 89, at art. 3; Genocide Convention, supra note 89 (emphasis added); ASMAL ET AL., supra note 4, at 202.
169. For a discussion of Chile, El Salvador, Uruguay, and Argentina see supra text accompanying notes 94–96.
171. Id.
172. Id.
interrogated him about the missing money for several hours by applying shocks to his body, including his sexual organs. They claimed they had to kill him when he tried to escape because had he escaped with such serious injuries, they would have been “in big trouble.”

One of the applicants explained that the police had covered for him in the past when he had interrogated someone who had only minor injuries. To avoid trouble with the police and to prevent identification of the deceased, the applicants burned the body.

The Committee concluded that the applicants had not acted on the basis of a political motive, on behalf of a political organization, or against a political opponent. Furthermore, the gravity of the act and its disproportional relationship to the goal pursued made the act “totally unsuitable” for amnesty. In an attempt to persuade the Committee that the murder served a political purpose, the applicants claimed that the deceased stole the money for a political party. They also claimed they were acting in the interest of the government, the country, and their employer when they committed the interrogation and the murder. The Committee dismissed these claims, noting that nothing in the court judgment on the merits, or in “the long and detailed judgment on sentence” suggested that the applicants had acted for political reasons or knew of any political connections of the deceased, or even suspected the deceased had political connections. The judgment indicated only that the applicants suspected the deceased had helped to commit the robberies at Fidelity Guards. The Committee concluded that the applicants targeted the deceased because they suspected him of theft, not because of his political activities, and that the applicant’s motive for killing “was to ensure that the deceased would not lay a charge against them and not to fulfill any political objective.”

This decision suggests that the Committee will not treat all personal motives as political ones for purposes of the amnesty analysis. Yet by leaving the first factor deliberately vague, Parliament left the Committee free to regard all political motives as

173. Id.
174. Id.
175. Id.
176. Id.
177. Id.
178. Id.
179. Id.
180. Id.
181. Id.
182. Id.
183. Id.
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legitimate regardless of whether the underlying politics were racist. Brigadier Cronje, one of five White amnesty applicants from the former security police seeking amnesty for the murders of over forty Black individuals, claimed that the struggle between the apartheid government and the resistance movement was “never based on a race foundation.” He said that the SAP had taken actions against White terrorists in which they were treated “in precisely the same manner” as Black terrorists, but he could not “remember” any specific examples. When General van der Merwe, an apartheid-era police commissioner, testified at the hearings of the five security policemen, he explained that the SAP’s motive for killing ANC “terrorists” was to protect Black members of the SAP from impending terrorist attacks. During cross-examination General van der Merwe added, “We knew if we couldn’t protect our black members and maintain their morale, the whole system would collapse.” As part of their defense, the five applicants claimed that they were fighting an anti-Communist war, and alleged that the security forces indoctrinated their members on a daily basis, convincing many of them that they should fight freedom fighters because of their communist beliefs.

Although applicants are often reluctant to admit race-based political motives, at least one of the drafters of the amnesty provisions, George Bizos, believes the Amnesty Committee would accept such motives. While international law categorically condemns and prohibits all forms of race discrimination by the state, the Truth and Reconciliation Act offers full criminal and civil indemnity to state officials who committed violent race-based acts, simply because their motives were at some level political. By the same token, the

184. Cronje, supra note 10, at 12.
185. Id.
186. Testimony of General J.V. van der Merwe Before the Amnesty Committee (Oct. 22, 1996) (unpublished transcript, on file with author) [hereinafter Testimony of van der Merwe].
187. Id.
188. See Cronje, supra note 10, at 15 (giving the following quote from President Mandela’s autobiography as an example of propaganda in the government: “[b]y definition if a man worked for the present service, he was probably brain washed by the Government’s propaganda. He would have believed that we were terrorists and communists who wanted to drive the white man into the sea.” NELSON MANDELA, LONG WALK TO FREEDOM 405 (1996)).
189. Interview with George Bizos, supra note 2. Mr. Bizos believes that applicants are refraining from admitting such motives simply because it is not “polite” or polite to say such things in public. Id.
Amnesty Committee may find that an admittedly race-based political motive arose instead out of "personal malice, ill-will or spite" and thereby reject the amnesty application. Given the natural reluctance of applicants to admit to racist motives, the Committee is unlikely to have enough evidence to reject applications solely on the grounds that the motives were racist and therefore personal. Even if the Committee decides race-based motives satisfy the first criterion under subsection 20(3)(a), the Committee must still weigh the other five factors to determine whether the applicant deserves amnesty.

B. The Context in Which the Act Was Committed

The second factor the Amnesty Committee must consider is the "context in which the act, omission or offence took place, and in particular whether the act... was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto." Once again, the ANC-dominated Parliament decided to retain the apartheid government's language, in this case, the addition of the words "in reaction thereto," in establishing the amnesty factors. This decision seems to constitute a political concession to those most likely to take retaliatory action against anti-apartheid groups for having created political disturbances, such as the NP, the Conservative Party, the AWB, and the Freedom Front. Apartheid supporters who have applied for amnesty, especially members of the SAP, have claimed they committed their acts in the context of a "total onslaught" by the ANC, SACP, PAC, and UDF against the NP government and insist that it was "necessary to take precaution against the action of the activists and to act outside normal police channels and the normal legal system."

According to the five former security policemen who applied for amnesty in October 1996, South Africa suffered from "a full-scale guerrilla war" led by the ANC and SACP against the state government. After the UDF was established in 1983, this "war"

191. Section 20(3)(a)(i) of the Act prohibits the Committee from granting amnesty to persons who acted "for personal gain" or "out of personal malice, ill-will or spite, directed against the victim of the acts committed," and racist motives arguably fall within the parameters of these exclusions. § 20(3)(a)(i) of Promotion of National Unity and Reconciliation Act 34 of 1995.
192. Id. § 20(3)(b).
193. Cronje, supra note 10, at 2 (emphasis added). Cronje's testimony was confirmed by Captain Hechter and Officer van Vuuren. See Testimony of Security Police, supra note 48.
194. The five applicants were Brigadier J. Cronje, Colonel R. Venter, Captain J. Hechter, Warrant Officer P. van Vuuren, and Captain W. Mentz. The first four men testified before the Amnesty Committee during the period of Oct. 22–Nov. 1, 1996, in City Hall, Johannesburg. See Testimony of Security Police, supra note 48. In June 1997,
intensified and remained at a "full-scale" level until about 1989, despite emergency measures taken by the government, such as the 1986 Public Safety Amendment Act. During his testimony before the Amnesty Committee, Brigadier Cronje described the political context between 1983 and 1989 as a "full-scale, almost conventional war in South Africa" and explained that the police had to model their techniques on the military and perform operations "of a military nature." Brigadier Cronje summarily concluded on behalf of himself and the other four applicants that the war-like atmosphere made it "necessary to eliminate infiltrated terrorists and activists."

While anti-apartheid organizations also perceived the country to be in a state of armed struggle, their response was not as ruthless as that of the apartheid government. The ANC often described its struggle as a "People’s War," but never authorized war on the people supporting the apartheid government. Although the ANC did commit murders, even some they have acknowledged as excessive, they selected their targets more carefully than the SAP and SADF and killed far fewer people. In a submission to the Justice Department, former Commissioner of Police, General van der Merwe "attributed 153 deaths to alleged ANC ‘acts of terror.’"

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195. See ASMAL ET AL., supra note 4, at 88.
196. Cronje, supra note 10, at 3.
197. Id. at 4 (emphasis added).
199. "It was the policy of the ANC—ever since the formation of MK in 1961—to avoid unnecessary loss of life. The ANC has never permitted random attacks on civilian targets." Id. at 9.
200. The ANC “acknowledge[s] that, in the context of this [liberation] work, excesses did occur.” Id. at 11.
201. The ANC policy statement of January 1987 said that Umkhonto Sizwe, the ANC military wing ("MK"), “must continue to distinguish itself from apartheid death forces by the bravery of its combatants, its dedication to the cause of liberation and peace, and its refusal to act against civilians, both black and white.” Id. at 9. One study of 150 MK operations between 1976 and 1982 found they “overwhelmingly concentrated on economic targets, the administrative machinery of apartheid, the police and SADF installations and personnel.” Id.
202. ASMAL ET AL., supra note 4, at 41. In his written submission to the Amnesty Committee on Oct. 21, 1996, General van der Merwe noted that the number of police members killed between 1973 and 1992, but did not say how many of these murders were caused by the ANC. There were 76 police members killed between 1973-79, 270 killed between 1980-90, and 385 killed between 1991-92. General J.V. van der Merwe, Written Statement Submitted to the Truth and Reconciliation Commission 17 (Oct. 21,
This number, even if true, pales in significance compared to the thousands of people killed by the apartheid regime.\textsuperscript{203} With respect to attacks on civilian targets committed by the MK, the ANC stated: "the ANC does not seek to justify such attacks, but insists that the context in which they occurred is relevant."\textsuperscript{204} Clearly, the "context" throughout 1960 until May 10, 1994, was one of oppression for the ANC and other banned organizations who were forced to work underground, often from abroad, and with limited financial resources. While the apartheid government could and did pass emergency laws to detain and convict members of anti-apartheid political organizations,\textsuperscript{205} the organizations themselves had no means to arrest or prosecute members of the SADF and SAP even though many were guilty of violent apartheid crimes.

Thus, when the Amnesty Committee considers the "context" of a given act, it must keep in mind the political reality of apartheid: the oppressive laws, and the completely unequal resources of the opposing sides in South Africa's "war." The Committee must not forget that much of the alleged "Black on Black violence" cited by the apartheid regime as grounds for its repressive measures was in fact fostered by the apartheid government's financing of the IFP.\textsuperscript{206} The Amnesty Committee should not allow the leaders of the SAP, SADF, and IFP to justify their actions on the basis of a "war" they largely created and perpetuated. The Committee must acknowledge that the circumstances in South Africa between 1960 and 1994 warrant a substantially different analysis of the amnesty applications of freedom fighters than those of apartheid officials who largely created and controlled these circumstances.

\textbf{C. The Legal and Factual Nature and the Gravity of the Act}

The third factor the Amnesty Committee must consider is the legal and factual nature and the gravity of the act.\textsuperscript{207} This section requires the Committee to determine how South African law classifies the acts for which amnesty is sought. Examination of the legal nature of the act allows the Committee to determine the

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1996) [hereinafter Written Statement of van der Merwe] (unpublished manuscript, on file with author).
\textsuperscript{203} ASMAL ET AL., supra note 4, at 41.
\textsuperscript{204} ANC STATEMENT, supra note 198, at 10 (emphasis added). "The ANC has acknowledged that in a number of instances breaches in policy did occur, and deeply regrets civilian casualties. The leadership took steps to halt operations in conflict with policy." Id.
\textsuperscript{205} See ASMAL ET AL., supra note 4, at 82–89.
\end{footnotesize}
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specific crime or delict for which amnesty is being granted. For example, an applicant may have described the bombing of a political opponent’s house as an illegal use of explosives and malicious damage to property on his amnesty application. If the Committee grants amnesty only for these two criminal offenses, the applicant could be tried for attempted murder because he may have intended to kill the occupants of the house.

The importance of properly identifying the legal nature of an act became clear during the October 1996 hearings of the five security policemen. The Committee actually allowed two of the applicants, Colonel Venter and Captain Hechter, to add criminal offenses to their applications during their public testimony. Colonel Venter asked to have ‘murder’ added to his application once he realized that his testimony about “the Pebco Three incident” could make him an accomplice to the murder of three prominent ANC activists. Captain Hechter asked the Committee to change his application from “attempted murder” to “murder” after he was implicated by Brigadier Cronje in the detonation of a bomb that killed a government official. Such last minute changes show flagrant disrespect of the amnesty application’s requirement of full disclosure.

While identifying the legal and factual nature of an applicant’s act is useful to courts, prosecutors, and potential plaintiffs who need to know whether an act can form the basis of a future law suit, it is puzzling how this determination helps the Committee to decide whether an act is associated with a political objective. Whether a person’s conduct constitutes first or second degree murder sheds little light on whether the person acted with a political objective. Furthermore, the focus on the gravity of the alleged political act suggests either a moral or safety concern about granting amnesty to persons who have committed horrific crimes even when those crimes have served a political objective. If this is the concern expressed, the drafters of the amnesty provisions should have required the Committee to assess the gravity of an act after determining whether the act was associated with a political objective rather than

207. § 20(3)(c) of Promotion of National Unity and Reconciliation Act 34 of 1995.
208. Testimony of Security Police, supra note 48, at 21. The “Pebco Three incident” refers to the disappearance and murder of three prominent ANC activists named Sipho Hashe, Qaqawuli Godolozi, and Champion Galela. The three men disappeared from the Verwoerd Airport in Port Elizabeth in 1985. “Pebco” stands for the Port Elizabeth Black Civil Organization. Colonel Venter explained that he was called down from Vlakplaas to Port Elizabeth to pick up three ANC “terrorists” at the airport and hand them over to the Port Elizabeth police somewhere near the ocean. Id. at 21–24. He insisted that he was only involved in the abduction, and not the subsequent interrogation and murder of the men. Id. at 26–27.
209. Testimony of Security Police, supra note 48, at 82.
during the determination process. At the very least, the provisions should explain how the gravity of an act informs the Committee's assessment of whether the act was political. The implicit meaning of the provision is that the more grave the act, the less political it is, but unlike the other factors in section 20(3), the gravity of an act is not necessarily correlated to or even illustrative of its political nature.

The inclusion of the gravity factor appears to grow out of the structure of the other amnesty provisions. These provisions oblige the Committee to grant amnesty for acts found to be associated with a political objective, provided the acts fall within the prescribed time period and have been fully disclosed by the applicant. If the drafters had wanted to limit the range of political acts eligible for amnesty, they could have incorporated limitations into the definition of "an act associated with a political objective" or made gravity an explicit ground for denying amnesty for an otherwise political act. Likely, the drafters included the gravity assessment because of the significant legal consequences of a determination that an act was associated with a political objective (e.g., full criminal and civil indemnity). They shied away, however, from making the gravity of an act a ground for denying amnesty for an otherwise political act as they did with respect to political acts motivated by "personal gain, ... personal malice, ill-will or spite" under subsections 20(3)(i), (ii).

The Committee must recognize applicants' acts for what they are under both South African and international law. Further, the Truth Commission's final report should explicitly identify all acts that constitute war crimes, crimes against humanity, and crimes of genocide and apartheid as such, whether committed by government officials or freedom fighters. Although the Truth Commission can make such legal and factual determinations in its final report and thereby respect international law, the Amnesty Committee will have trouble reconciling its duty to grant amnesty to those persons who meet the criteria of the Act and its duties under international human rights law. For example, the apartheid government's torture and murder of ANC "prisoners of war" may qualify as political acts, but they also constitute war crimes that require prosecution under international law. Under international law, those who committed

210. According to the Geneva Conventions of 1949 and Protocol I of 1977, certain acts, like torture, become a war crime when committed against prisoners of war during an international or non-international armed struggle. See generally Geneva Conventions of 1949, supra note 87; Protocol I, supra note 88. "A war crime is a grave breach of the terms of the Geneva Conventions which results in death, great suffering, or serious injury to any protected party, prisoner or civilian." Ziyad Motala, The Promotion of National Unity and Reconciliation Act, the Constitution and International Law, 28 COMP. INT'L. L. J. S. AFR. 348 (citation omitted). Protocol I defines "grave breach" to
the war crime of torture cannot claim in mitigation that they were acting under superior orders. Under the South African amnesty criteria, those who commit torture under orders are not only eligible for amnesty, but are more likely to receive it because they acted under orders. South Africa’s Amnesty Committee not only has explicit statutory authority to grant amnesty to applicants who have committed the war crime of torture, but has already done so.

Although the Committee lacks the statutory authorization to deny amnesty categorically for certain legal acts such as war crimes or crimes against humanity, the Committee can and must take the gravity of an alleged political act into account. The more the act in question violates international human rights law, the more the Committee should weigh its gravity against its political nature. To make an informed legal determination of the nature and gravity of an act, the Committee must elicit and scrutinize all relevant facts. The Committee must assess whether the harm grew out of the deliberate or negligent conduct of the actor, whether the amnesty applicant could have or should have foreseen the consequences of his or her actions, and whether the object or target of the act was an innocent civilian or a political opponent. This analysis naturally implicates several of the other amnesty factors.

D. The Object or Objective of the Act

The fourth factor the Amnesty Committee must consider is the object or target of the act. If an act is truly political, it should at the very least be directed against a political opponent or his or her property. Since the adoption of the armed struggle and the formation of the MK in 1961, ANC policy has always been “to avoid

include “willful killing, torture or any inhuman treatment, making the civilian population the target of attack, destruction of property . . . practices of apartheid and other degrading practices based on racial discrimination.” Protocol I, supra note 88, at art. 85. While the ANC officially endorsed both the Geneva Conventions and Protocol I, the apartheid regime ratified only the Geneva Conventions and claimed it was not bound by Protocol I. See Motala, supra, at 347. Though the apartheid government did not ratify Protocol I, the government arguably had an obligation to observe its terms as it simply codified already well-known and accepted principles of contemporary international law. See ASMAL ET AL., supra note 4, at 197; Motala, supra, at 349. Despite its international legal duty to treat ANC prisoners of war and civilians humanely, the apartheid government consistently violated this duty. See Convention Against Torture, supra note 89; GA Res. 2506(A), supra note 93, at art. 4; GA Res. 2396, supra note 93, at art. 8(c); ASMAL ET AL., supra note 4, at 197–98.

211. ASMAL ET AL., supra note 4, at 198.


213. § 20(3)(d) of Promotion of National Unity and Reconciliation Act 34 of 1995.
unnecessary loss of life.\textsuperscript{214} In the early 1960s, the MK permitted attacks on government installations provided they did not involve the loss of human life.\textsuperscript{215} Members of the MK were trained not to define the enemy along racial lines and were told to shoot only in self-defense.\textsuperscript{216} Over time, however, ANC policy designated certain members of the SAP and SADF as legitimate hard targets and permitted operations against them.\textsuperscript{217} Although the apartheid government insisted on calling ANC members "terrorists," the ANC never authorized or condoned terrorism.\textsuperscript{218} The ANC authorized the use of landmines on White border farms, but did not consider White farmers in these areas civilians because they were integrated into the state's security system and supplied with automatic weapons.\textsuperscript{219}

As a general rule, the Committee should always regard the murder of an innocent civilian as a grave political act, no matter what the applicant's political motive. Most states exclude the deliberate killing of innocent civilians from their definition of "political offenses" when deciding whether to extradite an individual.\textsuperscript{220} Since the beginning of the armed struggle in 1961, the ANC has always maintained that it is "not only morally wrong but strategically senseless to attack civilian targets."\textsuperscript{221} Under the 1949 Geneva Conventions and Protocol I of 1977, the murder of innocent civilians during an armed conflict rises to the level of an indefensible grave breach and requires prosecution.\textsuperscript{222}

During his testimony before the Amnesty Committee on October 21, 1996, General van der Merwe accused the ANC of adopting an armed struggle strategy that violated Protocol I, a document the

\begin{footnotesize}
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214. ANC STATEMENT, supra note 198, at 56.
215. Id.
216. Id.
217. Id.
218. The ANC defines terrorism "as military attacks on civilians by armed groups or individuals." Id.
219. Id. at 59–60.
220. See Keightley, supra note 56, at 343–44. In France:

offences involving violence against civilians have been regarded as so serious as to override the significance of any political motive espoused by the group responsible for them. Accordingly, such offences have been held not to be political. . . . Common to the approaches of the continental courts is the same reluctance shown by the English and Irish courts to extend the benefits of the political offence exception to violent offences committed against ordinary citizens.

Id.
221. ANC STATEMENT, supra note 198, at 57.
\end{footnotesize}
ANC purports to embrace. At the ANC Consultative Conference held in Kabwe, Zambia in June 1985, the ANC decided that it “must attack not only inanimate objects, but also enemy personnel” and that “the distinction between ‘hard’ and ‘soft’ targets should disappear.”222 Van der Merwe said this decision “was... a flagrant violation of that very undertaking which the ANC ostensibly held so dear, namely the signing at the end of 1980 of Protocol I of 1977 of the Geneva Convention of 1949 wherein it was declared that its future actions, inter alia, would only be directed at military targets.”224 In its official statement to the Truth Commission, the ANC openly admitted that at the Kabwe Conference in 1985, the ANC adopted a resolution “acknowledg[ing] that there would be unavoidable civilian casualties as warfare escalated” while simultaneously reaffirming its former policy regarding legitimate targets.225

The ANC concedes that it sanctioned a few operations against legitimate hard targets, such as military bases, that resulted in civilian deaths. On May 20, 1983, the ANC permitted a car bomb attack on South African Air Force (SAAF) headquarters on Church Street in Pretoria which killed nineteen people, of whom at least eleven were SAAF officers, and injured 200, of whom at least seventy were members or employees of the armed forces.226 Although the ANC regrets the civilian deaths and injuries caused by this attack, the ANC has stressed that it never ordered or permitted the deliberate massacre of civilians as the apartheid government did. For example, on June 16, 1976, the SAP opened fire on 10,000 pupils in Soweto’s Orlando West High School, killing 140 and injuring 1000 more.227 While there is no question that the loss of civilian life caused by ANC operations constitutes a gross violation of human rights, there remains a difference between the deliberate killing of hundreds of unarmed students and the indirect or negligent killing of civilians during attacks on military targets. The Amnesty Committee

223. Written statement of van der Merwe, supra note 202, at 5–6, (quoting an editorial printed in Sechaba, the official publication of the ANC, which described the conference).

224. Id. at 7 (referring specifically to articles 1, 52(1) and 57 of Protocol I).

225. ANC STATEMENT, supra note 198, at 6. At Kabwe, the ANC decided that “the risk of civilians being caught in the crossfire when such operations took place could no longer be allowed to prevent the urgently needed all around intensification of the armed struggle.” Id. at 9.

226. Id. at 58.

227. South African Youth Urged to Devote Energies, Xinhua English Newswire, June 16, 1996, at 1, available in 1996 WL 10548815. The students were peacefully protesting the apartheid government’s insistence that Black students be taught in Afrikaans. David Shribman, A Brutal Repression is Now Consigned to History’s Scrapheap, BOSTON GLOBE, May 3, 1994, at 1. In the four months of rioting that ensued after the June 16th massacre, approximately 600 students were killed. Id.
must remain mindful of such differences when analyzing the “target” of the act.

Often, the Committee will have trouble determining whether an applicant has killed an innocent civilian or a genuine political opponent. For instance, when the victim of a crime or a living relative of a deceased victim contests the applicant’s allegation that the victim was a “terrorist,” a “communist,” or a “double agent,” the Committee must decide whose testimony is more credible. Even when the Committee finds that the applicant genuinely believed the victim to be a political opponent, it must determine whether the applicant had a reasonable basis for this belief. The more an applicant sought verification and corroboration of the victim’s political activities, the more likely the motive for committing the act against the victim was “political.”

The difficulty of determining whether a victim was a legitimate political target was apparent at the amnesty hearings of the five security officers held in Johannesburg in October 1996. During Warrant Officer van Vuuren’s testimony about the torture and murder of three alleged ANC activists in 1987, he alleged that one of the activists, Jackson Maake, was a double-agent. According to van Vuuren, the SAP had given Maake a car and expected him to drive weapons over the border from Botswana in order to deliver them to ANC activists after the SAP had booby-trapped the weapons. Van Vuuren claimed that Maake never made such deliveries and started acting suspiciously by showing up at SAP headquarters even though he had been told to keep away. Because Maake’s actions made the SAP suspect he was a double agent also working for the ANC, van Vuuren, Captain Hechter, and an “askari,” named Joe Mamasela, took Maake to a remote farm to interrogate him. Under electric shock torture, Maake confessed to being a double agent and said that Andrew Makupe was his ANC contact.

Van Vuuren went on to explain how he and other security police verified Maake’s admissions by looking up the police file on Makupe. Van Vuuren claimed the file revealed that Makupe was

228. See Testimony of Security Police, supra note 48.
229. Id. at 48.
230. Id. at 55.
231. Id. at 56.
232. An “askari” is a former ANC activist who has been captured by the police and “persuaded” to change sides. Askaris and other police informants got paid for the information they supplied. Id.
233. Id. at 44–45. Assuming Maake did “confess” to being a double agent as van Vuuren alleged, it is hard to know how credible his confession was given that electric shock torture was applied to induce this confession.
234. Id. at 45.
an arms courier for the ANC. The police picked up Makupe, tortured him and learned that Harold Sefola was the head of an ANC 'cell' containing Makupe, Maake, and a few others. The resulting interrogation of Sefola provided enough evidence to persuade van Vuuren and Hechter that Sefola, Maake and Makupe did belong to an ANC cell. The officers decided it was necessary to kill all three of them in order to destroy the cell.

Van Vuuren claimed that the purpose of the officers' actions was to eliminate ANC terrorists and to prevent the deaths of innocent people. He asserted that it was not possible to detain the three men legally because the manner in which the police extracted information would get them into trouble with the magistrate. Furthermore, if the three activists were allowed to live, any information provided during the interrogations would quickly become useless. Van Vuuren believed that his actions were necessary in order to protect innocent people from being killed.

Maake's mother vehemently denied that her son was a "double agent." She insisted that he never drove a car and could not have gone to Botswana for three months because he had never left the house for more than a few days. Although the wives of Makupe and Sefola admitted that their husbands were involved in ANC activities, Mrs. Maake steadfastly protested her son's innocence and implicitly accused the police of targeting the wrong person or of fabricating an excuse for killing him. Faced with equally convincing but conflicting testimony, the Committee must decide whether van Vuuren killed a double agent, a police informant, or merely an eighteen-year-old boy who knew some ANC activists and admitted

235. Id.
236. Id. A cell is a small group of ANC activists, usually 4 to 10 people, who perform counter-apartheid operations together. For reasons of secrecy, members of a cell are told nothing that does not relate to the operation of their own cell. They know nothing of the operation of other cells. Id. at 51.
237. Id. at 46.
238. Id. at 55.
239. Id. at 46–47.
244. Id. at 60.
245. Id. at 62, 65.
under torture to being a double agent in order to stop the administration of electric shocks.

The problem is an evidentiary one. For many of the acts in question, actual physical evidence is hard to come by. The Committee’s decision must, therefore, come down to a credibility determination between the applicant and the opposing witness, a difficult process subject to abuse. As many anti-apartheid activists hid their political affiliations, it is relatively easy for members of the apartheid police and military to allege their victims were political threats. The Amnesty Committee must keep factors such as this in mind in making its determination.

E. Whether the Act was Committed Under Orders or with Organizational Approval

The fifth factor the Amnesty Committee must consider is whether the act was committed under orders or with the approval of a political organization.246 In many respects, the fifth factor in the amnesty analysis resembles what is known as “the defense of superior orders” in criminal law. This defense is often raised during criminal trials of military subordinates who claim they had a legal duty to obey the orders of their superiors. National legal systems have developed various doctrines for dealing with the conflict between a soldier’s duty to obey and his need to take responsibility for his actions. The doctrine of respondeat superior categorically relieves from all liability a soldier who commits a crime under orders.247 The doctrine of absolute liability, on the other hand, requires the subordinate to evaluate all superior orders and refuse to perform those that constitute illegal acts.248 The amnesty provisions of the Truth and Reconciliation Act adopt a middle of the road approach; while the defense of superior orders may be raised in support of an amnesty application, it is not a complete defense. South Africa’s amnesty provisions actually go well beyond the usual scope of the defense of superior orders by recognizing the mere “approval” of a political organization or movement as a mitigating factor in the amnesty analysis.

The Nuremberg Tribunals did not even allow accused individuals to plead the defense of superior orders to what were identified as “war crimes;” they could only raise this defense in

246. § 20(3)(e) of Promotion of National Unity and Reconciliation Act 34 of 1995.
248. Id. at 642.
mitigation of sentence.\footnote{249. See Eden, supra note 247, at 642 n.14 (quoting article 8 of the Charter of the International Military Tribunal: “[t]he fact that the defendant acted pursuant to order of his Government or a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires”).} It is still open to debate whether the Nuremberg Principles are a source of customary international law binding on all states because they have never been formally codified.\footnote{250. See Maurice Albert, The Question of Superior Orders and the Responsibility of Commanding Officers, 263 INT’L REV. OF RED CROSS 105–07 (1988).} Clearly, South Africa did not consider itself bound to respect them. Other sources of international law, most notably the Geneva Conventions of 1949 and the 1977 Protocols, impose a duty on contracting state parties to prosecute, extradite, and punish persons who have committed or ordered “grave breaches.”\footnote{251. See Geneva Convention I, supra note 87, at art. 49; Geneva Convention II, supra note 87, at art. 50; Geneva Convention III, supra note 87, at art. 129; Geneva Convention IV, supra note 87, at art. 146; Protocol I, supra note 88, at art. 85.} This duty to prosecute applies both to superiors and their subordinates, yet the Conventions and Protocols fail to say whether the defense of superior orders qualifies as a legitimate excuse for “grave breaches.” The drafters of Protocol I tried to include a provision relating to the defense of superior orders but did not succeed.\footnote{252. Eden, supra note 247, at 652–53.} As neither the Conventions nor the Protocols forbid the use of the defense as the Nuremberg Principles do, contracting state parties could arguably raise or recognize the defense. South Africa, a party to the Conventions, but not the Protocols, made a significant choice by incorporating the defense of superior orders into the fifth criteria of the amnesty analysis by offering indemnity from prosecution to persons who committed “grave breaches.”

Under South Africa’s broad amnesty criteria, both he who gives orders and he who follows them can escape prosecution provided the acts ordered or committed were “associated with a political objective” and provided all relevant facts are fully disclosed to the Amnesty Committee. South Africa’s amnesty provisions do not presume the defense of superior orders or duress for lower or middle-ranking officers.\footnote{253. In Argentina, the 1983 decree which ordered the prosecution of members of the first three military juntas limited the prosecution to persons with “decision-making capacity” who had ordered subordinates to commit crimes and to subordinate officers who had “exceeded” their illegal orders. In effect, the 1983 decree gave most lower and middle ranking officers who acted under orders, amnesty from prosecution; however, these individuals could still be prosecuted if they had followed orders involving “an atrocity or aberrant act.” See MARIA LUISA BARTOLOMEI, GROSS VIOLATIONS OF HUMAN RIGHTS IN ARGENTINA, 1976–1983: AN ANALYSIS OF THE PROCEDURE UNDER ECOSOC RESOLUTION 1503 281, 286 (1983). Despite the new
proving he or she acted under orders or with organizational approval. Any party opposing the application can rebut this evidence.

The first step for the Committee in applying this factor is to distinguish between specific and general instructions to act. As the testimony of the five former security policemen and General van der Merwe revealed at the amnesty hearings in October 1996, the SAP did not specifically authorize every operation taken against “terrorists” and “communists.” When specific instructions were given, the source often varied; some came from immediate superiors and others came straight from the State Security Council. General van der Merwe testified that instructions regarding the 1988 bombing of Khotso-House, an “internal headquarters” of the ANC, came from President P.W. Botha and Minister of Law and Order, Adriaan Vlok. His testimony shocked the nation because it publicly implicated high level officials and discredited the apartheid regime’s efforts to blame human rights violations on rogue state officials.

Brigadier Cronje also implicated high-ranking officials in his testimony. He claimed that until the mid 1980s, the SAP had authority only to act in a “reactionary way.” He explained that, over the course of time, the SAP had to take a more “proactive” and “preventative” approach to defending the state and combating its opponents. In early 1986, Cronje received “general instructions” from Brigadier Viktor, second in command of the Intelligence Unit, to take “every necessary step” to bring the situation in Pretoria under control. If a person attacked a policeman’s home, the police were directed to take steps to destroy that person’s house. Later in 1986, Brigadier Schoon instructed the SAP to work with the “spes-forces” of the SADF, essentially a military hit squad. Brigadier
democratic government’s efforts to use the defense of superior order to protect many officers from prosecution, many of the judges trying the officers in the civilian appeals courts “threw out the concept of ‘due obedience.’” Id. at 295. The government responded by passing the law of due disobedience, which created an irrebuttable presumption that low and middle ranking officers, and even most officers of higher rank, had acted under superior’s orders or duress. This 1987 law indemnified many officers from prosecution and President Menem’s pardons in 1989 and 1990 ensured that no officer, regardless of whether he gave orders or followed them, would be prosecuted. Id. at 283.

254. Testimony of van der Merwe, supra note 186, at 6.
255. Id. at 6–7. The State Security Council included the President, the Ministers of Police and Defense, and representatives from National Intelligence.
256. Written Statement of van der Merwe, supra note 202, at 27.
257. Testimony of van der Merwe, supra note 186.
258. Id.
260. Id.
261. Id. at 8.
Cronje interpreted both of these general instructions to mean that the SAP had to take a "full-scale" war approach and use "proactive guerrilla tactics" against activists to prevent acts of terror.262

To Brigadier Cronje's knowledge, this approach was followed at every security branch in South Africa and no one in the government, from immediate supervisors to the Government Security Council and the Cabinet, ever repudiated it.263 Brigadier Cronje was convinced that the SAP pursued the proactive approach against anti-apartheid organizations "because of the Government's approval."

De Klerk explicitly denied this accusation in his submission to the Truth Commission, stating that "the unconventional strategies from the side of the Government... within my knowledge and experience... never included the authorisation of assassination, murder, torture, rape, assault or the like."265 He went so far as to say that he has "never been part of any decision taken by Cabinet, the State Security Council or any Committee authorizing or instructing the commission of gross violations of human rights."266 High-ranking officials of the former apartheid regime have repeatedly denied that they ever ordered or permitted their subordinates to murder, torture, and pillage.

The fact that many of the SAP's instructions were of such a general nature makes it difficult for the Committee to ascertain when individual security officers were acting under orders and when they exceeded the scope of their "express or implied authority."267 Brigadier Cronje and the other applicants from the security forces clearly believed they were acting "on behalf" of the State.268 Cronje's claim that the State had knowledge of and failed to repudiate these actions also suggests State approval. The Amnesty Committee must again determine who is more credible: the

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262. Id.
263. Id. at 7.
264. Id.
266. Id.
267. § 20(2)(b), (f) of Promotion of National Unity and Reconciliation Act 34 of 1995.
268. Dirk Coetzee, who testified before the Amnesty Committee in November 1996, also claimed he was acting under orders. He said, "[w]e were executing orders (which were) anything but legal. We were involved in illegal cross-border raids, blowing up (bodies), stealing cars, abducting and killing people." Claire Keeton, I Killed in Line of Duty, Says Coetzee: TRC Has to Decide Whether Following Orders is Sufficient for Amnesty," SOWETAN, Nov. 7, 1996, at 11. Once a police officer became involved in the security forces, Coetzee said it was dangerous to challenge or disobey orders from superiors. Id. He referred to the police murder of Vlakplaas's own agent, Brian Ngqulunga, to show how dangerous questioning and resisting orders was. Id.
subordinates who claim they acted under the instructions of the State or the high-ranking officials who continue to deny the State’s involvement. Because the fifth factor is only one of many considered by the Amnesty Committee, applicants need not prove they acted under orders; however, applicants who received general or vague instructions will likely be able to prove that they acted “on behalf of” or “with the approval” of the State. In this respect, the fifth criteria is overly generous because it does not allow the Committee to distinguish between acts that are self-initiated or self-serving and those that are government ordered or approved.

Because of the nature of the resistance movement, it is more difficult for members of the ANC and other anti-apartheid organizations to satisfy the fifth criteria of the amnesty analysis than for SAP and SADF members. It is easier for members of the SAP or SADF to find witnesses to corroborate claims that they were acting under orders. To insulate themselves from the State, anti-apartheid groups gave instructions to members only in small groups. Out of necessity, MK training stressed the “need for personal initiative” at all levels of the MK hierarchy and tried to “develop the capacity of operatives to use their own discretion based on strict political considerations,” such as holding the moral high ground and not perceiving the struggle as a race war. For the most part, senior MK commanders provided only general guidelines to subordinates unless the subordinates were participating in a major operation.

The apartheid State was in a much better position than the ANC or MK leadership to know what its subordinates were doing and to give them more specific instructions. Given the meticulous reporting procedures that were in place, the State either knew or should have known the exact activities of its personnel and could have easily repudiated actions exceeding the boundaries of permissible military and police conduct. The ANC and MK leadership, acting either in exile or underground, had less knowledge about their comrades’ activities and could not give more specific instructions as easily or as often.

The anti-apartheid movement needed to operate in secrecy, leaving lines of communication unreliable and difficult to maintain. As a result, orders were less detailed and the grant of authority to subordinates was less explicit. In addition, it was often difficult to pinpoint the source of a particular instruction. Therefore, an

269. ANC STATEMENT, supra note 198, at 58.
270. Id.
anti-apartheid member seeking amnesty may find it more difficult than a SADF or SAP member to prove that he was acting under orders. In analyzing the fifth factor with respect to such applicants, the Committee must keep in mind the circumstances under which the anti-apartheid movement was operating and the difficulty the movement had in supervising the activities of its subordinates.

F. The Relationship Between the Act and the Political Objective

The sixth and final factor that the Amnesty Committee must take into consideration is the relationship between the act and the political objective. Deciding whether the Committee should assess the directness or proportionality of the relationship between the act and the political objective sought became a controversial issue that ultimately required resolution at the Cabinet level. The proportionality requirement was retained despite tremendous pressure from the NP to omit it. Upset at the inclusion, the NP insisted that the Committee should also consult the criteria used by the apartheid government under the Indemnity Acts of 1990 and 1992. Section 20(4) of the Act therefore requires the Committee to take the older criteria into consideration.

This concession was somewhat of a victory for the NP. De Klerk argued that the existing criteria should be interpreted generously. In his submission to the Truth Commission, de Klerk asked the Commission

[to] ensure that . . . it adheres strictly to the requirements of . . . the precedent already established by the extension of indemnity to large numbers of people in terms of the Further Indemnity Act. In this regard, it should be borne in mind that the great majority of such indemnities were granted to supporters of revolutionary movements, that many of them had committed and had been convicted of heinous and disproportional crimes and that their release was part of the price demanded by the ANC in September 1992 for returning to the negotiating table.

Section 20(4) implies that the Amnesty Committee should interpret the directness and proportionality requirement leniently, even in cases of disproportional crimes. Ironically, de Klerk himself

272. § 20(3)(f) of Promotion of National Unity and Reconciliation Act 34 of 1995.
273. See HUMAN RIGHTS COMMITTEE, supra note 63, at 6.
274. Id.
275. De Klerk, supra note 265, at 9 (emphasis added).
denied indemnity on the grounds that murder was too disproportional an act to any political objective pursued. During the NP’s negotiations with the ANC in the early 1990s, de Klerk at first rejected, but ultimately agreed to the possibility of granting amnesty for “cold-blooded murder” after the ANC pressured the apartheid government to release from prison an ANC activist responsible for bombing a bar frequented by security policemen. In light of the inconsistencies among de Klerk’s former indemnity decisions, it is unclear how the Amnesty Committee should treat cases involving murder.

For instance, in one decision, the Committee found that the murder of a man by two members of a tribe struggling for independence was sufficiently related or proportional to the political goal of regaining control of a Civic Center that used to belong to the tribe. Boy Diale and Christopher Makgale were members of the Action Committee of Bafokeng tribe resisting incorporation in the homeland of Bophuthatswana and seeking to reinstate their tribal chief. The tribe’s chief had been driven into exile and replaced by Glad Mokgatle, an appointee of the Bophuthatswana President, Mr. Lucas Mangope. The trouble began after Mokgatle was appointed chairman of the Tribal Council in the Bafokeng District and given the keys to the Civic Center, an important and symbolic structure for the tribe. The applicants decided that the only way to regain control of the Civic Center was to seize the keys from Mokgatle, who was killed during the resulting abduction and interrogation. Diale and Makgale claimed that they did not originally intend to kill Mokgatle, but realized that they would go to jail if he was allowed to live.

The Amnesty Committee concluded that the applicants “believed they were acting on behalf of the Bafokeng people in furtherance of their political struggle against an oppressive regime.” Assuming this belief was reasonable, the Committee had to decide whether abducting, assaulting, and finally killing Mokgatle to get the keys to the Civic Center was directly related to this political goal. The question is not whether it was “necessary” to kill him, but

276. See supra note 152.
277. Robert McBride was responsible for bombing Magoo’s Bar and for killing many of its patrons. De Klerk Distances, supra note 153.
278. Diale and Makgale Decision, supra note 212.
279. Id.
280. Id.
281. Id.
282. Id.
283. Id.
284. Id.
whether killing him was "proportional" to the goal of regaining control of the Civic Center, and whether regaining control of the Civic Center was "proportional" to the ultimate goal of regaining control of the tribe. The inquiry is further complicated by the fact that the applicants admitted that the main reason for killing the victim was so that he could not identify them.  

Refusing to concede the obvious, the Amnesty Committee merely said that "it might appear from the evidence that the applicants" killed the victim because they feared he would implicate them in the assault if he had lived. Ultimately, the Committee ignored the evidence and the disproportional relationship between the murder and the political motive, concluding that "the evidence as a whole leaves no doubt that the attack on the deceased was associated with a political objective, that is regaining control of the Tribe." While the Committee's conclusion makes sense under a liberal interpretation of the six criteria, it would not follow from a more narrow interpretation of section 20(3). Even if the facts support a finding of a political motive, they do not necessarily demonstrate a direct or proportional relationship between the motive and the act committed. Under a narrow interpretation of section 20(3), the Committee could have denied amnesty even though the murder of Mokgatle served a political objective, because killing him was far too grave and disproportional a means of achieving that objective. The Committee's decision to grant amnesty likely reflects the fact that Mokgatle's sons did not oppose the applications.

Yet, in a decision granting amnesty to Brian Mitchell, a White former police officer serving a thirty-year jail sentence for his role in the Trust Feed Massacre of December 3, 1988, the Committee did not even refer to the proportionality principle. Mitchell was a former secretary to the Joint Management Committee in Pietermartizburg. The apartheid government established the Joint Management Committee System

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285. Id.
286. Id.
287. Id.
288. See discussion on possible interpretations of § 20(3), supra text accompanying note 158–164.
289. See Diale and Makgale Decision, supra note 212.
292. Id.
to develop and implement counter-revolutionary strategy.\textsuperscript{293} The purpose of the strategy, in part, was to train special constables to oppose and undermine the activities of the UDF, which the police perceived to be the internal arm of the banned ANC.\textsuperscript{294} Mitchell ordered a group of special constables to attack a house outside of Pietermaritzburg, in an area called Trust Feeds, because he believed UDF/ANC activists were hiding out there.\textsuperscript{295} He instructed the constables to “target male persons between the ages of 16 and 35 who were involved in the political violence in the area.”\textsuperscript{296}

When Mitchell’s squad attacked the house, it discovered eleven women and children inside mourning at an all-night vigil.\textsuperscript{297} Although the squad had clearly targeted the wrong house, it killed all of the occupants anyway.\textsuperscript{298} Despite the SAP’s “frantic and feverish attempts to cover up this colossal blunder,” Mitchell and four of the special constables were sentenced to death on eleven counts of murder and to three years of imprisonment on each of two counts of attempted murder on April 30, 1992.\textsuperscript{299} On April 24, 1994, the State President commuted Mitchell’s death sentence to thirty years imprisonment.\textsuperscript{300}

The Committee emphasized that Mitchell was under the command of the Joint Management Committee System and felt obliged to carry out the system’s strategy.\textsuperscript{301} They also found significant the fact that Mitchell “had no personal motive” in the attack and that several of the special constables convicted with Mitchell had already been released from prison under the provisions of the Further Indemnity Act of 1992.\textsuperscript{302} The Committee did not discuss at all whether the actual act of killing eleven women and children was “proportional” to the goal of combating the UDF and ANC. The decision to grant amnesty under such extreme circumstances, suggests that the Committee is either interpreting the proportionality principle leniently or ignoring it altogether.

\begin{itemize}
\item \textsuperscript{293} Id.
\item \textsuperscript{294} Id.
\item \textsuperscript{295} Id.
\item \textsuperscript{296} Id.
\item \textsuperscript{297} Amnesty for First Apartheid Police Killer, supra note 290.
\item \textsuperscript{298} Id. The eleven women and children who were murdered were: Mseleni Ntuli, Dudu Shangase, Zetha Shangase, Nkoyeni Shangase, Muzi Shangase, Filda Ntuli, Fikile Zondi, Maritz Xaba, Sara Nyoka, Alfred Zita, and Sisedewu Sithole. The two victims of attempted murder were Ida Hadebe and Nomagoli Zuli.
\item \textsuperscript{299} Id.
\item \textsuperscript{300} Mitchell Decision, supra note 291.
\item \textsuperscript{301} Id.
\item \textsuperscript{302} Id.
\end{itemize}
If the Amnesty Committee feels bound to follow its own precedent, the Mitchell decision precludes the Committee from following a more narrow interpretation of section 20(3). The eleven murders constituted a grave act against innocent civilians in a peaceful setting that was grossly disproportional, if not completely unrelated, to the original political objective. Had the Committee looked at the gravity of the act, the nature of the victims, and proportionality of the crime as separate inquiries, rather than focusing on the original political intent of the order and the attack, it is clear that Mitchell would have been denied amnesty. As a practical matter, the public stood to gain little from a grant of amnesty to Mitchell because the "truth" about the Trust Feed Massacre had already been revealed during the criminal trials of Mitchell and the squad members.

Although the Committee essentially ignored the proportionality factor in the Mitchell decision, it did invoke this factor to deny amnesty for the murder of innocent civilians in another case. On August 14, 1997, the Committee denied amnesty to the convicted murderer of two farm workers in the Western Cape in the 1980s, but granted amnesty to his two accomplices. The three applicants, P. Maxam, T. Madoda, and C.S. Ndinisa, were political activists in the Paarl Youth Congress, an affiliation of the UDF. They claimed that they were following the orders of then president of the ANC, Oliver Tambo, to steal guns from White households, when they broke into a farmhouse to steal firearms on April 15, 1986. During the course of the burglary, Maxam shot and killed Anne Foster and John Geyser, two farm workers who happened to be on the property, primarily to prevent himself from being identified.

The Committee granted amnesty to all three men for the crime of housebreaking, finding Tambo's orders to be compulsory and the procuring of firearms from White households to be a "legitimate political objective." The two accomplices, Madoda and Ndinisa were granted amnesty for attempted murder, but Maxam's amnesty request for the two murders was denied. The Committee found no evidence that the applicants regarded the murders "as a political objective within their express or implied authority." The Committee found that there was "no need to kill these people in furtherance

304. Id.
305. Id.
306. Id.
307. Id.
308. Id.
309. Id.
of any instructions from the ANC or elsewhere.\footnote{Id.} The Committee concluded that "the killing of these two innocent people was so disproportionate to the aims sought to be achieved, that is to obtain arms with which to defend themselves, that it is not an act associated with a political objective for which amnesty should be granted."\footnote{Id. (emphasis added).}

An examination of the above decisions shows that the Amnesty Committee is not applying the proportionality principle consistently. In both the Diale and the Maxam cases, the applicants admitted the killings were committed to prevent future identifications by the victims. In the Diale case, the Committee seemingly ignored the admission in favor of the "evidence as a whole."\footnote{See supra text accompanying notes 278–287.} Maxam’s admission, on the other hand, was enough to render his purpose apolitical.\footnote{Id.} Given that the main objectives in both cases involved arguably equivalent legitimate political goals and that the murders in both cases occurred in the pursuit of these goals, the Committee had no clear reason to treat them differently. Furthermore, the murders of the eleven women and children in the Trust Feed Massacre were also likely committed to prevent the identification of the special constables because the murders clearly did not serve Mitchell’s goal of combating male participants in UDF’s violent political activity.

The Amnesty Committee also treated the murders of “innocent people” inconsistently in the Mitchell and Maxam decisions. As the Committee explained in the Maxam case: “[t]here was no need to kill these people in the furtherance of instructions” from Oliver Tambo and the ANC;\footnote{Id.} similarly, there was no need for to kill the women and children discovered in Trust Feed in order to comply with Mitchell’s instructions. Mitchell ordered the special constables to kill only sixteen- to thirty-five-year-old men who had committed political violence in the area. Tambo’s instructions to seize firearms from White households likewise did not include murdering “innocent” people on the premises. If the Committee found “the killing of [these] two innocent people was so disproportionate to” Maxam’s political goal of obtaining arms,\footnote{Id.} then the Committee certainly should have found the killing of eleven innocent women and children grossly disproportionate to Mitchell’s goal of combating violent male UDF activists. Under a narrow interpretation of the six amnesty criteria, none of the murders in the Diale, Mitchell, and
Maxam cases would qualify for amnesty because the murders were too disproportionate to the political objectives pursued.

V. HOW CAN THE AMNESTY PROCESS ELICIT THE FULL TRUTH?

Section 20(1)(c) requires an applicant to make a “full disclosure of all relevant facts” in order to obtain amnesty. In keeping with many of the other sections of the act, the drafters declined to define the meaning of “full disclosure.” The process has therefore turned up some interesting problems related to the substance of certain types of disclosure, such as the effect of self-incriminating statements and statements that incriminate third parties. The Amnesty Committee should interpret the full disclosure requirement narrowly to ensure that only persons who apply in good faith receive amnesty. The Committee should deny amnesty when it discovers that an applicant has not told the entire “truth.” If the Committee is willing to offer applicants full criminal and civil indemnity, the applicants should be willing to provide “full disclosure of the relevant facts” even if such disclosure incriminates them or others.

In the course of their testimony, amnesty applicants inevitably make self-incriminating statements. Section 31(1) of the Act obliges “[a]ny person who is questioned by the Commission . . . or who has been subpoenaed to give evidence . . . at a hearing of the Commission shall . . . answer any question . . . notwithstanding the fact that the . . . answer may incriminate.” As a check on that requirement, section 31(2) requires the Committee to consult with the Attorney General who has jurisdiction and to demonstrate that the requested information is “reasonable, necessary and justifiable in an open and democratic society based on freedom and equality.” Finally, section 31(3) forbids the use of “any incriminating answer or information obtained or incriminating evidence directly or indirectly derived from questioning” against a person referred to in section 31(1) “in criminal proceedings in a court of law or before any body or institution established by or under any law.”

At the amnesty hearing for the five security policemen, the applicants expressed concern about the scope of section 31(3)’s protection for self-incriminating statements. The applicants wanted to know whether section 31(3) applies only to persons directly questioned or subpoenaed by the Commission under section 31(1), or whether it also applies to persons under section 29(1)(c) who are

316. § 20(1)(c) of Promotion of National Unity and Reconciliation Act 34 of 1995.
317. Id. § 31(1).
318. Id. § 31(2).
319. Id. § 31(3).
"by notice in writing call[ed] upon to appear before the Commission and to give evidence or to answer questions." The applicants asked the Committee to state on record that all of the applicants' testimony would be covered by section 31(1) and thus protected from future use under section 31(3). Surprisingly, the Committee refused to do this, explaining that whether the applicants' testimony constituted an "answer" under section 31(1) is for a future tribunal, not the Committee, to decide. The Committee claimed that it did not have the power to give a ruling now that would bind the powers of a future tribunal, especially because a tribunal in a future hearing would have to decide whether testimony elicited by victims' questions qualifies for the same protection given to testimony elicited by Commission questions under section 31(3).

Although alarmed by the Committee's refusal, the five applicants made self-incriminating statements on their own and under questioning by the Commission and others. The applicants likely assumed that a tribunal would not use their amnesty testimony against them as doing so would defeat the purpose and spirit of the amnesty process. Sections 31(1) and 31(3) certainly could be interpreted as providing full protection for self-incriminating testimony from applicants regardless of whether it is elicited by the Committee or a victim. The objective of the amnesty process suggests that applicants should be protected from having both their voluntary and compulsory testimony used against them. Without this protection, very few if any persons would come forward. The Committee's refusal to reassure the five security policemen leaves future applicants in an uncertain position.

Tribunals must also grapple with the issue of what constitutes incriminating evidence "indirectly derived from a questioning" by the Committee. For instance, Officer van Vuuren said he would be willing to identify the site in which Maake, Makupe, and Sefola were killed and the bodies destroyed provided this evidence could not be used against him in the future. In contrast to its earlier reluctance, the Committee immediately reassured van Vuuren,

320. Id. § 29(1)(c).
322. Id.
323. Id.
324. The Durban High Court recently held in the highly publicized criminal trial of Dirk Coetzee that certain confessions to the Amnesty Committee could not be admitted in a later criminal trial for murder. This decision may do much to re-assure potential applicants. Coetzee's Confession to Harms Commission Ruled Admissible, Reports from SAPA, April 30, 1997, available at <http://www.truth.org.za/sapa9704/s970430f.htm>.
explaining that the Committee required these types of facts for the purpose of full disclosure and that therefore they were protected under section 31(3). This response seems to contradict the Committee's earlier claim that a tribunal might find applicants' responses to victims' questions admissible. Although the Committee's ruling and the terms of section 31(3) would prohibit a tribunal from using the fact that van Vuuren pointed out the site as evidence he committed the crime, it is not clear whether the tribunal could admit evidence obtained later at the site that independently linked van Vuuren to the crime. Arguably, such evidence would be "indirectly derived from a questioning," but the questioning would have come from the victims, not from the Committee. George Bizos believes section 31(3) would allow a tribunal to admit what he called "derivative evidence" of this kind.

If the Committee denies amnesty after holding a public hearing in which self-incriminating evidence is exposed, it will be difficult for potential plaintiffs and prosecutors to resist using this evidence to gather additional evidence against the applicant. However, evidence gathered in this manner may be inadmissible as "indirectly derived from a questioning." Prosecutors also face the problem of applicants incriminating themselves with evidence already possessed by the prosecution. Presumably, the evidence would still be admissible, but tribunals may find it difficult to determine whether evidence was gathered before or after an amnesty hearing. George Bizos notes that the Act was never intended to allow amnesty applicants to make already known evidence inadmissible against them by simply raising it in their written applications or during Committee hearings.

In the course of full disclosure of the relevant facts of an incident, it is not uncommon for applicants to incriminate individuals other than themselves. During his testimony about the Pebco Three incident, Colonel Venter was asked about others who may have been involved in the abduction and interrogation of the three ANC activists. The attorneys representing the relatives of the Pebco Three victims asked him to supply not only the names of those who planned the operation, but also the names of any officers who would have been aware of what had happened. Venter stated that he did not know who was responsible for the decision to abduct and eliminate them, but he did provide the names of four policemen.

326. Id. at 98.
327. Interview with George Bizos, supra note 2.
328. See id.
330. Id.
who had knowledge of the events.\textsuperscript{331} The Committee decided to use its section 29 powers to subpoena the four officers.\textsuperscript{332}

When Colonel Deon Niewoudt, one of the four named by Venter, appeared before the Committee on Monday, October 28, 1996, his counsel explained that the subpoena had only arrived on Thursday and that principles of fairness and equity required the Committee to give Niewoudt time to review the evidence before requiring him to testify.\textsuperscript{333} As the attorney for the applicants pointed out, the Truth and Reconciliation Act does not indicate the minimum amount of time necessary for reasonable notice to a person implicated in Truth Commission hearings.\textsuperscript{334} The Act merely requires the Committee to afford any person implicated in a proceeding an opportunity to give evidence or make submissions on his or her behalf.\textsuperscript{335} The Committee, conceded that in some cases a fortnight might constitute reasonable notice, but decided to postpone the testimony of the four men indefinitely.\textsuperscript{336} The applicants' attorney argued that the Act does not entitle implicated persons to a review of the incriminating testimony or of the amnesty applications.\textsuperscript{337} Stressing that the implicated persons were not on trial, the attorney argued that the amount of notice usually required prior to a trial did not apply to amnesty proceedings.\textsuperscript{338} The Committee, choosing to ignore these objections, agreed to give them more time to review the applications and the testimony.\textsuperscript{339}

By giving the four men time to prepare their testimony and compare each others versions of the events, the Committee seriously jeopardized the goal of full disclosure. The Committee made this mistake again with respect to two incidents in which members of the SADF and Civil Cooperation Bureau ("CCB")\textsuperscript{340} were implicated by one or more of the five applicants. During his testimony about the murder of the Ribeiros, Brigadier Cronje implicated Special Forces Commander, Major General Joep Joubert,

\begin{footnotesize}
\begin{enumerate}
\item[331.] Id.
\item[334.] Testimony of Security Police, supra note 48, at 36.
\item[335.] § 30(2) of Promotion of National Unity and Reconciliation Act 34 of 1995.
\item[337.] Testimony of Security Police, supra note 48, at 36.
\item[338.] Id.
\item[339.] Id.
\item[340.] The CCB was another arm of the apartheid's regime counter-revolutionary system and strategy.
\end{enumerate}
\end{footnotesize}
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SADF Chief of Staff Lieutenant-General Ian Gleeson, Noel Robey of the CCB, and CCB Commander Colonel Joe Verster in the cover-up of the murders. Concerned about proper notice, the Committee cut Cronje’s testimony short and postponed further testimony on the Ribeiro murders until the implicated men could be notified.

How much notice the Committee must give to persons implicated in other people’s testimony has been a source of some contentious litigation against the Commission. Two members of the apartheid regime implicated in human rights violations, Brigadier du Preez and Colonel van Rensburg, sought an interdict against the Truth Commission requiring the Committee to give them reasonable notice before forcing them to appear at an amnesty hearing. Judge King granted an interdict, forbidding the Commission from allowing testimony implicating the two men until they had received “proper, reasonable and timely notice” of the time and place of the proposed hearing. In June 1996, a full bench of the Cape Supreme Court overturned Judge King’s decision, holding that the Truth Commission had no obligation to give advance notice to persons whom the Commission had reason to believe would be implicated as an alleged perpetrator of gross human rights violations. The Court also held that once a witness implicates another person as such a perpetrator, the Commission must give this person an opportunity to submit representations to the Commission or give evidence at a hearing within a stipulated reasonable time. Finally, the Court held that implicated persons have a right to any information involving their alleged involvement in the human rights abuse, such as copies of witness statements and transcripts of evidence. These holdings constituted a significant victory for the Commission because requiring them to issue notice before testimony began would seriously impede and delay the Commission’s work.

In order to obtain “full disclosure of all relevant facts,” the Committee has the power to subpoena people and documents under section 29 of the Act. When Colonel Venter implicated four other policemen in the Pebco Three incident, the Amnesty Committee

341. Laufer, supra note 83, at 1.
344. Id. at 1002.
345. Id. at 1009–10.
346. Id. at 1010.
347. Id.
subpoenaed them to get a more complete picture of what happened, especially because Colonel Venter's testimony was questionable.\textsuperscript{348} Venter claimed he did not know the Pebco Three would be killed and that he did not know what happened to them.\textsuperscript{349} If one of the other four policemen subpoenaed testifies that Venter did possess such knowledge, then Venter's application should fail for lack of full disclosure. Venter could even face a fine or jail time for having lied to or misled the Committee.\textsuperscript{350} The testimony of people present at the scene with the applicants can either corroborate or refute the claims of the applicants or fill in gaps in the applicant's memory. Given the value of such information, the Committee should use its subpoena powers liberally in the interest of full disclosure.

Generally, the Commission tries to rely on voluntary public submissions from perpetrators, but occasionally finds it necessary to subpoena people to testify in camera. For instance, the Truth Commission asked the Ministers of Safety and Security and Defense to make submissions, but ultimately had to subpoena the testimony of certain officers when they refused to revise their unsatisfactory and unhelpful submissions.\textsuperscript{351} The Commission has allowed several people to testify in camera, having determined that certain information, even if obtained only through a closed hearing, is vital to the pursuit of truth and reconciliation.\textsuperscript{352} Although some have criticized the closed hearings for thwarting the goal of full disclosure, the Committee fortunately retains the right to disclose information released in closed hearings in its final report.\textsuperscript{353} Ironically, in some cases, permitting a person to testify in a closed hearing is the only way for the Commission to obtain full disclosure of all the relevant facts.

VI. SHOULD REMORSE BE A CRITERION FOR AMNESTY APPLICANTS?

Notably absent from the amnesty criteria is a contrition requirement. Some interpret the terms of the Act as obliging the

\textsuperscript{348} Testimony of Security Police, \textit{supra} note 48, at 25, 35.
\textsuperscript{349} Id. at 26–27.
\textsuperscript{350} § 39(d)(ii) of Promotion of National Unity and Reconciliation Act 34 of 1995.
\textsuperscript{351} Among the policemen subpoenaed were Johan van der Merwe, who testified in public on October 21, 1996; Johan Coetzee, who testified in camera in Cape Town on November 18, 1996; and former law and order minister Adriaan Vlok. Vlok is the first cabinet minister of the old apartheid regime to be compelled to testify before the Truth Commission. Daisy Jones, \textit{Truth Probe to Grill Vlok and Generals}, \textit{STAR}, Oct. 4, 1996, at 1.
\textsuperscript{352} Dr. Alex Boraine, \textit{New Developments Within the Commission}, \textit{Truth Talk}, THE OFFICIAL NEWSLETTER OF THE TRUTH AND RECONCILIATION COMMISSION (Truth and Reconciliation Commission, Cape Town, South Africa), Nov. 1996, at 2, 4.
\textsuperscript{353} See \textit{id}. 
Committee to give amnesty even to applicants who have not apologized for their acts. Others dismiss this interpretation because it means a person could be brought before the Commission against his will, disclose his acts without contrition, and walk away with the benefit of amnesty. The former approach “discards the core ideas of voluntary confession, the renunciation of bad ways, and of reconciliation within humane norms.” The Amnesty Committee can and should require of applicants both an apology for and a renunciation of past crimes as a precondition to amnesty. A public apology and a renunciation of past crimes will strengthen democracy and foster a human rights culture in South Africa.

Nothing in the Act explicitly precludes the Truth Commission from requiring an apology from amnesty applicants. One possibility would be for the Committee to insist the applicant apologize as a form of “reparation.” An observer of the October 1996 hearings of the five security policemen noted that the applicants failed to “make way for the remorse their victims desperately need to see them feeling if truth is to beat a path through anger to reconciliation.” The observer concluded that the applicants seemed incapable of feeling remorse, of “opening the heart and the soul to the pain of others and one’s own pain at having caused it.” While the attorney for the five applicants often claimed that the applicants were sorry for what they had done, at no time in their testimony did the applicants themselves express remorse or ask for forgiveness. Not surprisingly, many victims found the absence of genuine remorse from the applicants to be further grounds for opposing their applications.

During his submission to the Truth Commission in August of 1996, de Klerk apologized to the nation for the “pain and suffering caused by former policies of the National Party” while simultaneously distancing himself and his party from apartheid crimes. Although claiming that the purpose of his submission was not “to try to find excuses for [apartheid] abuses but to explain the
historic context within which they occurred," de Klerk described at length how the apartheid regime sincerely believed "an ANC Government would lead to Communist domination" and that the regime's struggle against the ANC played "an important role in the West's global resistance to the expansion of Soviet Communism." De Klerk denied that the government ever authorized murder, torture, rape, or assault and insisted that it only approved "unconventional strategies" involving "information gathering, disinformation and assistance to outside organisations opposed to the revolutionary forces." Needless to say, many political parties including the ANC, SACP, AZAPO, DP, and even the IFP publicly condemned de Klerk's submission as "incomplete and unsatisfactory."

Although de Klerk refused to apply for amnesty, many believe that he must make a substantive and genuine public apology to the people of South Africa in which he condemns apartheid as an evil system both in concept and application. The closest he has come is expressing his "deep regret" about apartheid in Parliament in February 1996 and his "deepest sympathy with all those on all sides who suffered during the conflict" to the Commission in August 1996. These concessions have done little to foster reconciliation. De Klerk's more recent apology for apartheid on May 14, 1997, further jeopardized the reconciliation process by once again distancing the NP from the murders of prominent anti-apartheid activists. The ANC rightfully rejected de Klerk's May 14, 1997, apology, explaining that "[i]t would be asking too much of South Africans to accept the apology in the absence of full disclosure of the truth."

If genuine reconciliation is to occur in South Africa, the NP must publicly acknowledge its active and deliberate role in the commission and continuation of all apartheid crimes. Archbishop Desmond Tutu tried unsuccessfully to persuade P.W. Botha, former apartheid-era President, to apply for amnesty or at the very least publicly acknowledge some responsibility for the apartheid crimes

363. De Klerk, supra note 265, at 6, 8.
364. Id. at 8.
367. See ASMAL ET AL., supra note 4, at 30.
368. Id. at 30–31.
370. De Klerk Distances, supra note 153.
committed during his presidency. Botha offered the Commission a manuscript of his biography instead of public testimony, but was warned that the manuscript did not satisfy the requirements of the Truth and Reconciliation Act. In the end, few senior apartheid officials have applied for amnesty or publicly apologized. Now, more than ever, the people of South Africa need the Truth Commission’s final report to “expose apartheid’s lies and... finally destroy the facade of sanity and idealism that apartheid maintains in the eyes of its erstwhile active and passive adherents.”

De Klerk and Botha have both criticized the Truth Commission for focusing too much attention on the crimes of the apartheid government and not enough on the crimes of the ANC. The ANC has repeatedly said that it owes no apology to de Klerk for having waged “a just and legitimate struggle against a criminal system which was the brainchild of his political party.” The ANC asked de Klerk several times to come forward with his knowledge of the human rights violations committed by the apartheid death squads and yet de Klerk remains silent, continuing to profess his ignorance and innocence. The ANC and its leaders, on the other hand, have publicly accepted responsibility for all “excesses” committed during the course of the armed struggle and have apologized to the Commission and the people of South Africa.

Whether fighting for or against apartheid, amnesty applicants have a moral obligation to apologize to the people they harmed. An expression of genuine remorse not only may help to ease the pain of victims and their relatives but also goes a long way towards fostering feelings of reconciliation among South Africans. When applicants testify on public television about committing brutal crimes in a smug or heartless fashion, they show a lack of respect for their audience and for the amnesty process. At the same time, a contrition requirement may result in feigned and insincere remorse, embittering the public even more. The point is probably moot.

373. ASMAL ET AL., supra note 4, at 33.
374. See, e.g., Justice Malala, “It’s All Twak,” Says de Klerk, STAR, Nov. 4, 1996, at 3 (quoting de Klerk, “[w]e are fed up with the way in which the ANC is abusing the work of the Commission”).
375. We Owe No Apology to FW, STAR, Nov. 4, 1996, at 3.
376. Id.
377. See ANC STATEMENT, supra note 198, at 11; see also Inigo Gilmore, Mbeki Apologises for ANC Atrocities in Liberation War, TIMES (London), Aug. 23, 1996, at 1 (“We recognise there were excesses and want to apologise.”); Anti-Apartheid Leaders Detail Own Atrocities, HOUS. CHRON., May 13, 1997, at 13 (“We regret the deaths and injuries to civilians arising from armed actions. We apologize to the next of kin for the suffering and hurt.”).
however, given that Archbishop Tutu, the head of the Commission, publicly announced that amnesty applicants do not need to show remorse and may even express pride in their actions.  

Even if the Committee cannot require actual apologies, they could make amnesty contingent on the performance of some act of contrition to benefit victims or their families. For instance, the Committee could require the applicant to do volunteer work in a victim’s community or to pay for the costs of educating one of the victim’s children. Unfortunately, any such imposition is unlikely. In fact, Archbishop Tutu has said that he prefers to challenge perpetrators to figure out on their own what they need to do to repent rather than having the Committee prescribe some specific act of contrition. Of course, there is the risk that perpetrators will not engage in such soul-searching, nor take active steps to express their apologies and regret, unless required to do so. The reconciliation process suffers as a result.

VII. WILL THE AMNESTY PROCESS FOSTER RECONCILIATION AMONG SOUTH AFRICANS?

The amnesty process is predicated on the belief that uncovering the “truth” about the apartheid past will pave the way toward reconciliation among the diverse ethnic and political groups in South Africa. As one journalist aptly described the Truth Commission and the amnesty process:

[t]he effort assumes that truth is a balm, and that recording the horrors of the past will by itself help diminish the chance they will be repeated in the future. Not everyone agrees that recording the horrors is enough. The truth commission itself is the result of a compromise embodied in its guarantee of amnesty to those who confess. One side favored unrelenting punishment for political criminals. . . . The other wanted to wash its hands of apartheid, without even paying the price of humiliation through exposure.

Archbishop Tutu, the champion and chairman of the Truth Commission, concedes that “[t]he commission remains a risky and delicate business,” but insists that “it remains the only alternative to

Nuremberg on the one hand and amnesia on the other.\textsuperscript{381} In an appeal to political leaders and potential amnesty applicants to come forward, Archbishop Tutu said:

\begin{quote}
[\textit{t}here is no instrument in the country with the same potential as this process for ending the accusations and counter-accusations about the past, the recriminations and the political bickering which will plague this country's life for generations to come if you do not seize the opportunity of using properly the Commission which you created.\textsuperscript{382}
\end{quote}

Despite Archbishop Tutu's conviction that the Truth Commission and the amnesty process provide the only path toward reconciliation and national unity in South Africa's deeply divided society, many South Africans seriously question the value of the Truth Commission's work.

Public criticism of the Truth Commission suggests the amnesty process has been much better at establishing the truth than at promoting reconciliation. Many of the attacks have come from White conservatives who claim the Commission is a one-sided organization, intent on discrediting the Afrikaners and glorifying the ANC. For example, one editorial complains that:

\begin{quote}
[\textit{t}he C]ommission is obviously being used to present a bad image of the previous government and put the Afrikaans people in a bad light . . . The object is evidently to show to the world that apartheid was the greatest evil in South Africa. The terrorists were all pure, innocent people who never put a foot wrong but were unjustly persecuted.\textsuperscript{383}
\end{quote}

Another conservative editorial called the Truth Commission hearings a "judicial charade, with histrionics, fables, uncorroborated evidence, and [a] lack of cross examination" and accused the "biased" Commission of "bring[ing] itself and everyone connected with it into disrepute."\textsuperscript{384} De Klerk has repeatedly criticized the Commission as "uneven-handed" and "biased" against the former

\textsuperscript{381} Id.
\textsuperscript{384} Cassandra Verfontein, EL Truth Hearings Show Utter Bias, CITIZEN, Nov. 21, 1996, at 25.
Even Archbishop Tutu has chastised Commission members for making statements during hearings that could be characterized as biased. According to national surveys, a third of Whites interviewed perceive the Commission to be favoring Black over White South Africans and many Whites scornfully refer to the Commission as the "Kleenex Commission" because of all the tears it has generated.

These observations ignore the reality of the Amnesty Committee hearings. Thus far, the decisions handed down by the Amnesty Committee have demonstrated considerable leniency toward conservative Whites. For example, in December 1996, the Committee not only granted Brian Mitchell amnesty, but also granted amnesty to four Afrikaner men belonging to right-wing groups who planted bombs in Black schools after Mandela began negotiating with de Klerk. Most of the amnesty hearings before March 1997 involved supporters of the apartheid regime, and the Mitchell precedent virtually assures that these applicants will receive amnesty provided they do not conceal relevant facts and did not commit their crimes for explicitly personal reasons. Additionally, White conservatives have the Truth Commission to thank for the extension of the cut-off date until May 10, 1994, which has allowed several White conservatives who set off bombs at polling stations in April 1994 to come forward. Without the Commission’s pressure, President Mandela would likely have remained opposed to a time extension.

Although the majority of South Africans interviewed in national surveys endorse the work of the Commission, many oppose the granting of amnesty to grave human rights violators and more than half believe the "perpetrators" testifying before the Commission should face trial. This sentiment is particularly strong among Black South Africans. As one editorial explained, "Many black activists resent that police and others who brutalized members..."
of the country’s black majority may go unpunished, literally getting away with murder.”

On the whole, Black South Africans have been extraordinarily tolerant of an amnesty process that has operated to benefit many White applicants at the expense of primarily Black victims. However, sometimes the decisions of the Amnesty Committee may go too far. Decisions like those granting amnesty to Brian Mitchell and to the Afrikaners convicted of blowing up Black schools, and the pressure put on Mandela to extend the cut-off date primarily to cover right-wing bomb attacks against Blacks in early 1994 have many Black South Africans wondering if these attempts to buy “truth” have come at too costly.

Official reactions from predominantly Black parties were mixed. The ANC party publicly endorsed the extension of the cut-off date and the application deadline, as well as the Mitchell decision. The ANC found Mitchell’s testimony extremely valuable because it identified the apartheid security network as being primarily responsible for the “Black on Black” violence and implicated senior level IFP members in major attacks on the ANC. The PAC denounced the Committee’s decisions of December 1996 as “naked injustice for these victims of apartheid crime.” Leaders of the PAC’s military wing complained that many of its anti-apartheid activists were “rotting” in jail while apartheid criminals were walking around free.

The IFP, a predominantly Black party, has publicly opposed the Truth and Reconciliation Commission from its inception and discourages IFP members from applying for amnesty. As a result, very few IFP members have applied for amnesty. The IFP

396. Dellios, supra note 164, at A27.
398. Id.
399. Id.
400. Id.; see also PAC Accuses TRC of Bias Against APLA Cadres, Reports from SAPA, Feb. 14, 1997, available at <http://www.truth.org.za/sapa9702/s970214a.htm> (noting the PAC’s accusation that the TRC is unfairly prioritizing cases of people like Dirk Coetzee and Brian Mitchell over hundreds of applications from imprisoned APLA cadres).
402. See Brand, supra note 34, at 3. At the close of the first deadline for applications in December 1996, only a few IFP members had applied as individuals, but the IFP
continues to attack the TRC as “a monster which is not only failing to heal the old wounds but, indeed, is opening new ones” and to accuse Archbishop Tutu of infecting the TRC with his own pro-ANC and anti-IFP “bias.”

In May 1997, the IFP issued a statement reiterating these criticisms: “[a]s currently constituted the Truth Commission is not promoting reconciliation and nation building. The [pro-] African National Congress sympathies of the commission are patent. All other parties are treated in a second-class manner bordering on contempt.”

Given that violent clashes between the IFP and the ANC are one of the most pressing problems facing South Africa today, the IFP’s response to the Truth Commission suggests that reconciliation between these two groups is unlikely.

In August 1997, AZAPO, a mostly Black anti-apartheid movement, seriously questioned the Committee’s decision to grant amnesty to Dirk Coetzee, a former police hit squad commander, and his police operatives, Almond Mofomela and David Tshikilange, for the highly publicized murder of human rights lawyer Griffiths Mxenge in 1981. The three men had been convicted of Mxenge’s murder on May 15, 1997, in the Durban High Court. A spokesperson for AZAPO said the Amnesty Committee’s decision confirms that the truth and reconciliation process has “nothing to do with justice . . . [or] reconciliation,” but rather “has everything to do with political expediency of the government.”

The spokesperson went on to explain how the amnesty process affects victims and their families: “it is like turning the knife after the initial blow to the heart. It causes more pain and reveals the futility of saying the families can always oppose the granting of amnesty.”

South Africans across the political and racial spectrum have been voicing doubt about the Commission’s ability to foster reconciliation and national unity. At the same time that members of the Black community are finding their sense of justice sorely tested by the seemingly indiscriminate grants of amnesty to White applicants, much of the White and conservative populations in South Africa are
accusing the Commission of “bias” against Whites.\textsuperscript{410} While the Commission is doing a formidable job of uncovering the truth about the apartheid-era crimes, its it is having far less success in promoting reconciliation. Although there is logic in the argument that the ANC government “must temper its reaction to the past, given how it came to power and the continuing importance of the white population to the economy and in the security forces,”\textsuperscript{411} the Truth Commission must pay heed to the complaints from the much larger Black population in South Africa if the Commission is serious about promoting reconciliation in the vast majority of South Africans. For the amnesty process to succeed, the Commission must focus more of its attention on fostering reconciliation and less of its attention on exposing the painful “truth” at the expense of justice.

CONCLUSION

South Africa’s dual goals of establishing the truth about the apartheid past and of fostering reconciliation among its discordant populations are not always complimentary. The Amnesty Committee must employ the amnesty criteria of the Truth and Reconciliation Act to achieve a proper balance. At the present time, South Africa’s definition of amnesty is too broad and the Amnesty Committee’s procedures are too lenient. This Note recommends a narrow interpretation of the amnesty provisions in order to rectify the current imbalance between truth and reconciliation. Despite its discretionary authority, the Committee has made some extremely disturbing decisions, which it has justified in the name of political expediency and the search for truth. While both are necessary components of the amnesty process, the Committee must not lose sight of the other purpose of the Act—the formation of a human rights culture in South Africa and the promotion of reconciliation and national unity among South Africans.

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\item \textsuperscript{410} See discussion supra Part VII.
\item \textsuperscript{411} Herbst, supra note 10, at M6.
\end{itemize}
\end{footnotesize}