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

Report of the Amnesty Committee

SOME REFLECTIONS ON THE AMNESTY PROCESS

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

Some Reflections on the Amnesty Process

1. As was noted in Chapter Two of this volume, the South African amnesty process was unique in that it provided not for blanket amnesty but for a conditional amnesty, requiring that offences and delicts related to gross human rights violations be publicly disclosed before amnesty could be granted. This meant that the Amnesty Committee (the Committee) set sail in uncharted waters, with no international or local precedents to guide it.

2. Nobody foresaw the immensity of the work ahead. The legislature originally envisaged that the entire task could be completed within a mere eighteen months. Both the Truth and Reconciliation Commission (the Commission) and the Committee were astonished at the sheer volume of amnesty applications.

3. While the Committee is aware that the process as it developed was by no means perfect, it believes nonetheless that the experience was in many respects a positive one for South Africa. While recognising that the realisation of national unity and reconciliation is a long-term project involving a range of role players, the Committee is of the view that the amnesty process has contributed in no small way to the promotion of these objectives.

4. The Committee is also aware that its work has been closely watched and widely admired by the international community. While mindful of the fact that the work of truth commissions must be tailored to the individual cultural, political and other needs of the societies within which they operate, and that the South African model cannot be randomly superimposed on other societies, the Committee believes, nonetheless, that there are lessons to be learnt from the South African experience. It is in this light that the following comments are made.

Perceptions about the Committee

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

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

6. There were negative perceptions about that part of the Committee's work that related to indemnifying offenders. These perceptions were prevalent not only amongst the general public, but were also evident amongst some officials of the prosecuting authority and the police, especially during the early stages of the Committee's existence. There was some resistance from some of the officials who were requested to assist the Committee with investigations into amnesty applications. This resistance could possibly be ascribed to an understandable view that the Committee was undermining their work in fighting crime by indemnifying criminals. Various meetings, at which the role and objectives of the Committee were explained, helped ease the situation and improve the working relationship with members of these bodies.

7. Thus the amnesty process was often the subject of scrutiny and criticism. Although the Committee was a creature of statute, some critics saw its work as being at odds with that of the Commission's other Committees. While the Human Rights Violations Committee (HRVC) was perceived to be devoting its time and energy to acknowledging the painful experiences of victims of gross violations of human rights, the Amnesty Committee, it was argued, was indemnifying many of the perpetrators of such violations against prosecution and the legal consequences of their actions. These perceptions were, of course, the result of the statutory scheme created by the provisions of the Act. Moreover, while the Amnesty Committee had the powers to implement its decisions, the Reparation and Rehabilitation Committee (RRC), for example, could only make recommendations for reparations for victims. Thus, while perpetrators were granted immediate indemnification if their amnesty applications succeeded, victims were required to wait until Parliament took a final decision on implementing reparations.

8. The resultant view that the Committee was 'perpetrator friendly' was thus to an extent understandable and even unavoidable. Any accusation that the Committee was insensitive towards victims is, however, totally unfounded. The Committee's records bear ample testimony to the resources made available to assist victims. Substantial budgetary provision was made for locating victims, arranging for their legal representation and providing subsistence, transport and accommodation to enable them to attend and participate fully in amnesty hearings.

9. The statutory provisions that ensured the Committee's independence as an adjudicative body unfortunately resulted in the development of some distance and differences of opinion between the Committee and the rest of the Commission. It was, however, considered necessary to maintain such an 'arm's length' relationship in order to allay fears that the Commission might influence the decisions of the Committee. This was vividly exemplified by the fact that the Commission, on one occasion, brought a court application to set aside the Committee's decision in respect of the collective amnesty application of thirty-seven prominent leaders of the African National Congress (ANC).

10. It was against this background that the Committee was required to perform its statutory functions. The Committee never allowed any of these circumstances to deter it from its statutory mandate to adjudicate objectively, impartially and even-handedly on all applications for amnesty.

Composition of the Amnesty Committee

11. Appointments to the Committee were made exclusively from the ranks of the legal profession: that is, its members were judges, advocates and attorneys. There were those who questioned this. It was their view that the process would have been enriched had social scientists and other non-lawyers – for instance historians or anthropologists – been appointed to the Committee. The argument was that the specialised knowledge of such persons could have benefited the deliberations of the Committee.

12. In the view of the Committee, this argument entailed the danger of assuming findings of fact prior to evidence having been heard. It also felt that the presence of non-lawyers could have increased the fears of those persons who were concerned that they might not receive a fair and impartial hearing.

13. Committee members were all aware of the fact that they had entered the process with different perspectives. They were equally aware of their statutory duty to act impartially and decide applications objectively. Given the fact that its role was largely adjudicative, the Committee remained convinced that the legal training of its members rendered them better equipped to perform this adjudicative function. Hence, in the Committee's view, its impartiality was generally accepted by all those who participated in the amnesty process.

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

Unfolding of the Process

15. What was true for the Commission as a whole was also true for the Committee: no preparatory work had been done before the Committee was established. The original Committee of five members had to start from scratch, designing application forms and determining its own operational procedures. It had to appoint staff with no clear idea either of the scope of its tasks nor of the volume of work that lay ahead. As it turned out, the number of staff members appointed was inadequate to cope with the workload.

16. In spite of this obvious lack of preparedness, the Commission exerted pressure on the Committee to commence with hearings. Despite a concerted effort to summarise applications and capture the information on a database, the first hearings were held before the closing date for the filing of applications for amnesty, and before all applicants who had applied for amnesty for the same incidents had been linked. As a result, not all the evidence that related to a specific incident had been placed before the Committee or could form part of the record of the hearing. This necessitated different panels hearing different applicants on the same incident, resulting in duplication and extra costs. Moreover, the Commission's Investigation Unit was at that time taken up with investigations on behalf of other arms of the Commission. As a result, the Committee had done no proactive investigations by the time the initial hearings began.

17. There was, however, one very positive result that arose from these early hearings. The fact that the amnesty process was being publicly observed seems to have reduced public scepticism, and consequently the volume of applications increased.

18. The lack of a dedicated or adequate investigative capacity for the Committee created numerous problems, which are discussed briefly below.

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60 See this section, Chapter Four.

19. First, although hearings were scheduled in the expectation that the relevant applications would have been properly investigated prior to the hearing, on more than one occasion this turned out not to be the case. In some cases, not all victims had been informed of the hearing, and some had not even been traced. The result was that hearings had to be postponed, prolonging the overall process.

20. Occasionally, however, hearings had to proceed at a stage when more extensive investigations could possibly still have been done, or even where the event for which an applicant had applied for amnesty had not been fully corroborated by the Committee. The Committee had to weigh the interests of all parties in deciding at what particular stage to set a matter down for a hearing. The prejudice caused by delays, especially to applicants in custody, was of particular relevance in this regard.

21. Second, in those instances where the Committee realised that further applicants still had to be heard in respect of the same incident, a decision was held over, pending the hearing of all applications relating to that incident. This was done in order to avoid potential prejudice to interested parties. Decisions on specific incidents were thus also postponed. By so doing, the Committee simply created more work for itself, since the hearings panel had to revisit the record of the proceedings and their notes in order to refresh their memories before finalising the delayed decision.

22. Third, the delay in finalising decisions on incidents that concerned clusters of applicants deprived lawyers for those applicants of guidelines on the requirements for amnesty contained in decisions of the Committee. This resulted in the presentation of extensive evidence on minutiae and non-material matters, and sometimes unnecessary cross-examination, out of excessive caution on the part of legal representatives. This added a lot of unnecessary time to the process.

23. There are a number of observations to be made in respect of the above.

24. First, the prescribed application form could have been simplified by providing for a narrative summary of both the incident and the role of the applicant. In far too many applications, correspondence with applicants was required simply to obtain information the application form should have elicited in the first place.

25. Second, legal assistance should have been made available to applicants who required help with the completion and submission of their applications. This would have substantially reduced the number of defective applications, particularly those that failed to disclose a political objective or an offence or delict. People in prison were particularly vulnerable in this respect. The saving of time and

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

26. Third, and in the same vein, legal assistance should have been provided to all applicants on a basis of parity from the outset. The Legal Aid Board provided legal assistance to applicants at much lower rates than that provided to former or present employees of state departments. Victims or their families also received the lower rates and, by implication, less experienced legal assistance. The Committee assumed the responsibility for providing legal assistance towards the middle of 1999, after which its legal department negotiated better fee structures with legal representatives. This made for a more equitable arrangement. Although the Committee is of the opinion that no real prejudice resulted from this situation in view of the more inquisitorial approach it adopted in these earlier hearings, victims understandably felt aggrieved by that semblance of inequality. This should not detract from the very positive aspects of the process, particularly the fact that legal assistance was afforded to all interested parties.

27. Fourth, the absence of useful precedents inhibited the Committee's ability to conceptualise, plan and manage the process in an integrated fashion from the outset. It would, for example, have served the process much better had the Committee immediately dedicated its full capacity to capturing all applications on the database with the least possible delay. All linked applications should have been prioritised for analysis and subjected to focused and managed investigations. This should have entailed the tracing of victims or their next-of-kin and other interested parties with a view to obtaining their versions of events and, where applicable, to obtaining research material relevant to the applications in question.

28. Fifth, pre-hearing conferences involving legal representatives could have been better utilised to limit the scope of hearings by minuting common cause facts and thus focusing the hearing solely on matters actually in dispute.

29. Sixth, the more regular use of *ex tempore* decisions in the many instances where applications were clear-cut would have contributed towards effecting savings and speeding up the overall process.

A Few Reflections on the Provisions of the Act

30. In some instances, applicants applied for amnesty in respect of offences for which, they maintained, they had been wrongly convicted. Since the Act required that the conduct for which amnesty was sought should have constituted an offence or delict, the Committee could not consider such applications favourably. In some cases, co-applicants confirmed the innocence of such an applicant. The Committee referred those cases to the Department of Justice in the hope that they could be dealt with in terms of the Presidential prerogative. The Committee merely wishes to record that such cases could have been dealt with had the legislation either conferred additional powers on the Committee or provided for a concurrent process to deal with those cases.

31. In a few cases, the Committee found that gross human rights violations that did not fall within the ambit of the Act had occurred during and as a result of the conflicts of the past. These related mainly to intra-organisational conflicts. In such conflicts, the acts in question were not directed at a political opponent as required by the Act. Although these cases might have been deserving, they could not qualify for amnesty. This difficulty could have been addressed by extending the ambit of 'an act associated with a political objective' so as to encompass matters of this nature.

32. In many instances, where applications were unopposed and the facts common cause among all interested parties, the Committee was still compelled to hold public hearings merely by virtue of the fact that these matters concerned gross human rights violations. These included, for example, matters related to conspiracies to commit a gross violation of human rights where plans were later aborted, and abductions of persons for a very limited period of a few hours without any physical harm being done to the victim. A wider discretion to grant amnesty in matters where the application was unopposed and the facts common cause, without having had to hold a public hearing, would have contributed to a more expeditious process and cost savings.

33. Applications for amnesty were received from persons in leadership positions in various political groupings, who accepted collective responsibility for (gross) human rights violations committed within the ambit of their policies or resulting from a misguided but bona fide belief that these violations were perpetrated in the implementation of such policies. Often these applications were made pursuant to calls by the Commission on persons in leadership to apply for amnesty. The application of the provisions of the Act to such matters was fully dealt with in the High Court review of the collective amnesty application by ANC leaders.

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

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

Reconciliation and National Unity

35. The various participants experienced the Amnesty Committee process differently. Victims who attended hearings had to contend, generally speaking, with the reopening of old wounds. Their responses varied from strongly opposing to supporting applications for amnesty; from opposing the principles underlying the amnesty process to embracing them; from frustration with perceived non-disclosure by perpetrators to satisfaction at having learnt the facts; from animosity towards applicants to embracing them in forgiveness and reconciliation. Often they merely stated that they had learnt the truth and now at least they understood how and why particular incidents had happened.

36. Perpetrators' attitudes ranged from taking pride in their past actions, to disavowing any further support for their earlier attitudes, to expressions of deep remorse. Often they had to experience the humiliation of public exposure of their shameful pasts. Others said that they would probably repeat what they had done in similar circumstances.

37. The Committee believes that, in all its many facets, the amnesty process made a meaningful contribution to a better understanding of the causes, nature and extent of the conflicts and divisions of the past. It did so by uncovering many aspects of our past that been hidden from view, and by giving us a unique insight into the perspectives and motives of those who committed gross violations of human rights and the context in which these events took place.

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