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**Amnesty and the Human Rights Community: An Historical and  
Comparative Study of the Role of the Human Rights  
Communities in the Argentine and South African  
Transitions**

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## COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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## **Abstract**

Using material such as organisational reports and newspaper clippings, along with a survey of relevant literature on the South African Truth and Reconciliation Commission, this thesis fills an important gap in the literature on the TRC's amnesty process by investigating the perspective and contribution of the South African human rights community on the novel form of amnesty involved in the TRC process. In so doing, the study draws on relevant comparisons with the role of the Argentine human rights movement in advocating for truth and justice for human rights atrocities following the restoration of civilian rule in Argentina 1983. The thesis adds new perspectives on the important debate around amnesty and prosecutions in the South African transitional context. It furthermore gives a unique insight into how these debates and contributions from important civil society members shaped the eventual TRC process which included a novel individual and conditional amnesty. In particular, it sheds new light on the eventual TRC process that was the result of a fusion of two different but parallel agendas: a civil-society based agenda for a victim-centred truth process and the official agenda for amnesty entrenched in the Postamble.

Unlike the Argentine human rights movement, the SA human rights community's response to the issue of amnesty for human rights atrocities did not amount to a principled rejection based on human rights grounds. Instead, when the human rights community was given the opportunity to give its input on the legislation for an amnesty process, combined with a truth commission, this amounted to constructive input and an attempt to render the amnesty more acceptable from a human rights perspective than a general amnesty. Significantly however, the thesis finds that unlike the case of Argentina, the issue of amnesty versus prosecutions was not a priority for the South African human rights community in the transition. Instead, the human rights community's priorities during the transition resonated more with the need for socio-economic transformation than with the need to prosecute perpetrators of human rights atrocities in the wake of the transition. This may account for why there has been a lack of sustained mobilisation by the human rights community around the failure of the state to prosecute perpetrators who did not apply for, or who were denied, amnesty at the TRC.

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## **CHAPTER 1: INTRODUCTION**

There is a large and diverse range of literature on the South African Truth and Reconciliation Commission (TRC) and its significance as a model for transitional justice. Among the more problematic and controversial aspects of the TRC process has been its provision for amnesty to perpetrators of past political atrocities and gross human rights violations. This particular aspect of the South African transition has been investigated in a number of general and more specialised studies.<sup>1</sup> By comparison, there is little literature that seriously engages with the distinctive and particular role that civil society, or non-state actors, can play in developing and advocating for transitional justice.

This thesis seeks to fill an important gap in the literature on the TRC's amnesty process by investigating the perspective and contribution of the South African human rights community on the novel form of amnesty involved in the TRC process. In doing so, the approach of this thesis differs from prevailing approaches in the literature in two important ways. Firstly, because amnesties are typically part of elite pacts in which civil society has no direct role, the role of civil society in these processes has not been much considered. However, on closer investigation the distinctive origins, trajectories and outcomes of the amnesty processes in Argentina and South Africa have a great deal to do with the different perspectives and contributions of the respective civil society agencies in general and the human rights communities in particular. Secondly, debates on amnesty typically concern the legal and

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<sup>1</sup> Du Bois-Pedain, Antje, 2007. *Transitional amnesty in South Africa*. Cambridge: Cambridge University Press; Dugard, John. 1997. Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question. *South African Journal on Human Rights* 13, pp.268-268; Dugard, John. 1998. Reconciliation and Justice: the South African Experience. *Transnational Law & Contemporary Problems* 8 (2), pp.277-311; Gibson, James L. 2002. Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa. *American Journal of Political Science*, 46 (3), pp.540-556; Greenawalt, Kent. 2000. Amnesty's Justice. In *Truth versus Justice*. Eds. Robert Rotberg & Dennis Thompson. New Jersey: Princeton University Press, pp. 189-210; Mamdani, Mahmood. 2002. Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa. *Diacritics* 32 (3), pp. 33-59; Moellendorf, Darrel. 1997. Amnesty, Truth and Justice: Azapo. *South African Journal on Human Rights* 13, pp. 283-91; Sarkin, Jeremy. 2004. *Carrots and Sticks: the TRC and the South African Amnesty Process*. Oxford, UK: Intersentia Publishers; Slye, Ronald. 2000. Justice and Amnesty. In *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*. Eds. Charles Villa-Vicencio & Willem Verwoerd. Cape Town, South Africa: University of Cape Town Press, pp.174-183; Slye, Ronald 1999. Apartheid as a Crime against Humanity: a Submission to the South African Truth and Reconciliation Commission. *Michigan Journal of International Law* 20(2), pp.267-300; Van Zyl, Paul. 1999. Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission. *Journal of International Affairs* 52 (2), pp.647-667

moral obligations of the state to hold perpetrators of past political atrocities and human rights violations accountable on the one hand and to ensure political stability and consolidation of democracy on the other hand.<sup>2</sup> The approach of this thesis differs from this in that it amounts to a specifically civil-society based approach to transitional justice and amnesty in the context of the South African transition.

This thesis takes seriously the claim of O'Donnell and Schmitter that "the dynamics of the transition from authoritarian rule are not just a matter of elite dispositions, calculations, and pacts."<sup>3</sup> As their comparative analysis demonstrates, such dialectical developments as the "resurrection of civil society" and the "restructuring of public space" in the transitional context brings about a general reconfiguration in the underlying relationships between political society and civil society. During the early stages of the transitional process there are significant overlaps and fluctuations with civil society formations and public figures taking on quasi-political roles preparing the ground for political parties and processes. The roles of different actors, whether representative of political organisations or civil-society based human rights society, or both, bear in different ways on the eventual outcomes of transitional justice processes and involve different mechanisms for "dealing with past". A few scholars have argued the importance of doing research on the role and impact of civil society on transitional justice for this reason.<sup>4</sup> However, as David Backer argues, the role of non-state actors is generally "under-appreciated" in the transitional justice literature.<sup>5</sup>

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<sup>2</sup> Backer, David. 2003. Civil Society and Transitional Justice: Possibilities, Patterns and Prospects. *Journal of Human Rights*, 2(3), pp. 297-313

<sup>3</sup> O'Donnell, Guillermo & Schmitter, Philippe. 1986. Resurrecting Civil Society (and Restructuring Public Space). In *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*. London: John Hopkins University Press, pp.48-53

<sup>4</sup> Ibid.; Roht-Arriaza, Naomi. 2002. Civil Society in Processes of Accountability. In *Post-Conflict Justice*. Ed. M.Charif. Bassiouni. Ardsley, New York: Transnational Publishers; Brahm, Eric. 2007. Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies. *International Journal of Not-for-Profit Law*, 9(4), pp. 63-72; Crocker, David A. 2000. Truth Commissions, Transitional Justice, and Civil Society. In *Truth v. Justice: The Morality of Truth Commissions*, pp. 99-121; Other literature on the topic of civil society in relation to 'transitional justice' tends to focus on the impact of the transition on the development and sustainability of civil society and NGOs on the one hand, and on the role that NGOs can potentially play in building and consolidating a new democracy on the other hand. A few country-specific case studies of civil society's role in transitional justice also exist. See for example case studies on Morocco, Liberia and Indonesia: Wilcox, Luke. 2009. Reshaping Civil Society through a Truth Commission: Human Rights in Morocco's Process of Political Reform. *International Journal of Transitional Justice* 3 (1), pp. 49-68; Pajibo, Ezekiel. 2007. Civil Society and Transitional Justice in Liberia: A Practitioner's Reflection from the Field. *International Journal of Transitional Justice* 1 (2), pp. 287-296; Farid, Hilmar & Rikardo Simarmatra. 2004. The Struggle for Truth and Justice: A Survey of Transitional Justice Initiatives Throughout Indonesia. *International Centre for Transitional Justice*, January 2004. A number of papers on the topic of civil society in transitional justice in Africa were presented at a conference held on this subject. As was acknowledged at the conference, there is yet much research to be done on the particular role of civil society in advocating for and supporting local transitional justice mechanisms. See the conference report: Centre for the Study of Violence and Reconciliation.



The specific role and impact of civil society and especially of the human rights community in the origins and fashioning of the South African Truth and Reconciliation, and the distinctive amnesty process in particular, is worthy of investigation for a number of reasons. First, civil society made significant contributions to the origins and fashioning of the TRC.<sup>6</sup> While officially mandated and resourced by the state, the proposal for an official TRC process was arguably initiated by civil society figures who secured the support of Mandela and Dullah Omar as the Minister of Justice. Indeed, compared to the Latin American cases, the TRC was a significantly more inclusive and participatory process. This was due to the significantly different processes involved in the creation of the TRC by parliamentary legislation rather than by presidential decree. The Argentine truth commission was created as a presidential initiative in which the President unilaterally decreed the mandate, objectives and composition of the commission. The South African TRC, including the amnesty aspect, was a parliamentary commission the mandate, objectives and composition of which was subject to a process of public comment and parliamentary debate. In contrast to the Latin American truth commissions which were essentially top-down interventions on the authority of the president, the general mandate and objectives of the TRC as well as the particulars of the legislation were developed in the course of an extensive public process while the composition of the Commission was also the outcome of a public process of nominations, hearings and consultations. To this end the public was invited to make written and oral submissions on the draft TRC bill. Civil society did make use of this opportunity to contribute to ‘transitional justice’ in South Africa. However, little attention has been paid to their distinctive perspectives and contributions in the literature. Instead, most accounts tend to focus on the development of key aspects of transitional justice in SA in relation to the main *political* actors and issues.

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2010. *Advocating Justice: Civil Society and Transitional Justice in Africa*. Twickenham Guest House, Johannesburg, South Africa, August 30-31

<sup>5</sup> Backer 2003, p. 197

<sup>6</sup> Van Der Merwe, Hugo, Polly Dewhirst & Brandon Hamber. 1999. Non-governmental organisations and the truth and reconciliation commission: an impact assessment. *Politikon* 26(1), pp.55-79. Hamber, Brandon, Tlhoki Mofokeng & Graeme Simpson. 1997. Evaluating the Role and Function of Civil Society in a Changing South Africa: The TRC, a Case Study. Paper presented on behalf of CSVR at *The Role of Southern Civil Organisations in the Promotion of Peace* Seminar, DHR Seminar, hosted by the Catholic Institute for International Relations, London, November 10; Simpson, Graeme. 1994. Truth, Dare or Promise: Civil society and the proposed commission on truth and reconciliation. Paper presented at *Making Ends Meet: Reconciliation and Reconstruction in South Africa*, hosted by CSVR World Trade Centre, Johannesburg, August 18

It may arguably have been expected that civil society, and the human rights community in particular, would have been strongly opposed to any form of amnesty to perpetrators of gross violations of human rights. In the event the contributions from the SA human rights community were surprisingly supportive and posed little generalised opposition to the amnesty proposals. This provides a further strong reason for investigating the contributions from civil society, with a special focus on the human rights community, to the origins and fashioning of the TRC.

The few studies already done on the contribution of civil society to the TRC are mainly descriptive accounts of the role that particular South African civil society organisations played in developing and supporting the Truth and Reconciliation Commission as a whole.<sup>7</sup> These studies tend to be narrowly concerned with particular civil society contributions to the TRC process itself but do not provide a more general civil society-based perspective on transitional justice issues in the South African transitional context. Indeed, the amnesty issue surfaced in South African politics and as a human rights issue throughout the early 1990s even before the conclusion of the negotiations at the end of 1993. In particular, existing studies of civil society involvement in the TRC process are not particularly concerned with the issue of amnesty.

In addition, there have been significant post-TRC developments on aspects relating to the issue of prosecutions or amnesty/pardons which are not covered in the existing literature. Part of the amnesty arrangement was that perpetrators who did not apply for amnesty or who were denied amnesty at the TRC would be liable to prosecution. However, the fact is that in South Africa there have been only a handful of complementary and follow-up prosecutions for apartheid-era perpetrators not immunised by the amnesty. Since the dismantling of the Amnesty Committee in 2001 there have been no prosecutions of such perpetrators. The specific focus of this thesis on the issue of amnesty was adopted partly in light of recent and continuing controversy over the issue, which thirteen years on from the disbanding of the TRC, and eight years on from the closing of the Amnesty Committee, still constitutes part of the TRC's so-called 'unfinished business'. At present, a core of South African human rights organisations and professionals are mobilised around these outstanding issues. However,

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<sup>7</sup> See also Koetz, Meverett. 1994. *The Responsibilities of Civil Society: Priorities, Strategies and Concerns for Reconciliation in South Africa*. Paper presented at *Making Ends Meet: Reconciliation and Reconstruction in South Africa*

unlike in Argentina, the South African human rights community hasn't effectively mobilised around the issue of outstanding prosecutions. There has been minimal activity or intervention from the South African human rights community in response to the state's apparent 'back-tracking' on complementary and follow-up prosecutions from the TRC. This prompts the question to what extent the SA human rights community was concerned with retributive justice and legal accountability as a priority for the human rights community from the very beginning? While an exhaustive account of the outstanding prosecutions matter is outside the scope of this mini-thesis, the issue motivates this historical and analytical account of civil society's role and impact on the amnesty issue from the outset of the transition.

## **1.1 Perspectives on amnesty in transitional justice**

From a general human rights perspective amnesty is a profoundly problematic issue, raising basic questions of moral, legal and political principle. On the one hand there is a legal and moral duty to hold perpetrators of past political atrocities responsible for their actions, while on the other hand in the context of a fragile transition, it would be unrealistic to expect that the former regime will relinquish power if there is a possibility that they will have to face prosecution once they do so. In that case the duty to establish accountability for the past atrocities comes into conflict with the duty to prevent further atrocities by facilitating a peaceful transition.<sup>8</sup> It is important to embed the analysis of amnesty in the dual contexts of a general human rights perspective on amnesty as well as of a contextualised account of the South African post-apartheid transition. This subsection therefore gives a brief account of the issue of amnesty from a general human rights perspective and as a problem of transitional justice. It also locates the problem of amnesty within the particular South African transitional context.

### *1.1.1 Blanket amnesty as a principled human rights issue and in the transitional justice context*

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<sup>8</sup> See the classic debate on this between Carlos Nino and Diane Orentlicher. Nino, Carlos. 1991. The duty to punish abuses of human rights put into context: the case of Argentina. *Yale Law Journal*, 100(8), pp. 2619-2640 Orentlicher, Diane. 1991. A Reply to Professor Nino. *Yale Law Journal* 100 (8), pp. 2641-2643. See also Orentlicher, Diane F. 1991. Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime. *Yale Law Journal* 100 (8), pp. 2537-2615; See Zalaquett, Jose 1992. Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations. *Hastings Law Journal* 43(6), pp.1426-1432; Huntington, Samuel. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. Norman, OK: University of Oklahoma Press.

From a human rights perspective general or ‘blanket’ amnesties are especially problematic in that they grant unqualified immunity to the perpetrators of gross human rights atrocities.<sup>9</sup> This type of general amnesty granted to a class of state agents by executive decree is sometimes referred to as an ‘amnesic’ amnesty because it serves to ‘erase’ and even deny human rights atrocities committed in the past.<sup>10</sup> In this sense a general amnesty may be viewed as an instrument of forgetting and ignoring the past; it not only fails to establish the truth about past political atrocities, but denies the very need for acknowledgement of past wrongs. Their defining features are concealment of the atrocities and anonymity for the perpetrators, amounting to a complete lack of acknowledgement and accountability for past human rights atrocities, and therefore total impunity.<sup>11</sup> Furthermore there is typically no moral condemnation of past atrocities and violations.<sup>12</sup> In this way general amnesties serve as the opposite of accountability: because of their broad scope of application general amnesties have no procedural requirements and thus do not offer the possibility of individual identification of those responsible (nor of the victims or the atrocities committed).<sup>13</sup> General amnesties thus amount to a rejection of accountability and responsibility for past human rights violations.<sup>14</sup> For these reasons international human rights law and practice very much condemns the use of general amnesties for the perpetrators of human rights atrocities.<sup>15</sup> Likewise it has become a basic tenet of the global human rights movement that justice for past violations is tied up with the duty to prosecute the perpetrators of human rights atrocities.<sup>16</sup> From a principled human rights perspective the state thus has a basic duty to prosecute the perpetrators of human rights atrocities while the decision for amnesty must amount to an unacceptable moral and political compromise.

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<sup>9</sup> For a thorough discussion of this see Slye 2002

<sup>10</sup> Burke-White, William. 2001. Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation. *Harvard International Law* 42, p.482; Slye 2002, pp.240-241

<sup>11</sup> Ibid.

<sup>12</sup> Du Toit, Andre. 2000. The Moral foundations of the South African TRC: Truth as Acknowledgment, Justice as Recognition. In *Truth versus Justice*, p.133

<sup>13</sup> Ibid.

<sup>14</sup> On the issue of amnesty and accountability see Young, Gwen K. 2001. Amnesty and Accountability. *U.C. Davis Law Review* 35, pp.427-482

<sup>15</sup> See for example Roht-Arriaza, Naomi. 1990. State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law. *California Law Review* 78 (2), pp.449

<sup>16</sup> See Scharf, Michael. 1996. Accountability for International Crimes and Serious Violations of Fundamental Human Rights. *Law and Contemporary Problems* 59(4), pp. 41-61. Three points can be argued in this regard: i) the state has an obligation to prosecute the perpetrators of human rights violations and thereby pursue the goals of the criminal justice system to establish truth, responsibility and accountability for gross human rights violations, ii) a failure to prosecute human rights violations also violates (for a second time) the fundamental rights of victims under international law iii) amnesties undermine respect for human rights and the rule of law in society. <sup>16</sup> So, in practice amnesties for human rights violators create a culture of impunity that encourages further human rights violations. As against this it is postulated that prosecution serves as a deterrent against similar crimes being committed in the future. See Slye 2002, p.189, 191, 199

As against such a principled human rights position, a typical ‘transitional justice’ approach also takes into account political and practical considerations of what is *feasible* and *possible* in the actual context of transition from authoritarian rule. While a principled human rights perspective holds that human rights cannot be overridden “by subordinating them to a calculus of the greatest overall societal good”,<sup>17</sup> a transitional justice approach may seek to reconcile the objective of accountability for human rights atrocities with what is best for the overall societal good in the particular transitional context (e.g. by facilitating a peaceful democratic transition and the cessation of human rights violations). From a transitional justice perspective the political imperative to grant amnesty to perpetrators of past human rights violations for the sake of securing a peaceful transition to democracy may be a legitimate one.<sup>18</sup> Jose Zalaquett, a human rights lawyer and key figure in the Chilean Truth Commission, argued that politicians first have a responsibility to prevent recurring atrocities even if this is at the expense of prosecuting perpetrators of past human rights violations. Zalaquett invoked Max Weber’s distinction between the *ethics of responsibility* and the *ethics of conviction* to argue that in the context of transitions from authoritarian rule democratic politicians’ first duty was to prevent future violations.<sup>19</sup> In his famous lecture *Politics as a Vocation*, Weber argued that political leaders should be guided not by ethical principles regardless of the outcome but had to take responsibility for the unintended but “predictable outcome of their decisions”.<sup>20</sup> Applying this to the transitional justice context, Zalaquett argued that it would be irresponsible for politicians to insist on prosecutions in an incomplete and fragile transition when insisting on prosecutions may result in a political or military backlash defeating the original ethical objective to protect human rights. Politicians cannot be guided by ‘ethics of conviction’ only, but must be responsible for probable consequences, or else place in serious jeopardy the very ethical objectives they seek to protect.<sup>21</sup>

It may also be argued that amnesty is not necessarily a matter of principle only, but that its legitimacy could also depend on the particular way of arriving at it (e.g., was the amnesty the outcome of a negotiated settlement or was it a unilateral decision taken by the former regime?). For example, in the context of a democratic transition it may be that amnesties

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<sup>17</sup> Roht-Arriaza 1994, p.17

<sup>18</sup> Young, Gwen K. 2001. ‘Amnesty and Accountability.’ *U.C. Davis Law Review* 35, p.427, 444, 476;

<sup>19</sup> Zalaquett 1992, p. 1430

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

granted as part of a negotiated political compromise retain more legitimacy than amnesties granted unilaterally by the beneficiaries unto themselves.<sup>22</sup> The attempt by the Argentine junta to entrench amnesty for its generals and officers in 1983 after their defeat in the Falklands war was an example of an amnesty that was deemed illegitimate mainly because it was a self-amnesty. Slye argued that “[p]olitically speaking, greater legitimacy is perceived when the civilian government offers amnesty for military crimes as a means of moving toward a better future.”<sup>23</sup> This was an argument used by human rights organisations in the South African case which will be discussed further in Chapter Three.

These competing perspectives and debates on amnesty *versus* prosecutions for human rights violations are a staple of transitional justice literature. In this thesis we will be concerned with the domestic human rights community’s perspectives on, and contributions to, the amnesty process and the extent to which these arguments and discussions took place amongst the human rights community at the time. This is an empirical and historical question: it cannot be assumed that the South African human rights community necessarily adopted a principled human rights perspective on the issue of amnesty. Rather, it will be a question for historical investigation to what extent the South African human rights community did adopt such a principled human rights stance on amnesty and/or were swayed by other considerations regarding the realities of the local political, social and economic transitional contexts in determining what was needed on the one hand, and what was possible on the other.

### *1.1.2 Political context of amnesty in the South African transition*

Apartheid was a policy of political, economic and social racial segregation and discrimination entrenched by the National Party government from 1948 to 1994. This was carried out by a long list of legislative acts that assigned races to different residential areas,<sup>24</sup> restricted the right of black people to own land, enforced segregation of public facilities,<sup>25</sup> restricted black people to unskilled labour and low-wage employment,<sup>26</sup> and created a separate and inferior education for black people<sup>27</sup> to name a few. The government used its ‘total strategy’ to justify

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<sup>22</sup> Slye 2002, p.245

<sup>23</sup> Weiner, Robert O. 1995. Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties. *St. Mary's Law Journal* 26 (3), pp.859-876. See also Zalaquett 1992, pp.1425-1426

<sup>24</sup> Group Areas Act of 1950 (Act No. 41 of 1950)

<sup>25</sup> Reservation of Separate Amenities Act (Act No 49 of 1953)

<sup>26</sup> Mines and Works Act (Act no 12 of 1911, amended in 1926)

<sup>27</sup> Bantu Education Act (Act No 47 of 1953)

the extreme measures of repression and violence used against dissidents.<sup>28</sup> Repression also took more covert forms that the state denied its part in such as torture which was rife in prisons, deaths in detention and also covert state operations including torture camps and illegal detention centres, disappearances and assassinations. The government, as well as covert state operatives, conducted their activities with widespread impunity and minimal accountability. The widespread and systemic denial of the fundamental rights of human beings led the United Nations General Assembly to adopt the Convention on the Suppression and Punishment of the Crime of Apartheid in 1973 declaring apartheid a “crime against humanity”.<sup>29</sup>

The transition was officially set in motion when De Klerk announced the unbanning of the ANC and other liberation movements, as well as the release of Mandela on 2 February 1990. There was at this time a stalemate in which the ANC’s “armed struggle” and the NP government’s “total strategy” made way for the beginning of “talks about talks” which opened the way for political negotiations. After the first official meetings of the government and the ANC took place in May 1990 in Cape Town, the “Groote Schuur Minute” establishing a working group to consider the release of political prisoners was signed by both parties.<sup>30</sup> A few months later in August 1990 the parties signed the “Pretoria Minute” in which among other things the ANC agreed to suspend all armed actions with immediate effect.<sup>31</sup> Direct discussions over a democratic South Africa founded on a new constitution began a year later in December 1991 when the first Convention for a Democratic South Africa (CODESA) was set in motion. However, the key issue was not yet that of amnesty for past human rights violations but rather of indemnity to enable the political negotiations to proceed. While it is likely that the need for a possible “amnesty deal” for past political atrocities was an underlying or background consideration from an early stage of the political negotiations, it was not explicitly posed in these terms at the time. Rather, this initial provision for Indemnity was necessary because of the fact that key leaders of the ANC and

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<sup>28</sup> The ‘total strategy’ was the apartheid government’s response to what it perceived as the threat of the ‘total onslaught’: “The total onslaught, the story went, was the threat posed to South Africa (and indeed the western world) by the Soviet Union’s designs on the strategic value of South Africa ... [which] would enable [the Soviet Union] to hold the world to ransom.” See Coleman, Max ed. 1998. *A Crime Against Humanity Crime Against Humanity: Analysing the Repression of the Apartheid State*. Cape Town: Human Rights Commission, p.7

<sup>29</sup> UNSC. 1973. Convention on the Suppression and Punishment of the Crime of Apartheid. Adopted by the General Assembly on 30 November 1973. For an excellent legal analysis of apartheid as a crime against humanity see Slye, Ronald 1999. *Apartheid as a Crime against Humanity: a Submission to the South African Truth and Reconciliation Commission*. *Michigan Journal of International Law* 20(2), pp.267-300

<sup>30</sup> Groote Schuur Minute, May 1990

<sup>31</sup> Pretoria Minute, 6 August 1990

other liberation movements crucial to the onset of the political negotiations were serving prison sentences, or were at risk of being incarcerated, merely because they were members of banned organisations. The Indemnity Act 35 of 1990 served the function of enabling constitutional negotiations to proceed. It meant that exiled ANC members who would otherwise be liable to be detained and prosecuted on return to South Africa could now return to South Africa without this threat.

From a principled human rights perspective this indemnity did not necessarily raise the same moral objections as amnesty for perpetrators of past human rights violations. In practice, the indemnity was mostly limited to the category of persons who had not themselves committed violent political acts such as ‘murder, arson and treason’.<sup>32</sup>

After the first Indemnity Act of 1990 was implemented, the ANC’s contention that many members of the liberation struggle were still incarcerated as political prisoners became a major issue in the attempts to resume the constitutional negotiations which had broken down in May 1992. To deal with this the NP put in place the Further Indemnity Act 151 in October of 1992. Unlike the first Indemnity Act, the Further Indemnity Act came to include the release of prisoners who had been convicted of gross human rights violations. At this point, the matter therefore implicitly became a matter of principle from a human rights perspective. The way in which the issue of the further indemnities rose was complex and contested, both at the time and retrospectively. Whatever the intricacies of the Act, the prospect of perpetrators convicted of gross human rights violations being granted indemnity/amnesty under the new Act was clearly an emerging issue from a human rights perspective and began to be debated and discussed among civil society and within the human rights community. These early debates are significant and are discussed in detail in Chapter 3.

The prospect of a possible ‘general amnesty’ for human rights violations remained a politically contentious one throughout the constitutional negotiations though significantly it never actually featured on the agenda or in open discussions at CODESA until the Postamble of the Interim Constitution with its provision for ‘amnesty’ was adopted in the closing stages of reaching a negotiated settlement. There are various and conflicting accounts of how the issue of amnesty eventually emerged in the context of the Postamble which will not be

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<sup>32</sup> See De Klerk, F.W. 1990. Address by the State President, Mr FW De Klerk at the Opening of the Second Session of the Ninth Parliament of the Republic of South Africa. Cape Town, February 2



pursued in this thesis. However, by most accounts, agreement on the issue of amnesty was reached at the last minute before the signing of the Interim Constitution on 6 December 1993.<sup>33</sup> The issue of amnesty for human rights atrocities was the only outstanding issue and had the potential of derailing a final transitional peace agreement. Amidst implied threats representatives of the security forces and of the National Party government insisted that provision for amnesty be included in the 1993 Interim Constitution. Key ANC members on the constitutional committee wanted to object in principle to an “amnesty deal” but in the event the ANC agreed to include the amnesty provision in the Postamble of the Interim Constitution, knowing full well that the assistance and cooperation of the armed forces would be necessary to see South Africa through the coming democratic elections.<sup>34</sup> The Postamble of the Interim Constitution framed the amnesty as necessary for ‘national unity’ and ‘reconciliation’ in South Africa.’<sup>35</sup> Placed in the context of the Postamble, and as a pivotal component of the negotiated settlement, the amnesty was framed as a transitional justice issue rather than as a principled human rights concern. The question of how the amnesty provision was perceived and debated by the human rights community at the time is discussed in later chapters.

Following the signing of the Interim Constitution at the end of 1993, the first democratic elections were held in April 1994 and the new Government of National Unity led by Mandela as President was inaugurated. Significantly, and unlike the case in Argentina, the issue of “dealing with the past” in terms of transitional justice initiatives around “truth” and “justice” did *not* feature as part of any political parties’ election campaign. Behind the scenes however, and particularly in the lead up to the April 1994 elections, when political parties were preoccupied with the politics of the transition and the democratic elections, key individuals from civil society played a robust role in instigating and encouraging discussions about the possibility of holding a victim-oriented truth commission in South Africa. It was only after complex interactions between new Justice Minister Dullah Omar and some members of the human rights community that Minister Omar announced that there would be an official truth commission including an amnesty process set up. From very early on, Minister Omar

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<sup>33</sup> Sachs. Albie. 1999. Truth and Reconciliation. *Southern Methodist University Law Review* 52, pp.1566-7

<sup>34</sup> Dullah Omar for example publicly stated that “without an amnesty agreement there would have been no elections”, Informal remarks prior to speech, Justice and Impunity: Germany and South Africa Compared conference, Community Law Centre, Cape Town, October 1994 found in Van Zyl, Paul. 1999. Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission. *Journal of International Affairs* 52 (2) p. 650. See also pp. 648-651.

<sup>35</sup> Republic of South Africa. Postamble to the Interim Constitution, Act 200 of 1993

signalled his intentions to involve civil society and the public in the setting up of such a truth commission.

Significantly, the TRC was set up as a parliamentary commission meaning that the process involved in its creation was *not* by presidential decree, as in the case of Argentina, but rather involved a comparatively *public* process. *After* the Portfolio Committee had heard representations by civil society and other interested parties, the TRC Bill was subjected to numerous rounds of further amendments and intense debates in Parliament.<sup>36</sup> This process was finalised on 19 July 1995 when the Bill was signed into law. After a wide and consultative appointment procedure, commissioners were appointed to the TRC on 15 December 1995 and the TRC Act came into effect on the same day.

### *1.1.3 Individual and conditional amnesty in SA*

The South African amnesty that was part of the TRC process took a novel form compared to previous blanket amnesties. Significantly, the South African amnesty was a *conditional* amnesty for which perpetrators of human rights violations had to apply on an *individual* basis. Perpetrators were required to give full and public disclosure of all the details of the human rights violation(s) in question as well as relevant events surrounding these. Furthermore, the applicant had to satisfy the Amnesty Committee that the act(s) in question were associated with a political objective. The relevant considerations of an individual amnesty conditional on full (public) truth disclosure may render the amnesty more acceptable from a human rights perspective than a blanket amnesty.

Firstly, the TRC's conditional amnesty was actually designed, not as an instrument of forgetting and ignoring past political atrocities, but to be part of a truth process. The full-disclosure requirement for the SA amnesty was intended to encourage the recovery of the 'truth' about the apartheid past and in particular apartheid-era human rights atrocities which had for so long been covered up and denied by the apartheid government. Perpetrators were more likely to come forward with the truth about their involvement in gross human rights violations if doing so would present the opportunity of gaining amnesty from prosecution and punishment. In this sense, the objective of the South African conditional amnesty was not to

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<sup>36</sup> See the account given by Alex Boraine in Boraine, Alex. 2001. Consultation and Legislation. In *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*, pp. 47-75

frustrate or prevent exposing the truth about human rights atrocities, as a blanket amnesty would, but rather to encourage truth exposure. For these reasons, the South African individual and conditional amnesty linked with full-disclosure may not raise the same principled concerns from a human rights perspective that a blanket amnesty that promotes impunity and amnesia about the past.

Secondly, it was a clear implication of the amnesty granted on this individual and conditional basis that perpetrators of human rights violations who did *not* apply for amnesty, or who did not meet the requirements for amnesty (full disclosure, political objective etc.) would be liable for possible prosecution via the ordinary criminal justice system. In that sense individual and conditional amnesty, unlike general blanket amnesty, does not rule out further prosecutions of perpetrators of human rights violations, but actually implies this as a necessary counterpart of the amnesty process. While blanket amnesty typically forecloses the option of prosecution in general terms, the South African amnesty implied criminal prosecutions of perpetrators who did not apply for amnesty or who were denied amnesty by the TRC. Again, this important characteristic of the South African amnesty may change the principled considerations of amnesty from a human rights perspective.

For our purposes the question is what the perspective on and contribution of the South African human rights community to the development of this special type of individual and condition amnesty was at the time. Taking into account the general ‘transitional justice’ and ‘human rights’ perspectives on amnesty discussed above, the thesis explores the perspective of the SA human rights community on the ‘justice vs. amnesty’ dilemma in the particular context of the South African transition. For example, did the SA human rights community perceive the amnesty in SA as legitimate because it was the outcome of a negotiated settlement instead of a unilaterally imposed self-amnesty such as the amnesty in Argentina? Did the human rights community perceive that the amnesty was a justified compromise in order to achieve the outcome of a peaceful transition? What was their perspective on how the issue of amnesty tied in with important transitional justice considerations such as truth recovery, impunity and accountability, or reconciliation?

## 1.2 Research design and thesis structure

From a historical perspective it is relevant that the amnesty announced with the signing of the Postamble to the Interim Constitution at the end of 1993 was not yet the individual and conditional amnesty tied to a truth commission that it eventually developed into. The Postamble merely announced that “there shall be amnesty”, leaving the procedures for this to be determined by the new democratic Parliament. The defining features of the South African amnesty differentiating it from a general amnesty were not yet stipulated in the Postamble but were subsequently developed by a combination of government and civil society actors, including some from the human rights community. Accordingly this thesis will investigate the human rights community’s response to the amnesty issue in the changing historical contexts, and not just as a single general issue. The general research design and thesis structure relates to significant key moments in the development of amnesty as an issue of transitional justice, focusing on the key junctures when the issue became one that the SA human rights community could address. This way we may gain a thorough understanding both of the origins of the amnesty issue and the particular contexts in which the human rights community responded as well as contributed to it.

Chapter Two will investigate the comparative perspective of the Argentine human rights movement on the issues of amnesty and prosecutions for human rights violations in the transitional justice context. In the case of Argentina a formidable human rights movement effectively mobilised around the issue of amnesty and prosecutions of perpetrators from the military juntas who had been responsible for such human rights violations as the “disappearances” and torture of civilian victims. Certainly it was primarily the human rights movement that put the issues of impunity and accountability, amnesty and criminal prosecutions onto the agenda in the transitional period. Using accounts from various secondary literature sources, the second chapter will provide an account of the role of the human rights movement Argentina in the transitional process with a specific focus on the issue of amnesty and prosecutions.<sup>37</sup> The idea is that this will provide a useful springboard

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<sup>37</sup> Fruhling, Hugo. 1989. Nonprofit Organisations as Opposition to Authoritarian Rule: The Case of Human Rights Organisations in Chile. In *The Nonprofit Sector in International Perspective*. Ed. Estelle James. Oxford: Oxford University Press, p.369; Brysk, Alison. 1993. From Above and Below: Social Movements, the International System, and Human Rights in Argentina. *Comparative Political Studies*, 26(3), pp.259-285.; Brysk, Alison. 1994. *The Politics of Human Rights: Protest, Change and Democratisation*, Stanford, California: Stanford University Press; Fisher, Jo. 1989. *Mothers of the Disappeared*. Boston, MA: South End Publishers;

from which to study the role of the South African human rights community with regard to amnesty as an issue of transitional justice in the different context of the 1994 transition to democracy.

The main body of the thesis will provide a descriptive and historical account of the South African human rights community's perspective on, and contribution to, the development of the issue of amnesty *versus* prosecutions of perpetrators of human rights atrocities committed during apartheid. It will concentrate on the crucial transition period, beginning in 1990 and up until after the 1994 elections and the launch of the TRC in 1995. The overall account will be divided into three parts according to three distinct and critical periods in the development of the amnesty issue. Each chapter will be mainly descriptive and will pay close attention to the implications of the relevant political context in that historical period.

Thus, Chapter Three deals with the first critical period around the time of the Record of Understanding in the latter half of 1992 when 'indemnity' was extended to include human rights violations with the Further Indemnity Act of 1992. While the full circumstances of the complex and contested interactions between the ANC and the National Party government regarding a possible "amnesty deal" remain obscure the relevant issue for the purposes of this thesis concerns the ways in which the issue of amnesty for human rights violations became a controversial one in the public domain at this time. Statements on the issue of a possible general amnesty were made by various political groupings as well as by some civil society members. Primary material (newspaper articles, press statements, organisational newsletters and position papers etc.) and some secondary material (articles published by influential human rights activists and lawyers in journals such as the *South African Human Rights Journal*) will be used to determine the extent to which the human rights community took a direct interest in this issue at the time.

Chapter Four moves on to deal with the period when the CODESA II negotiations were concluded with the signing of the 1993 Interim Constitution. The Chapter describes the human rights community's initial responses to the provision for amnesty contained in the Postamble of the Interim Constitution. The discussion is based on similar primary and secondary materials as those used in Chapter Three. The collection of presentations made at

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Jelin, Elizabeth. 1994. The Politics of Memory: The Human Rights Movements and the Construction of Democracy in Argentina. *Latin American Perspectives* 21 (2), pp. 38-58

the two transitional justice workshops held in 1994 will be used as an indication of the type of issues being debated amongst civil society and the human rights community at this time. Again, we will seek to establish the extent to which the issue of amnesty and legal accountability for the past was a major concern for the human rights community in this context. How did the human rights community understand the problem of amnesty and legal accountability for past human rights abuses and what proposals, if any, did they suggest for how the problem could and should be addressed?

Chapter Fives moves on to discuss a third critical period in the development of the amnesty issue – around the time that the founding legislation for the TRC was being developed, that is from mid-1994 to mid-1995. Soon after Justice Minister Dullah Omar's announcement in May 1994 that there would be a state mandated and resourced truth commission, some members of civil society and the human rights community submitted proposals for such a truth commission. Subsequently civil society was invited to make formal written submissions on a draft bill for the prospective TRC, the Promotion of National Unity and Reconciliation Bill. The conference presentations and the subsequent submissions made by human rights organisations on the draft PNUR Bill are used to establish the human rights community's perspective on and contribution to this important piece of legislation, paying particular attention to the issue of amnesty.

An important part of the amnesty arrangement had been that perpetrators who did not apply for amnesty, or who were denied amnesty by the TRC, would be liable to prosecution. However, in fact there have been only a handful of post-TRC complementary and follow-up prosecutions for apartheid-era perpetrators not protected by amnesty from the TRC. Despite this, the South African human rights community hasn't effectively mobilised around the lingering issues of outstanding prosecutions.<sup>38</sup> Moreover, there has been minimal response from the South African human rights community to this apparent 'back-tracking' on complementary and follow-up post-TRC prosecutions. The concluding chapter will therefore discuss the significance of the human rights community's overall response to the amnesty. In retrospect this may raise the question to what extent the human rights community had this expectation of the South African amnesty in the first place (i.e.: that perpetrators who did not receive amnesty or apply for amnesty from the TRC would be liable to prosecution). Had it

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<sup>38</sup> Wannenburg, Gail. 2003. *Post TRC Legal and Truth Seeking Activities in South Africa: an Evaluation of the Way Forward*. Centre for the Study of Violence and Reconciliation.

been the case that the human rights community acquiesced in the legitimacy of the amnesty process on the basis of it being an individual and conditional amnesty linked with a broader truth process, then it is curious that the human rights community has not mounted sustained activism in response to the lack of complementary or follow up prosecutions. In short, is there any relation between the human rights community's role in the issue of amnesty at the time of the transition and the almost complete lack of follow-up prosecutions that were supposedly meant to complement and follow the work of the amnesty committee?

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## CHAPTER 2: LATIN AMERICAN HUMAN RIGHTS MOVEMENTS AND TRANSITIONAL JUSTICE: THE ARGENTINE CASE

The role and impact of the human rights movement in Argentina on questions of amnesty and legal accountability in transitional justice provide for interesting and illuminating (dis)analogies with that of the human rights community in South Africa. The Argentine transition (1982-1984) saw one of the most far-reaching efforts to establish truth and retributive justice for human rights violations perpetrated by the prior regime of the military junta. The human rights movement in Argentina played a significant role in shaping the agenda of democratisation in favour of the human rights principles of “truth” and “justice”.<sup>39</sup> Indeed, by the time of the transition from military rule to democracy, an impressive human rights *movement* had been mobilised in Argentina. This human rights movement was comprised of an array of human rights organisations and activists, lawyers, victims groups, victims’ family groups, religious organisations and other non-governmental organisations. This chapter tracks the development of the human rights movement in Argentina in relation to transitional justice issues of retributive justice for human rights violations as well as the issue of truth about past political atrocities and “the disappeared.” To what extent did the human rights movement consider amnesty and prosecutions from a principled human rights perspective and to what extent did they allow for pragmatic and political considerations in the particular context of the Argentine transition? To what extent, and in what ways, did this movement mobilise publicly around the issue of prosecutions for human rights violations? How did the human rights movement seek to impact the public and political agenda? What contextual factors influenced the human rights movements in pressing for retributive justice for perpetrators of human rights violations? The case is examined to the extent that it provides comparison with similar (or alternate) modes of engagement by South African human rights proponents during the transition from apartheid

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<sup>39</sup> See Brysk 1994



## 2.1 The human rights movement during the military dictatorship

The military rule of Argentina, from 1976 to 1983 was characterised by “disappearances”, imprisonment, torture and killings of outspoken political dissidents. Throughout this period the junta officially denied responsibility for the “disappearances” of between 9,000 and 30,000 people.<sup>40</sup> It justified its tight grip on state politics as a response to perceived “terrorist” threats to the state and pursued a covert “dirty war” in which it sought to eliminate these “subversive elements.” In response, as human rights violations and disappearances of political dissidents became more pervasive, organisations of victims and victims’ families were created.<sup>41</sup> The most famous of these is the mother’s resistance movement which came to be known as *Las Madres de Plazo de Mayo* for their regular demonstrations on the Plaza in Buenos Aires denouncing political disappearances in Argentina. *Las Madres* worked with other victims’ organisations in denouncing human rights violations, giving support to victims and seeking legal advice from human rights organisations.

At this stage two types of organisations could be distinguished within the broad human rights movement, victims’ organisations and traditional human rights bodies. Victims associations were made up of people directly affected by the policies of the government, i.e. the relatives of the “disappeared” while “nonaffected” human rights organisations included mostly legal human rights organisations.<sup>42</sup> In response to the increase in human rights violations from the time of the coup, a few pre-existing human rights organisations together with newly formed human rights organisations and victims’ organisations formed alliances and sought ways to denounce violations and defend human rights.<sup>43</sup> This emergence of human rights activists and organisations was a relatively new phenomenon in Argentina – previous repressive eras had generated some human rights activity but no broadly based human rights movement like the one that emerged in response to human rights violations and repression in the years 1973-1984.<sup>44</sup> The human rights movement therefore emerged as a contextual response to the repression and human rights abuses.

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<sup>40</sup> There is considerable controversy over this figure. The national Commission CONDAEP declared the number of “disappeared persons to be 8960 but several human rights and victims organisations believe the number to be closer to 30 000

<sup>41</sup> For a detailed history of the emergence of human rights organisations and victims organisations that made up the human rights movement see Brysk 1994, pp. 42-62

<sup>42</sup> Including: Permanent Assembly for Human Rights, Service for Peace and Justice, Ecumenical Movement for Human Rights, the Argentine League for the Rights of Man, and the Centre for Legal and Social Studies.

<sup>43</sup> Jelin 1994, pp.38-41

<sup>44</sup> Brysk 1994, p.31

During the repression, human rights organisations played a major role in systematically recording human rights violations and formally registered denunciations by victims, and their families, of “disappearances” and cases of torture and killings.<sup>45</sup> On this basis human rights lawyers geared their work around representing victims and their families and making judicial demands that human rights violations be investigated and prosecuted. Jelin argues that in the absence of political opposition, the human rights movement became “the key actor in the development of societal demands for the defence of human rights.”<sup>46</sup> The demands of Las Madres and the victims’ organisations were certainly a focal point for the human rights movement; typically this took the form of demands for the “truth” about the “disappeared” and “justice” in terms of prosecutions of the perpetrators.<sup>47</sup> Marches and public demonstrations by Las Madres and other victims groups were inspired by their desire to know the fate of their disappeared children, husbands, brothers and sisters but were insistently accompanied with the demand for justice and punishment of the perpetrators. During protest marches, demonstrators carried banners with slogans such as “Where are the disappeared?” and “We want our children alive, and the culprits punished.”<sup>48</sup>

The eventual democratic transition was prompted by the military’s external defeat in the Falklands war combined with an economic crisis and a loss of legitimacy internally. However, even before the defeat of the military in the Falklands war, the human rights movement had played an important role in delegitimising the military with open protests which received wide social support.<sup>49</sup> Towards the end of 1982, with the military junta by this stage significantly weakened, the human rights movement “made the transition to a mass movement capable of mobilising hundreds of thousands in the streets.”<sup>50</sup> According to Munck, mass demonstrations for democracy in December 1982 brought the final blow to the military dictatorship, and precipitated the announcement declaring democratic elections for the following year.<sup>51</sup>

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<sup>45</sup> See Jelin 1994 p. 54, n 6.

<sup>46</sup> Jelin 1994, p. 38

<sup>47</sup> Munick, Ronaldo. 1989. *Latin America: the transition to democracy*. London: Zed Books., p. 92

<sup>49</sup> Navarro, Marysa. 1989. The Personal is Political: Las Madres de Plaza de Mayo. In *Power and Popular Protest: Latin American Social Movements*. Ed. Susan Eckstein. Berkeley, CA: University of California Press, p. 255

<sup>48</sup> Munck 1989, p. 255

<sup>49</sup> Brysk 1994, pp. 58-60

<sup>50</sup> Munck 1989. p. 95

<sup>51</sup> Ibid.

## 2.2 The Military's attempts to entrench impunity

In April 1983, in the face of mass demonstrations demanding the truth about the disappeared and justice for human rights violations, the junta attempted to put to bed the issue of “disappearances” with the “*Final Document of the Military Junta on the War against Subversion and Terrorism*.”<sup>52</sup> This document called for national “reconciliation” and sought to justify the disappearances and killings on the basis that they were the casualties of a justified war against subversion and terrorism. The *Documento final* also declared that unresolved cases of disappearances should be considered closed. This move provoked the ire of the human rights movement which staged a march of 30 000 people rejecting the military's *Documento Final*.<sup>53</sup> In September 1983, after this failed attempt to absolve themselves of responsibility for human rights violations, the Junta issued a National Pacification Law including a retrospective amnesty for human rights violations committed by both sides in the “Dirty War.”<sup>54</sup> Effectively this amounted to an attempted self-amnesty for the military regime and its agents. This was heavily criticised by the human rights movement which organised massive protests against the National Pacification Law and the self-amnesty: on 19 August 1983, 40 000 people marched in Buenos Aires protesting the proposed amnesty and on 21 September 1983 between 8 000 and 15 000 protestors demonstrated for 24 hours in Buenos Aires demanding information on the “disappeared”.<sup>55</sup> Despite these protests, the military passed the law implementing the amnesty on the eve of the return to civilian rule.

## 2.3 The human rights movement and Alfonsín's electoral campaign

In the lead up to the democratic transition, at a stage when functioning political parties had not yet been fully restored, the civil society-based human rights movement played a *quasi-political role* in denouncing the crimes of the junta and mobilising popular justice and truth concerns regarding the ‘disappearances’, torture and other human rights abuses.<sup>56</sup> In the context of 1983 election these human rights concerns could then be “transferred” from civil society-based movements to political parties now once again legitimately operating in the

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<sup>52</sup> Junta Militar. 1993. *Documento Final sobre la Guerra contra la Subversión y el Terrorismo*. Buenos Aires, April 28

<sup>53</sup> Brysk 1994, p.61

<sup>54</sup> *Ley de Pacificación Nacional, Ley No. 22.924* (22 September 1983)

<sup>55</sup> Mallinder, Louise. 2009. The Ongoing Quest for Truth and Justice: Enacting and annulling Argentina's amnesty Laws. *Working Paper no. 5 from Beyond Legalism: Amnesties, Transition and Conflict*

*Transformation*. Institute of Criminology and Criminal Justice, Queens University: Belfast, p. 17, n110, n111

<sup>56</sup> For a general account of these dynamics in a transitional context see O'Donnell & Schmitter 1986, pp. 48-53

public realm. One commentator observed that political parties “found their place in the sun, thanks to a popular mobilisation they neither encouraged or controlled.”<sup>57</sup>

Against this background, the human rights issue of addressing past human rights violations by the military became pivotal to the electoral campaign of Raul Alfonsin’s Radical Party. Indeed Alfonsin’s Radical Party, which up to the point of the elections had been a relatively small minority party compared to the Peronist tradition, was particularly outspoken on issues of human rights and also the need to address past human rights violations. In response to the human rights movement’s popular demands for “truth and justice” these issues became central to Alfonsin’s political campaign.<sup>58</sup> The military’s self-amnesty which had occasioned a popular outrage from the human rights movement became another key issue in the election campaigns. Alfonsin, who had a personal history of human rights activism himself, garnered the support of the human rights movement with promises to deal seriously with the human rights violations of the military junta. Included in his campaign was the promise to repeal the self-amnesty and put the military on trial.<sup>59</sup> Reacting to the overwhelmingly positive public response to the Radical Party’s human rights focus, many left-wing political parties, who had not previously considered the issue of human rights, now did so in acts of political opportunism.<sup>60</sup> As one scholar says “when the electoral campaign began [the human rights movement] had successfully transformed the *desparecidos* into an issue that no political party could ignore or afford to negotiate.”<sup>61</sup> The human rights movement thus ‘forced’ the civilian politicians to address the truth and justice issues associated with the disappearances and other human rights violations committed by the military.<sup>62</sup>

## 2.4 Establishing “truth” and “justice” during the transition

In December 1983 the opposition Radical Party won the elections and Raul Alfonsin became president, marking the restoration of civilian rule in Argentina. True to the promises made in his election campaign, Alfonsin immediately annulled the military’s self-amnesty and announced a “backward-looking programme” for dealing with the crimes of the military

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<sup>57</sup> Munck 1989, p. 95

<sup>58</sup> Brysk 1994, p. 64

<sup>59</sup> Brysk 1994, p. 62

<sup>60</sup> See Osiel 1986, pp. 143-144

<sup>61</sup> Navarro 1989, p. 255

<sup>62</sup> Munck 1989, p.92

junta.<sup>63</sup> In the same month Alfonsín announced the setting up of an investigative truth commission to establish the truth about the disappeared and other human rights atrocities perpetrated by the military junta during the repression. Regarding the prosecution of perpetrators, Alfonsín devised a strategy that was less radical than the human rights movement had in mind in view of the potential threat of a destabilising military backlash. Already in this early announcement of measures to deal with the past there were signs of Alfonsín's attempt to limit the duration and the scope of the trials.<sup>64</sup> Alfonsín announced that prosecutions would be directed at two categories of perpetrators: 1) the prosecution of top military officials and members of the Junta responsible for "giving out orders", and 2) subordinates who had complied with orders that were so abhorrent that they could not be "reasonably" be deemed to be legitimate.<sup>65</sup>

The human rights movement immediately criticised the government for limiting the number of prosecution and exempting too many perpetrators from responsibility. However, despite increasing criticism from the human rights movement Alfonsín continued to limit the scope of the trials in the face of the increasing threat of a possible backlash which could threaten stability and prospects of democratic consolidation. The next part of this chapter discusses these developments in detail focusing on the response of the human rights movement to these shifts in Alfonsín's policies regarding human rights atrocities. In particular the key question is to what extent the human rights community maintained its own principled human rights perspective on the amnesty/prosecutions issue throughout these events or came to accept different transitional justice perspectives as espoused by Alfonsín's shift in policies in response to the increasing threat of the military.

#### *2. 4. 1 Establishing the "truth" about the "disappeared" and tortured: CONADEP*

Following on from its demands for "truth", the human rights movement had long been making calls for official investigations into the whereabouts of the "disappeared". More specifically, the human rights movement lobbied for a bicameral parliamentary commission to investigate all human rights atrocities committed by the junta.<sup>66</sup> In anticipation that the

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<sup>63</sup> Nino 1996, pp. 68-69.

<sup>64</sup> Nino 1996, pp.70-71

<sup>65</sup> Nino 1996, p.71

<sup>66</sup> Brysk 1994, p.68; Crenzel, Emilio. 2008. Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice. *International Journal of Transitional Justice* 2, p. 176

government would set up an investigative truth commission many human rights organisations came together to form a “Technical Commission” and pooled all the data and reports relating to human rights violations collected during the repression. Responding to the human rights movement’s demand for “truth”, Alfonsín created the National Commission on Disappeared Persons (CONADEP) by executive decree.<sup>67</sup> While in favour of an investigative truth commission, the creation of CONADEP by executive decree was against the wishes of the human rights movement who had lobbied for a parliamentary commission.<sup>68</sup> A parliamentary commission “would have been amenable to popular and human rights movement pressure through elected legislatures and would have had the power to subpoena accused repressors as witnesses.”<sup>69</sup> However, this did not happen and instead CONADEP was created by executive decree with its members appointed directly by the President. According to Nino, the Alfonsín government “believed that a commission linked to Congress would give legislators an unhealthy opportunity to compete in lambasting the military, and as a result create an extremely tense situation.”<sup>70</sup>

Most victims and human rights organisations, Las Madres in particular, initially objected to CONADEP for the reason that it was a non-representative body with a limited mandate merely to collect documentation as opposed to a truth commission with “real powers” of search and seizure to investigate new cases as they had hoped.<sup>71</sup> While many human rights activists, at least initially, refused to participate in the Commission, in the end CONADEP relied heavily on the work of local human rights activists as it conducted its hearings throughout Argentine’s fifteen provinces.<sup>72</sup> In part this was due to efforts by the government to lobby members of the human rights movement for support of the commission.<sup>73</sup> Indeed government was keen to secure the human rights community’s cooperation with and support of CONADEP.<sup>74</sup> Many organisations developed a “dual position” on the Commission in that “they cooperated with the Commission but publicly continued to call for the establishment of

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<sup>67</sup> Decreto 187. 1983. Comisión Nacional sobre la Desaparición de Personas (15 December 1983). *el Boletín Oficial*, December 19, ALJA, 1983-B-1944.

<sup>68</sup> See Nino 1996, p. 72. See also Brysk 1994, p. 69, n28: Based on an interview with the Minister of the Interior (Antonio Troccoli) Brysk writes that it was decided by the President that a bicameral commission would be “politically uncontrollable—in the sense of being open to claims outside of the major bipartisan consensus.”

<sup>69</sup> Brysk p. 68, n23

<sup>70</sup> Nino 1996, p. 72

<sup>71</sup> Brysk 1994, p. 70, Crenzel 2008, p. 179

<sup>72</sup> The organisations eventually helped with taking statements and testimonies and also handed over the reports of the Technical Commission. See Crenzel 2008, pp. 179-180, 182 ; Brysk 1994, p. 70; Nino 1996, p. 73

<sup>73</sup> Brysk 1994, p. 69, n 31

<sup>74</sup> Nino 1996, p. 78-79

a bicameral commission, with the same arguments they had used to oppose CONADEP.”<sup>75</sup> According to Brysk, many human rights organisations did eventually decide to participate in CONADEP but this decision brought about a “split” in the human rights movement between those organisations willing to work “within the system” as distinct from those that chose “to continue their role as outsiders.”<sup>76</sup> Indeed, five of the ten appointees to the commission were prominent members of the human rights movement and in the end the human rights movement also provided most of its staff.<sup>77</sup>

Unlike, the South African TRC, CONADEP was not a public truth commission and made its public debut only with the publication of the final Report, *Nuncas Mas*, after the Commission had disbanded.<sup>78</sup> Despite the fact that CONADEP’s hearings had not been public or reported in the media, members of the public, and the human rights movement in particular, had not forgotten about its existence. The release of the report was marked by a human rights demonstration of 70 000 in support of the “truth” represented by the release of the report.<sup>79</sup> *Nuncas mas* confirmed the disappearance of 8 963 people, acknowledged the existence of 340 torture centres and listed the names of 1 351 people who had cooperated with the repression.<sup>80</sup> The human rights movement criticised the eventual findings of the Commission arguing that the figures produced by the Commission did not represent the true figures of those disappeared which they alleged was closer to 30 000 than the Commission’s 9000.

#### 2.4.2 Establishing justice for past human rights violations: criminal trials

The second longstanding demand of the human rights movement that Alfonsín had to address was the demand to have the perpetrators of human rights atrocities brought to justice. The human rights movement demanded the punishment of *all* military officials involved in human rights violations. In the first months after the return to civilian rule, the human rights

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<sup>75</sup> Crenzel 2008, p. 180. CONADEP took certain decisions which made the human rights movement more cooperative than they might have been given their objection to the Commission as an executive initiative. For example, the Commission decided to make all the information it gathered available to the human rights organisations.

<sup>76</sup> Brysk 1994, p. 70

<sup>77</sup> Three leaders from the prominent human rights organisations Service for Peace and Justice and the Centre for Legal and Social Studies turned down the invitation to serve on the commission because of their opposition to the use of military courts. Crenzel 2008, p. 178; Brysk, p. 69

<sup>78</sup> 503,830 copies had been sold as of 2007 according to Editorial Universitaria de Buenos Aires (EUDEBA) in Crenzel 2008, p. 173, n3

<sup>79</sup> Brysk 1994, p. 71, n43, n44

<sup>80</sup> de Brito, Alexandra. 2001. Truth, Justice, Memory, and Democratization in the Southern Cone. In *The Politics of Memory: Transitional Justice in Democratizing Societies*, p.121

movement brought cases to the civilian courts - by August 1984 more than 2000 cases had been lodged in the courts.<sup>81</sup> By the end of the year 1984, CONADEP too had handed over 1085 cases, identified through the Commission's work, to civilian judges. However, the progress of these cases was hampered by the new legislation requiring that cases involving military members should be dealt with by the Supreme Council of the Armed Forces and did not fall in the jurisdiction of the civilian courts.<sup>82</sup>

As already mentioned, due to the underlying threat of a military backlash, Alfonsín adopted a self-limiting strategy for the prosecution of perpetrators.<sup>83</sup> As part of this limited strategy Alfonsín made provision in February 1984 for the prosecution of members of the armed forces (those responsible for giving out orders) by their own military courts. This hampered the progress of cases that had initially been taken to the civil courts.<sup>84</sup> Alfonsín's objective was to avoid a direct confrontation with the military by inviting them to take responsibility for prosecution of the perpetrators of human rights violations through the military courts. The move was severely criticised by the human rights movement who viewed the government's approach as "too conciliatory to the military".<sup>85</sup> Indeed, human rights lawyers fought to avoid cases being transferred from the jurisdiction of the civilian to the military courts.<sup>86</sup>

Also, part of Alfonsín's limited strategy was to distinguish between different levels of culpability within the military, holding that those who had masterminded human rights violations should be tried first. To this end, part of Alfonsín's strategy was to try nine military

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<sup>81</sup> de Brito, 2001, p.122, Mignone, Emilio F, Cynthia L. Estlund & Samuel Issacharoff. 1984. Dictatorship on Trial: Prosecution of Human Rights Violations in Argentine. *Yale Journal of International Law* 10, p. 124

<sup>82</sup> Mignone et. al. 1984, p. 124

<sup>83</sup> See Nino 1996, pp. 109-111

<sup>84</sup> Mignone et al. 1984, pp. 124-125

<sup>85</sup> Ibid. pp. 125-126. There were major differences in the functioning of the civil courts compared to the military courts. The following passage is taken out of an article by M.K. O'Donnell (2009) entitled *New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human rights Violations*, it describes the criminal process in Argentina as one that considers victims as plaintiffs which is unlike the Supreme Council of the Armed Forces: "The institutional presence of the human rights organizations in the Argentine trials, primarily consisting of victims and their families, is secured by the *querellante* system. In Argentina, victims are considered *querellantes*, or plaintiffs, in the criminal process. They are represented by their own attorneys and act as parties to the action. Their lawyers are seated separately from the defence and the prosecution, and they have the right to present their own witnesses, make motions, and cross-examine any witnesses presented by the defence. They function as an accessory to the criminal process, and their interests are autonomous from those of the prosecutor." Proceedings in the military courts were also typically held in secret and according to strict military rank. O'Donnell, Margarita K. 2009. *New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human rights Violations*. *New York University Law Review* 84 Due to the pressure from Mignone et al. p. 129.

<sup>86</sup> Mignone et. al, 1984, pp. 130-131



heads of the junta in the Supreme Council of the Armed Forces. Human rights groups outrightly rejected Alfonsín's limited strategy:

The human rights groups' stance toward retroactive justice was intransigently retributive. They sought to punish each and every person responsible for the abuses regardless of their degree of involvement. They held a Kantian view of punishment; even if society were at the verge of dissolution, it had the duty to punish the last offender.<sup>87</sup>

As predicted by the human rights movement, the Supreme Council of the Armed Forces failed to proceed timeously and efficiently with prosecutions. As a result, and with mounting pressure from the human rights movement to proceed with prosecutions of the nine military officers and other cases that had been handed over to the military courts, the government handed jurisdiction for the prosecutions over to the civil courts whose legal proceedings were initiated in April 1985.<sup>88</sup> By December 1985, nine heads of the military juntas were convicted of 709 human rights crimes in what came to be known as the 'Trial of the Century'.<sup>89</sup>

The trial which took place in the course of 1985 was popularly supported by the human rights movement and citizens; when a coup plot was discovered just before the trial, more than 250 000 people demonstrated in support of the trials.<sup>90</sup> The trial was open to the public and extensively reported in the press: it was keenly followed by members of the human rights movement as well as the broader public, and not least by the President and the military.<sup>91</sup> Certainly, the human rights movement continued to mobilise around the issue of legal accountability with continued activism and by offering extensive assistance to the prosecution in the trial. Members of human rights organisations actively participated in the military trials by providing information required for the investigations, by working with the prosecutor to identify leading cases, by acting as a liaison between victims and the courts, by locating victims and generally enabling the proceedings of the prosecution.<sup>92</sup> Sustained activism ensured that the imperative of punishing those guilty of human rights violations remained the pertinent and relevant issue at stake in the trial. Throughout the trial the

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<sup>87</sup> Nino 1996, p. 112

<sup>88</sup> Brysk 1994, p. 76. The Centre for Legal Studies petitioned to have the federal court of appeals for Buenos Aires to assume jurisdiction from the military for the case. See also Mignone et al. pp. 140-141

<sup>89</sup> De Brito, 2001, p. 122

<sup>90</sup> Brysk 1994, n 17, p. 77

<sup>91</sup> See Osiel 1986

<sup>92</sup> Brysk quotes Luis Moreno Ocampo, the assistant prosecutor during the trials, as saying that "without the human rights organisations, there wouldn't have been a trial." See Brysk 1994, pp. 77-78

constant chanting of *castigo a todos los culpables* [punish all of the guilty] could be heard from outside the courtroom.<sup>93</sup>

At the end of the trial in December 1985, the popular desire for justice in Argentina had not been quelled, as the executive had hoped, but rather it had intensified.<sup>94</sup> Many from the human rights movement thought the sentences were too lenient, especially Las Madres who led a court room protest.<sup>95</sup> The human rights movement saw the trial, which the government had hoped would be merely exemplary, as an opening for further prosecutions of military officers at other ranks as well.<sup>96</sup> Indeed, the Trial of the Junta pointed to many other cases that needed to be investigated. In the judgment handed down the judge noted that, having been presented with 9000 legally proven crimes and having made only 5 convictions, the courts were legally required to bring further cases to trial.<sup>97</sup>

In response to the human rights agenda as determined by the popular support for the human rights movement the civilian courts continued to independently initiate further prosecutions. However, due to the excessive number of cases and the increasing threats of a possible military backlash it wasn't long before the Alfonsín government realised that it had made promises of judicial accounting that it couldn't keep.<sup>98</sup> In December 1986 the government attempted to put restrictions on the escalating number of prosecutions by introducing the 'Full Stop Law' which set a sixty-day limit for submitting charges to the courts (the first thirty days of which fell in January, Argentines' vacation period), extinguishing those that didn't make the deadline. The Full Stop Law did not accomplish what the government had hoped and actually proved to be counterproductive as more cases continued to be brought before the courts amongst massive protest demonstrations led by the human rights movement.<sup>99</sup> Furthermore, the judiciary was unexpectedly cooperative in processing cases even over the traditional vacation period. During the second week of December 1986, the human rights movement led a demonstration of more than 50 000 protesting against the Full Stop Law.<sup>100</sup> While the legislation was being debated, one human rights organisation staged a

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<sup>93</sup> Di Paolantonio, Mario. 2006. A Memory of Justice as a Democratic Pedagogical Force. *The Review of Education, Pedagogy, and Cultural Studies* 28, p.146

<sup>94</sup> Ibid.

<sup>95</sup> Brysk 1994, p. 79, n26

<sup>96</sup> Di Paolantonio 2006, p. 146

<sup>97</sup> Brysk 1994, p. 79-80

<sup>98</sup> De Brito, 2001, p. 122.

<sup>99</sup> These responses are reported in *El Periodista*, May 2-8, 1986, reference in Brysk 1994 p. 80, n35

<sup>100</sup> See Brysk 1994, p. 81 n38

simulacrum of a concentration camp at the entrance of Parliament.<sup>101</sup> Former CONADEP commissioners as well as the undersecretary of human rights within the Ministry of the Interior who was charged with “finishing CONADEP’s work” after its dissolution, also spoke out against the proposal.<sup>102</sup> As did the judiciary: members of the appeals court that had tried the juntas resigned in protest. It is clear that the human rights perspective on the prosecutions as a principled human rights issue found popular support at this conjuncture.

In the end, the Punto Final became law on 22 December 1986 and prevented the prosecution of the majority of cases that had been identified.<sup>103</sup> However, the judiciary continued to process the cases already handed over by the human rights movement at a record pace.<sup>104</sup> Owing to the human rights movement and the willing judiciary, there were still several hundred cases in which officers could be tried. The result of this unexpected development was that the military, including senior and middle-ranking officers, remained fearful that they would still be prosecuted. Contrary to objectives of the Punto Final Law, military threats of a possible backlash actually grew presenting a serious political and security threat to Alfonsín’s civilian government.<sup>105</sup> In April 1987, a military rebellion, the “Easter Rebellion”, in opposition to the trials developed and eventually forced Alfonsín’s civilian government to back down with a further attempt to limit the prosecutions.<sup>106</sup> The government passed the “Due Obedience Law” in June 1987 ruling that lower level officers could not be prosecuted if they had acted in terms of superior orders. HROs were outraged at the new laws and immediately counteracted the attempts to limit the trials with protests and also litigation, appealing to the courts to have legislation declared unconstitutional.<sup>107</sup> In its first legal challenge in the federal courts, on 11 June 1987, just three days after its promulgation, the law was declared unconstitutional. However, later on in the month, 27 June 1987, the Supreme Court overruled this judgement declaring that the due obedience law did not violate the constitution.<sup>108</sup> Following the application of the due obedience law only approximately fifty of the several hundred cases that survived the Punto Final legislation could be tried.<sup>109</sup>

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<sup>101</sup> Brysk 1994, p. 81

<sup>102</sup> See Brysk 1994, p. 81 n40. CONADEP was dissolved soon after it presented its report to the president on 20 September 1984. The undersecretary of human rights within the Ministry of the Interior was charged with “finishing CONADEP’s work.” See Nino, p. 80

<sup>103</sup> Brysk 1994, p. 82

<sup>104</sup> Ibid. p. 82, n47

<sup>105</sup> Ibid., p. 82

<sup>106</sup> Nino 1991, pp. 2627-2628.

<sup>107</sup> Ibid.; de Brito, 2001, p. 124

<sup>108</sup> See Malinder 2009, pp. 68-70

<sup>109</sup> Brysk 1994, p. 83

The relationship between the human rights movement and the Radical Party grew increasingly adversarial as the Alfonsín government developed its own approach to transitional justice issues of amnesty and prosecution which was no longer in line with a principled human rights perspective. However, from 1987, the human rights movement was less effective in its ability to impact on the transitional justice process. Despite this, the human rights movement did not modify its own principled human rights perspective on the issue of amnesty and prosecutions to come into line with Alfonsín's more pragmatic approach. The human rights movement continued to protest the Punto Final Law and the Due Obedience Law in terms of its own principled human rights perspective.

The above account of the Argentine transition suggests the independent role of a civil society based human rights movement which had a significant impact on the agenda of the 1983 elections and during 1984 to the end of 1986 effectively sustained a specifically "human rights" agenda focused on establishing truth and justice for human rights atrocities committed by the military junta. By means of widespread lobbying and sustained advocacy for human rights the human rights movement played a key role in placing issues of truth and justice on the national agenda in the first place.

In subsequent years the issue of prosecutions and amnesty/pardon for human rights atrocities has remained an unresolved and contentious issue in Argentine society and politics. Subsequent to this initial transition period further pardons were introduced under President Menem in the period 1989 to 2000. More recently however there was a successful appeal against the amnesty laws under President Kirchner who displayed a renewed commitment to truth and justice for past human rights violations during the period 2000 to the present. Despite many setbacks, which came as a major disappointment to the human rights movement against a background of high hopes for retributive justice as promised by the Alfonsín government, the human rights community has continued and continues to bring cases of human rights violations to the courts.<sup>110</sup> As recently as 22 December 2010, former dictator and leader of the coup that installed the 1976-1983 dictatorship, Jorge Videla, was sentenced to life in prison for the torture and murder of thirty-one prisoners.<sup>111</sup> Prosecutions

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<sup>110</sup> See Mallinder 2009, pp. 112-120

<sup>111</sup> Warren, Michael. 2010. Argentine ex-dictator sentenced to life in prison. *The Washington Post*, available online at: <<http://www.washingtonpost.com>> Accessed 4 January, 2011

such as this one have been made possible by the decision of the Supreme Court in 2007 to overturn the amnesties granted under President Menem.

#### *2.4.3 Assessing the nature and impact of the Argentine human rights movement*

The above account suggests a number of considerations for understanding the principled human rights response of the human rights movement to the issue of amnesty and prosecutions in the transition. The lack of an identifiable human rights tradition prior to the 1976 coup in Argentina suggests that the emergence of the human rights movement during the repression and in the early 1980s amounted to a primarily contextual response to the military junta. Certainly, the context of the government's clandestine operations in the course of which thousands of people "disappeared" prompted an extensive call for the truth as to the fate of these individuals. The human rights movement's demand for prosecutions was also likely a response to the systematic denial by the military of the disappearances, torture and killings.

Another factor is the structural context of gross human rights violations by the military regime as crimes committed by individual state agents, against individual dissidents, amenable to criminal prosecution. In this regard, Rosenberg argues that the torture and disappearances committed in the Latin American dictatorships as individual and direct acts of human rights atrocities were more amenable to criminal prosecution than the systemic complicity in human rights violations typical of the Eastern European Communist regimes.<sup>112</sup> The nature of the crimes committed under the military juntas was such that "one can point to a few hundred men who committed the actual crimes."<sup>113</sup>

In the context of Argentina where human rights violations were perpetrated against targeted individuals these human rights violations also primarily concerned individual civil and political rights or first-generation rights (as opposed to second-generation, socio-economic rights). Accordingly, criminal prosecutions were an appropriate response to human rights violations such as murder, torture and kidnappings – the courts were a place where these

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<sup>112</sup> The case in Eastern Europe was different in the sense that the communist regimes relied on the participation of ordinary citizens who thus became complicit in the system which generated human rights atrocities.<sup>112</sup> In the case of Eastern Europe one cannot readily identify individual perpetrators (nor a limited number of perpetrators and victims) as in the case of Latin America. See Rosenberg, Tina. 1999. Afterword: Confronting the Painful Past. In *Coming to Terms: South Africa's Search for Truth*, Martin Meredith. New York: Public Affairs, p. 138

<sup>113</sup> Ibid.

rights could be dealt with. Smulovitz commented on the impact of the judicial trials in the discourse of human rights in Argentina that it reinforced popular perceptions of the political significance of rights and justice:

The spectacular character of the trial, in which weak citizens held powerful individuals accountable for past violations, helped to build an image of a judiciary that could discipline the powerful and defend the rights of the weak . . . The decision of the Buenos Aires Federal Court made the courts the stage upon which the promise of the newborn democracy was to be fulfilled. The political impact and high visibility of this decision began to transform perceptions of the traditionally subordinate role of the judiciary. As a result of this ‘spectacular’ and ‘unexpected’ public event, the conservative judiciary appeared to become a place where the rights of citizens could be realized.<sup>114</sup>

The account in this chapter also points to the role of the Argentine criminal justice system as an available mechanism for ‘justice’ through criminal prosecution. The judiciary cooperated with processing complaints submitted to the courts and was available to investigate and take up such cases against the military. In the case of South Africa we shall see that the judiciary was generally unwilling to take on such cases. But then these cases weren’t brought to the courts in the same volume as by the Argentine human rights movement.

The particular chronological sequence of events relating to the interactions and relations between the political parties and the human rights movement had an impact on the agenda for prosecutions and retroactive justice in Argentina during the transition. The account of Argentina in this chapter points to a situation whereby the relationship between the human rights movement and the soon to be installed civilian government was cooperative in the lead-up to the transition, the civilian government having received the large part of its support base as a result of popular mobilisation led by the human rights movement. The result of this was an executive that was amenable to the demands of the human rights movement and that, at the insistence of the human rights movement, adopted “pro” human rights policies.<sup>115</sup> However, with time, the relationship between the two grew increasingly adversarial as the government began to factor in relevant strategic and political considerations such as political stability and the military threat. As mentioned earlier, there was a parting of the agendas of

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<sup>114</sup> Smulovitz, Catalina. 2002. The Discovery of Law: Political Consequences in the Argentine Case. In *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*, p. 252.

<sup>115</sup> Brysk 1994, p. 75

the new civilian government and the human rights movement which can be explained by the different relevant considerations faced by each actor in the context of the transition. The Alfonsín government had to reckon with the military's likely response to prosecutions who was still a power in the land and who posed a threat to the new and precarious civilian government. In adopting its strategy for a limited approach to justice, the Alfonsín government was evidently motivated by the need to take into account these strategic and political considerations. The relevant considerations of the human rights movement however were not those concerned with the political implications of policy decisions but rather with the objectives of truth about the disappeared and justice for the perpetrators of human rights atrocities. Their considerations were therefore more concerned with justice as a principled issue. The human rights movement generally maintained their "independent" base from government and continued to insist on a more comprehensive approach to truth and justice than the Alfonsín government implemented.

Taking the Argentine case into account, the rest of the thesis goes on to investigate the approach of the South African human rights community to the issue of truth and justice for human rights violations. To what extent were the issues of truth and retributive justice a priority for the South African human rights community as they were for the human rights movement in Argentine? To what extent did the South African human rights community insist upon retributive justice in the same way that the Argentine human rights community did, if at all? To what extent was the SA human rights community's response shaped by a contextual response to the particular exigencies at the time of the transition? Can we see the SA human rights community's response as a response to a different kind of human rights situation with different transitional justice concerns in the context of apartheid's overall legacy of socio-economic injustice?

## **CHAPTER 3: INDEMNITY IN THE EARLY TRANSITIONAL PHASE AND IN THE LEAD-UP TO THE POSTAMBLE, 1990-1993**

This chapter investigates the extent to which the South African human rights community in the lead-up to the transition, and while political negotiations were underway during 1990-1992, took an interest in the imminent problem of “dealing with the past” of human rights violations in South Africa. This is meant to serve as background and context for the more specific question of the human rights community’s concerns with amnesty and prosecutions for human rights atrocities. What form did its concern with transitional justice take and how did the human rights community’s response translate into action?

Before focusing more specifically on the SA human rights community’s concerns with the issues of amnesty and prosecution at this time these need to be contextualized within its more general approach to transitional justice. Significantly, at the onset of the transition the SA human rights community was concerned with a range of transitional justice-type issues such as recovering and exposing the truth about the past through investigations, the need for post-conflict and national reconciliation, material reparations, the transformation of the economy and socio-economic development. This suggests that they may have had other priorities than just that of the legal accountability of perpetrators of human rights violations under apartheid. What were these priorities and how can they be understood within the context of the South African transition? More generally, how did members of the human rights community view their role as human rights organisations and activists in the context of the political transition from apartheid to a new democracy? And how does this response compare to the mobilisation of the human rights movement in Argentina around retributive justice and prosecutions at a similar stage of their transition?

### **3.1 The human rights community’s perception of its role in the impending transition**

When it became publicly known that negotiations between the NP and the ANC were underway, human rights organisations began to review the focus of their work in light of the changing political terrain. Organisations such as the Black Sash, Lawyers for Human Rights and the Legal Resources Centre deliberately reconsidered their past functions and future role and strategy in the transition and in a prospective post-apartheid and democratic South



Africa. What issues were priorities for the human rights community at this early stage of the ‘transition’? To what extent was the human rights community at that stage concerned with issues of human rights in the general context of transitional justice, and more specifically with the question of prosecutions versus amnesty for perpetrators of human rights violations? On closer investigation it soon appears that, at least to begin with, the issue of ensuring legal accountability for perpetrators of human rights atrocities was not a particular priority for the human rights community. At this early stage the issues that the human rights community was most prominently concerned with were:

- 1) The ongoing social and economic injustices and general human rights violations that black people continued to suffer under apartheid;
- 2) The debate over a future Bill of Rights in a new Constitution for a democratic South Africa; and
- 3) the escalating violence in especially the KZN, Vaal and East Rand regions and the “peace process” at the level of local communities and regions that happened parallel to the political negotiations as a response to the violence

We will briefly consider each of these before turning to the human rights community’s more specific concerns with transitional justice and its response to the issue of amnesty and prosecutions in particular.

Articles from various organisational publications and their annual reports reveal how the SA human rights community conceived of its changing role and main priorities on the eve of the transition. For example, a 1990 issue of the Black Sash’s publication *Sash* featured an article by Mary Burton (who later served as a commissioner of the TRC Committee) discussing the Black Sash’s future role in South Africa.<sup>116</sup> Burton listed as priorities for the organisation the problems of ‘dismantling apartheid’, of instilling a democratic culture in South Africa through education, and addressing the injustices caused by apartheid including economic disadvantages, the lack of education and employment opportunities, the lack of social services and social welfare. Subsequent issues of *Sash* in 1990 and 1991 reflected the Black Sash’s prioritisation of the role of women in the future South Africa (in governance and in the economy), black schooling, human development, housing issues and the ‘land question’.

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<sup>116</sup> Burton, Mary. 1990. Where do we go from here? *Sash* 33 (1) May, p. 28

Broadly this prioritised the ongoing social and economic injustices and general human rights violations that black people continued to suffer under apartheid

Similarly, in its Annual Report for the year ending March 1991, the LRC expressed its plans to engage with new areas and opportunities as the changing political situation in SA developed.<sup>117</sup> It envisaged itself playing a role in ‘transforming the rule of law’; in developing a new Constitution and Bill of Rights for South Africa constructed by ‘ordinary people’; and assisting with the creation of a ‘legal framework for development’ in the country. At this time the LRC planned to deepen its focus on development issues around land and housing and accordingly plans were made to set up a ‘development fund’ for this. An analysis of case files opened by the LRC for the year ending March 1992 shows that most of these concerned issues of land, housing development, labour and consumer protection. Cases for civil damages against the Minister of Law and Order for misconduct by state police and security forces also constituted part of the LRC’s case load. These are discussed in the second part of the chapter. The Report however indicated that the LRC had devoted the most substantial part of its time to representing individuals and communities in cases involving claiming access to land and improved services – issues which the LRC considered to be of the “greatest importance”.<sup>118</sup>

Speaking at the Human Rights Trust’s annual “Human Rights Festival” at the end of 1990, National Director of LHR, Brian Currin, flagged second-generation rights as the most important of issues that confronted the SA ‘human rights movement’ in the immediate future.<sup>119</sup> Currin also wrote in the LHR’s Annual Report for the year ending June 1991 that the LHR was “acutely conscious of the need to concentrate on development oriented projects.”<sup>120</sup>

While Idasa cannot be said to be a *legal* human rights organisation in the same sense as the LRC and LHR, its publication *Democracy in Action* provided a good reflection of issues debated and on the agenda of not only civil society but also the South African human rights community at this time. Furthermore, Alex Boraine, who became a key instigator and role player in the debate over transitional justice in South Africa, was the Director of Idasa in the

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<sup>117</sup> LRC Annual Report. 1990, pp.1-2

<sup>118</sup> LRC Annual Report. 1992, p. 7

<sup>119</sup> Cherry, Janet. 1990. Controversy over bill of rights. *Democracy in Action*, December, pp 6-7

<sup>120</sup> Currin, Brian. 1991. National Director’s Message. *LHR Annual Report*, June 1991, p. 2

early 1990s before he left this position to set up the NGO 'Justice in Transition'. However, while Boraine was still at Idasa he had begun to form ideas about the problem of "dealing with the past" in South Africa. In as early as 1990 Idasa held conferences and workshops on "South Africa in transition." One such workshop, called "SA in Transition" was hosted by Idasa in June 1990 and attended by 300 delegates. The conference discussed the "political transition process and specifically the lessons from transitions in Latin America and Southern Europe" but focused on the dynamics of the *negotiations process* as well as the "key" problem of effecting not just a political transition but socio-economic transformation and "meeting the needs of the disadvantaged" in South Africa.<sup>121</sup> As with the other 'human rights' publications at this time, the majority of articles in *Democracy in Action* honed in on the problem of socio-economic development and the serious socio-economic ills suffered by black people and communities as a result of the apartheid system as well as widespread poverty amongst black communities and townships.<sup>122</sup>

It was with these concerns in mind that the human rights community and civil society actively participated in the debate over a bill of rights for South Africa. Central to the debate was the issue of whether/how socio-economic rights should be included in the proposed new Bill of Rights, and the issue of how these rights would be realised for the majority of South Africans.<sup>123</sup> Some key contributions to the debate appeared in *A Charter for Social Justice: A Contribution to the South African Bill of Rights* which was a collection of essays and included contributions from Hugh Corder, and Steve Kahanovitz amongst other human rights proponents and academics.<sup>124</sup> John Dugard, a prominent human rights figure in South Africa,

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<sup>121</sup> See the write up on the conference by an Idasa employee: Ronel Scheffer. 1990. Meet needs of disadvantaged, conference on transition told. *Democracy in Action*, June/July, pp. 1, 4-5. Idasa also held a staff workshop in June 1994 on Idasa's role in the process of the transition. Idasa prioritised the following imperatives: promoting progressive and democratic ideals; addressing racial tensions; providing information about issues in the transition; facilitating discussion of constitutional and developmental issues around a post-apartheid South Africa. See --. 1990. Taking up the challenge of transition. *Democracy in Action*, June/July, p. 15. See also Boraine, Alex. 1990. The Road Ahead. *Democracy in Action*, August/September, pp. 6-7. Boraine highlighted five "key areas" of the transition to focus on: transition and economic justice; transition and education; transition and civil rights; transition and media; transition and grass roots involvement.

<sup>122</sup> See for example especially *Democracy in Action*, August/September 1990 Issue

<sup>123</sup> For example Cherry 1990, pp.6-7. Also the conference *Interpreting a Bill of Rights* held by Lawyers for Human Rights and the Department of Applied Legal Studies, Potchefstroom University. Papers published in *Rights* Vol. 2, July 1992, pp.18-24; Also see LHR. 1992. *Rights* 3, November, pp. 18-22 for the LHR's contribution to the Constitutional Debate. Also see Legal Resources Centre. 1989. Annual Report, pp. 11-13 LRC. 1992. Annual Report, p.6; LRC. 1994. Annual Report, pp. 10-11. The issue of minority rights was also a major issue in the debate over a Bill of Rights.

<sup>124</sup> Corder, Hugh (ed.). 1992. *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate*. Cape Town: Department of. Public Law, University of Cape Town

made an early contribution to the debate with his journal article “A Bill of Rights for South Africa.”<sup>125</sup> Human rights scholar and lawyer,<sup>126</sup> Albie Sachs’s widely circulated publications reflected many of the most important issues at stake for ‘human rights’ once a political settlement had been achieved.<sup>127</sup> His books *Protecting Human Rights in a New South Africa* and *Advancing Rights in South Africa* published in 1990 and 1992 focused on the role of law in *social* transformation and represented a significant contribution from a prominent ANC-based human rights activist. Significantly, the issue of legal accountability and prosecutions for perpetrators of human rights violations during apartheid did not feature as one such ‘problem.’<sup>128</sup> Rather, the book considered a prospective democratic order based on a Constitution and Bill of Rights with a strong emphasis on second-generation social and economic rights.<sup>129</sup> In keeping with other members of the human rights community at the time, Sachs considered the most important issues facing South Africa as those of correcting the socio-economic injustices of the past, the problem of land and property rights, the organisation of civil society, affirmative action and also a possible Bill of Rights as part of the new Constitution.

The range of articles published in the *South African Human Rights Journal* around this time also reflected the human rights community’s preoccupation with socio-economic rights in the ‘new’ South Africa and in a future Bill of Rights and Constitution. In his editorial for the 20<sup>th</sup> Anniversary edition of the *South African Journal of Human Rights* in 2004, John Dugard remarked that in the early 1990s journal articles had centred on “the constitutional debate.”<sup>130</sup> Certainly many contributions to the SAJHR during this time were centred on the debates a prospective Bill of Rights and the future role of a new Constitution and a constitutional court in South Africa. The predominant ‘rights’ discourse around this time was therefore located within the more general concern of overcoming the legacy of an apartheid South Africa which had been entrenched as a system of racial discrimination and the systemic derogation

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<sup>125</sup> Dugard, John. 1990. A Bill of Rights for South Africa. *Cornell International Law Journal* 23, pp. 441-466. Dugard concluded saying that human rights had found a way into the political agenda – his referral to ‘human rights’ was within the context of a bill of rights for South Africa

<sup>126</sup> Albie Sachs’s role in the transition was actually more complicated than this as a member of the ANC’s Constitutional Committee – the significance of this is discussed in the next chapter at the point when Sachs became directly involved in the amnesty issue in the context of the final negotiated settlement .

<sup>127</sup> Sachs, Albie. 1992. *Advancing Rights in South Africa*. Cape Town: Oxford University Press, p. ix

<sup>128</sup> This is even more significant considering that Sachs himself was the victim of a gross human rights violation as the target of an attempted letter bomb assassination in which he lost his arm.

<sup>129</sup> Sachs. 1992, p. xi

<sup>130</sup> Dugard, John. 2004. Twenty Years of Human Rights Scholarship and Ten Years of Democracy. *South African Journal of Human Rights* 20, pp 345-354, 346

of citizens' political, social and economic rights. This was quite unlike the case in Argentina where the discourse was predominantly centred on the rights of victims to know the truth about the disappeared as well as their right to retributive justice for human rights atrocities.

The third major focus of human rights organisations during the early period of the political negotiations was the ongoing and increasing political violence in certain parts of South Africa, KwaZulu Natal and the East Rand in particular.<sup>131</sup> There was genuine concern among the human rights community and civil society that the violence was spiralling out of control and that it could derail the "peace process".<sup>132</sup> Human rights and civil society organisations became involved in behind the scenes mediation and facilitation in these risk areas.<sup>133</sup> Civil society and the business sector also came together to implement a National Peace Accord... "a civil society initiative that brought political actors from all sides together to establish codes of conduct needed for the initiated transition to be saved."<sup>134</sup> In terms of the Accord, a countrywide network of conflict mediation and monitoring committees made up of representatives of the signatories to the Accord and of civil society was created.<sup>135</sup> Human rights organisations actively participated in these processes. The focus of these committees was not on holding perpetrators legally accountable for human rights abuses but rather seeking a solution to the increasing political violence on the ground.

Indeed, the late 1980s and early 1990s was a period of intensive political violence in South Africa.<sup>136</sup> Liberal and human rights organisations such as the Human Rights Commission and the SA Institute of Race Relations had been prominent in monitoring and publicising covert government operations in torture and detention camps as well as "deaths in detention" by police officers. The LRC and the Centre for Applied Legal Studies contributed to a

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<sup>131</sup> Sisk, Timothy D. 1994. South Africa's National Peace Accord. *Peace and Change* 19 (1), pp.52-53

<sup>132</sup> Spies, C. 2002. pp. 20-21

<sup>133</sup> See Westcott, Shauna. 1990. Peace Process needs help. *Democracy in Action*, June/July., p.7

<sup>134</sup> Subklew, Friederike. 2004. Building Peace and Democracy in South Africa -- An Assessment of the Role of the NPA and the TRC and an Investigation of the Nexus between them. Masters Mini-Dissertation, University of Cape Town, p.74

<sup>135</sup> Odendaal, Andries & Chris Spies. 1997. You Have Opened the Wound but Not Healed it: the Local Peace Committees of the Western Cape, South Africa. *Peace and Conflict: Journal of Peace Psychology* 3 (3), pp. 261-273. See also Gastrow, Peter. 1995. *Bargaining for peace: South Africa and the National Peace Accord*. Washington, DC: United States Institute of Peace

<sup>136</sup> The SAIRR's figures for deaths in political violence: 1990: 3699; in 1991 more than 2700 people died; 1992: 3102; 1993: 3706 Jill Wentzel. 1995. *The Liberal Slideaway*, Johannesburg: South African Institute of Race Relations, p. 247

substantial “Human Rights Index” published in the quarterly issues of the SAJHR.<sup>137</sup> The *Vrye Weekblad*, an alternative news publication, played a key role in exposing “death squads” in the security forces which led to the Harms and the Goldstone Commissions which are discussed below. At the same time the issue of past political atrocities also emerged as an internal issue in the ANC, resulting in two internal commissions of enquiry into human rights atrocities that had occurred in ANC military camps in Angola and Zambia. The human rights community did take note of and become involved in these developments, some of which are discussed below. However, this was not necessarily with a view to accountability for such human rights violations but rather with a view to condemning and rejecting any involvement in the violence.<sup>138</sup> In general, while “human rights” were a major concern at this time for the human rights community, this was within a context shaped by other general priorities for the SA human rights community that did not specifically focus on the criminal prosecution of perpetrators of apartheid human rights violations.

Even in the months leading up to the Postamble of the Interim Constitution (which would announce the provision of amnesty as part of the negotiated settlement at the end of 1993 the main priority of these organisations continued to concern issues of socio-economic development and a new Bill of Rights. This focus on socio-economic rights eclipsed a principled human rights concern with amnesty versus criminal prosecution for human rights violations committed during apartheid. So, despite the impending transition, human rights organisations such as the LHR, LRC, Black Sash and other human rights organisations did not prioritise the issue of accountability for the human rights atrocities committed during apartheid to the same extent as other projects that dealt with socio-economic issues facing South Africans. The one exception to this was Boraine who had already begun to conceptualise the NGO Justice in Transition. Even so, this initiative was not conceived in terms of retributive justice or accountability but rather as a victim-oriented truth process. There is no evidence certainly in the news and media reports that these organisations, or others, campaigned in any sustained way for accountability of perpetrators of human rights violations. Instead, the trend towards projects around issues of socio-economic rights and development continued.

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<sup>137</sup> See for example Human Rights Index: 1 May – 31 July 1992. 1992. *South African Journal on Human Rights* 8, pp. 605-627.

<sup>138</sup> Indeed, there had been considerable contestation around the issue of a "principled" approach to political violence among SA liberals from the late 1980s (See Wentzel 1995, pp. 258-263). But this was focused on ongoing issues of political violence in the 'struggle' and the debate over a rebellious or revolutionary approach to the struggle rather than with accountability for past atrocities and the need for a truth process.

This did not mean that these human rights organisations did not develop considered views on the issue of amnesty for human rights violations at all. The controversies around the Further Indemnity Act from late 1992 on did provoke public stands from key human rights organisations on the prospect of a general amnesty well before the publication of the Postamble of the Interim Constitution at the end of 1993.

### **3.2 Addressing human rights violations: truth processes, civil actions and attempted prosecutions**

In the early 1990s the SA human rights community did become increasingly concerned with the nature and extent of political violence and human rights violations, and how these should be dealt with in the context of the transition. At this stage these concerns took at least three main forms:

- 1) truth processes: maintaining monitoring bodies and calling for investigative commissions focused on general trends of human rights violations;
- 2) civil actions: initiating litigation regarding particular cases of human rights violations; and
- 3) accountability and retributive justice: advocating for criminal prosecutions of prominent perpetrators of human rights violations.

We will briefly discuss each of these in turn as background to a more specific account of the human rights community's approach to the issue of amnesty and indemnities in the next subsection.

A number of NGOs in apartheid South Africa were involved in and/or were set up to monitor and record the human rights situation in South Africa. Going back the 1960s the South African Institute of Race Relations had monitored and reported on deaths in detention, state repression and human rights violations on a regular basis.<sup>139</sup> The CSVR was also involved in this and had a project within its organisation for the monitoring of political violence. The Human Rights Commission was established in 1988 as a civil society institution with the stated brief to investigate, monitor and publicise human rights violations in South Africa with

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<sup>139</sup> This published in annual surveys conducted by the South African Institute of Race Relations. See for example the 1992 Annual Survey: South African Institute of Race Relations. 1993. Race Relations Survey 1992/1993. Johannesburg: SAIRR

special emphasis on repressive measures exercised by the state.<sup>140</sup> Other organisations involved in monitoring and reporting human rights violations included the Independent Board of Inquiry and legal human rights organisations such as the LRC, LHR etc. The background to this was the extensive involvement of human rights lawyers in representing the accused in political trials during the apartheid era.<sup>141</sup>

Several official investigative commissions were established over the years 1990-1992, including the Harms Commission, the Goldstone Commission and the Hiemstra Commission as well as various inquests such as the inquest into the 'Trust Feed Massacre', to investigate increasing political violence and human rights violations as well as allegations that a 'third-force' and state hit-squad operatives were instigating the violence (especially in relation to the ongoing violence in KwaZulu Natal). Many human rights lawyers, particularly from the LHR and the LRC were actively involved in these Commissions, assisting with the investigations and presenting evidence as well as participating in the hearings. As part of one its national programmes in 1992/1993 – 'Commissions and Monitoring of Violence' – the LHR published information that emerged from the Harms Commission about state paramilitary hit squads.<sup>142</sup> The Legal Resources Centre teamed up with the Human Rights Commission in 1991 to produce a comprehensive report of political violence and killings in Natal by the KwaZulu (Natal) Police for the use of the Goldstone Commission.<sup>143</sup> The LRC worked closely with the Goldstone Commission and in particular with its Natal investigation arm.<sup>144</sup> It should be mentioned that the credibility of the commissions varied and so accordingly the approach of the human rights community to each commission also varied with the Harms Commission being very controversial but the Goldstone Commission widely supported.

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<sup>140</sup> See for example reports on violence compiled by the Human Rights Commission. 1993. Three Years of Violence: a record of political violence in South Africa from July 1990 – June 1993. *Special Report 13, Human Rights Commission*. Braamfontein: South Africa.

<sup>141</sup> Abel, Richard. 1995. Nothing Left but Rights: Law in the Struggle against Apartheid. *Identities, Politics and Rights*, In A Sarat & T Kearns (eds.), USA: University of Michigan Press, pp.239-270; Ellmann, Stephen. 1992. *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency*. Oxford: Oxford University Press

<sup>142</sup> Currin, Brian. 1991. National Director's Message. *LHR Annual Report*, June 1991, p.13

<sup>143</sup> See Coleman 1998, pp. 199-200. The HRC also produced a monthly report or 'Human Rights Update' in which it published statistics of repression and violence including reports on repressive legislation; detention without trial; deaths in police custody; political trials; death row; repression of gathering and security force actions; hit squads; vigilante related actions; right wing actions

<sup>144</sup> LRC. 1993. Annual Report, pp.31



In the absence of any response from the Attorneys-General regarding calls to institute prosecutions against those implicated in the Harms and Goldstone Commissions, both the LHR and the LRC opened a number of cases filing for *civil* damages on behalf of victims of the police and state security forces. In respect of the Goldstone Commission, close to 100 actions against the Minister of Law and Order were instituted for damages caused to the victims and their families.<sup>145</sup> In 1992, the LRC opened 94 new case files for damages against the Minister of Law and Order for unlawful arrests, assaults, shootings and killings by police which were at this stage all increasing occurrences.<sup>146</sup> These actions for civil claims against perpetrators of abuses must be differentiated from criminal prosecutions against individuals as the main objective of the civil claims was to claim compensation from the perpetrators for damages suffered as a result of unlawful actions against victims.

Significantly some of the human rights organisations expressed the view that prosecutions should follow on from the commissions of inquiry. The LHR for example was concerned as to what these investigative commissions meant for the prospect of prosecutions for human rights violations: “LHR would like to see the Government thoroughly investigate the activities of the police force as a whole and the prosecution of those who have committed offences.”<sup>147</sup> In an article in the February 1991 issue of LHR’s journal *Rights* entitled ‘Commissions of Inquiry: Where to From Here?’ David Dison, a human rights lawyer who had represented affected parties in the Harms, Goldstone and Hiemstra Commissions, suggested that prosecutions should be instituted in respect of the murders of activists such as David Webster and Anton Lubowski.<sup>148</sup> While Dison articulated a clear statement of a principled human rights commitment to criminal prosecution, and an implied rejection of amnesty, this was Dison’s own view and to what extent his stand was more widely shared within the LHR is not clear.

The LRC did contend that the investigative Commissions should lead to prosecutions. However, as the LRC reported in its 1992/1993 Annual Report, representations by the LRC to the Attorneys-General regarding prosecutions of policemen and state security forces were

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<sup>145</sup> Dison, David. 1991. Commissions of Inquiry: Where to from here? *Rights* 1, February, p.30

<sup>146</sup> LRC 1993. Case Reports. *LRC Annual Report*, 1993, p. 29

<sup>147</sup> LHR. 1991. National News. *Rights* 1, February, p. 5

<sup>148</sup> Dison 1991, p.30

“not often met with success.”<sup>149</sup> Despite these murmurs from the LRC and the LHR that investigative commissions should be followed by prosecutions, the issue was not pursued by the human rights community through public campaigns or sustained activism and was certainly not comparable to the Argentine human rights movement. Our conclusion must be that at this stage the issue does not appear to have been flagged as a major priority for the human rights community in the context of the transition.

### **3.3 The Indemnity Acts and the issue of amnesty for human rights violations**

At what stage and in what ways did the issue of amnesty for human rights violations become a more significant concern for the SA human rights community? Against the background of its more general concerns with different issues of transitional justice as well as its growing involvement with how human rights violations should be dealt with in the context of the transition, this section will reconstruct how amnesty for human rights violations became a more prominent issue for the human rights community in relation to the Indemnity Acts.

While at the end of 1993 a provision for amnesty was incorporated in the Postamble of the Interim Constitution as a final outcome of the negotiated settlement, this was not the first time that the issue of amnesty emerged in the political and public domain during the transitional period in South Africa. That had occurred in relation to the Further Indemnity Act from late 1992. The first Indemnity Act (no. 35 of 1990) was passed in 1990 but, as discussed in the Introduction, did not serve to grant impunity to perpetrators of human rights atrocities but rather to allow for political exiles to return to the country and/or be released from jail so that some of these individuals could engage in negotiations with the government over a new democratic South Africa. The stated purpose of the indemnity to encourage negotiations was well received by the human rights community who at this stage fully supported an indemnity of this sort for the purpose of reaching a negotiated solution. A working group was established to make recommendations on the definition of “political offences” in the South African situation. The working group made use of the Norgaard principles and in defining an act as political considered whether the act was committed “in the course of or as part of a

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<sup>149</sup> LRC 1993 Annual Report, p. 30. The LRC described a case which was not untypical whereby the LRC obtained an affidavit from a prisoner who had witnessed a fatal assault by a policeman. The Attorney-General at first refused a formal inquest but later ruled in an *informal* inquest that no person was responsible for the death of the prisoner. The LRC persuaded the Attorney-General to instruct further investigation at which stage the policeman was charged with culpable homicide. The prosecutor later withdrew the charges saying that the witness wasn't available; however when the witness was eventually traced the policeman was acquitted.

political uprising or disturbance” or “committed in the execution of an order or with the approval of the organisation, institution or body concerned.”<sup>150</sup> The defence of “superior orders” in this first Indemnity Act is not particularly problematic from a human rights perspective as the indemnity did not apply to human rights atrocities.

Following the Indemnity Act and also the Pretoria and Groote Schuur Minutes, direct negotiations over a democratic South Africa founded on a new constitution began a year later in December 1991 when the first Convention for a Democratic South Africa (CODESA) was set in motion. However, despite the implementation of the first Indemnity Act of 1990 the ANC contended that members of the liberation struggle were still incarcerated as political prisoners. This became a major issue in the attempts to resume the constitutional negotiations which had broken down in May 1992. It was settled in the Record of Understanding (RoU) signed by the ANC and the NP on 25 September 1992 enabling the constitutional negotiations (CODESA II) to resume soon after -- but only partially. In the Record of Understanding, the parties agreed that “all prisoners whose imprisonment is related to political conflict of the past and whose release can make a contribution to reconciliation should be released.”<sup>151</sup> They also recorded their disagreement on this issue of the release of political prisoners convicted of gross human rights violations:

The government and the ANC agreed that the release of prisoners, namely, those who according to the ANC fall within the guidelines defining political offences, but according to the government do not, and who have committed offences with a political motive on or before 8 October 1990 shall be carried out in stages (as reflected in a separate document; 'Implementation Programme: Release of Prisoners') and be completed before 15 November 1992.<sup>152</sup>

Shortly after the RoU was signed, in October 1992, a second indemnity was legislated known as the Further Indemnity Act (no. 152 of 1992).

The Further Indemnity Act was more controversial not least in that it effectively amounted to a provision of amnesty (and thus impunity) for perpetrators of gross violations of human

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<sup>150</sup> Report of the Working Group established under paragraph 1 of the Groote Schuur Minute. 1990. Section 6.5.2 (c)(vii)

<sup>151</sup> Record of Understanding, 25 September 1992, section 2(c)

<sup>152</sup> Ibid.

rights in so far as some of the prisoners to be released had been convicted of gross human rights violations. From a human rights perspective this inevitably had to raise principled objections, despite ostensible claims from politicians that the indemnity would contribute to ‘reconciliation.’<sup>153</sup> At the root of the controversy was that the Further Indemnity Act adopted a wider definition of ‘political offences’ with the result that perpetrators of gross human rights violations could henceforth be considered for indemnity.<sup>154</sup> However, the definition of “political offences” as a criterion justifying human rights violations also has significance in that it went directly against the core Nuremberg principle that “superior orders” or the defence of “political offences” did *not* justify human rights violations. Although the Norgaard principles did not explicitly refer to “superior orders” in terms of receiving orders within an institutional chain of command, the *political objective* criterion meant that committing human rights violations in furtherance of political objectives was an ‘acceptable’ ground for indemnity.

There were allegations, in the media and from some political quarters, that the Further Indemnity was an attempt by the National Party to secure amnesty for its own members and for the security forces and the police who were responsible for human rights violations and that it was doing so under the guise of the indemnities it claimed would benefit members of the ANC.<sup>155</sup> Whether these allegations were true or not, the point is that the objectives of the Further Indemnity Act were presented in this way in the media and by some political actors and so sparked debates and discussions around the issues of possible (self-)amnesty versus prosecutions for human rights atrocities in the context of the impending political transition.

Certainly, this issue did elicit a response from the human rights community whose representatives in numerous opinion pieces in the media condemned any prospect of a ‘general amnesty’.<sup>156</sup> The human rights community condemned a ‘general amnesty’ for two main reasons. One reason was the secrecy that surrounded the process of granting the

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Roelf Meyer (Minister of Constitutional Affairs and chief NP negotiator at the time) said “In an attempt to resolve the problem [of political prisoners], the government had offered to grant amnesty to the disputed prisoners in the interests of reconciliation,” quoted in Bulbring, Edith. 1992. Amnesty row fuels rift. *Sunday Times*, September 6, p2

<sup>154</sup> Keightly, Raylene. 1993. Political Offences and Indemnity in South Africa. *South African Journal on Human Rights* 9, p. 355.

<sup>155</sup> There were indeed many allegations in the media that the NP was trying to link the release of political prisoners to a general amnesty. See for example Bulbring, Edith. 1992. Kobie wrecks summit deal. *Sunday Times*, September 20

<sup>156</sup> See for example, Brian Currin. 1992. Forgiveness belongs not to those who have sinned. *Weekly Mail*, August 16-20, p.19.

indemnities which, instead of aiding truth recovery, would deny the public knowledge of the perpetrators and the crimes for which applicants would receive indemnity. For example, in response to the announcement of the Further Indemnity, Dennis Davis of the Wits University's Centre for Applied Legal Research wrote in his regular column 'Benchmarks' in the *Weekly Mail*, that the Further Indemnity Act allowed for "a range of people to be indemnified without the public ever having the opportunity of acquiring knowledge of a significant part of South African history."<sup>157</sup> The secret process could not be considered to meet "the requirements of a civilised, decent legal system." Brian Currin, National Director of the LHR, argued a similar point: "a blanket indemnity against prosecution is a denial of the right of South Africans to their history."<sup>158</sup> Currin added, "We say this not in retributive ire, but in the belief that we have a right to know the nameless and faceless torturers and assassins through whom an unjust system of government has been upheld for the past four decades."<sup>159</sup>

In its response to the Further Indemnity Act the Black Sash also argued that all South Africans had a "right and duty to know the truth about the past" and that amnesties could not be granted without full investigation.<sup>160</sup> The Black Sash contested that granting amnesty without full investigation and disclosure would mean that "past wounds would remain unhealed, and important concepts of justice and responsibility would be devalued."<sup>161</sup> Although the Black Sash did not elaborate on this idea at the time, the claim reveals assumptions about the important role of the truth about past political atrocities in healing as well as in contributing to 'justice' and 'responsibility' too.<sup>162</sup> Saying that justice required prosecutions, the Black Sash rejected the prospect of a general amnesty for the main reason that it would prevent uncovering and acknowledgement of the truth.<sup>163</sup>

The second reason why human rights organisations rejected the Further Indemnity Act at this stage was because the indemnity was to be granted by the National Party government as an effective *self-amnesty*. It was contested that the NP had no 'right' to grant indemnity for

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<sup>157</sup> Davis, Dennis. 1992. Give meaning to the rule of law. *Weekly Mail*, December 4-10, p. 23

<sup>158</sup> Currin 1992. Forgiveness belongs not to those who have sinned, p.19

<sup>159</sup> Ibid.

<sup>160</sup> Chubb, Karin, Mary Burton & Jenny de Tolly. 1992. No to an amnesty. *Weekend Argus*, October 3, p.18

<sup>161</sup> Chubb, Karin, Mary Burton & Jenny de Tolly, Jenny. 1992. Amnesty. Forgiveness Without Confession? Cover-up of Crime? Christians need to know! Pamphlet issued by Western Province Council of Churches, Branch of SACC, undated (estimated date October 1992)

<sup>162</sup> Chubb et al. 1992, No to an amnesty, p.18

<sup>163</sup> Ibid.

crimes and human rights violations committed by their own members. In other words, the human rights community took a principled stand against the National Party government granting *itself* an effective *self-amnesty*. In an opinion article published in the *Weekend Argus*, the Black Sash voiced its opposition to a general self-amnesty by the National Party:

Above all, it should be remembered that those who are guilty have no right to indemnify themselves. When the possibility of an amnesty is discussed, it is those who suffered who should set the terms – not those who are guilty and, through the mechanisms of indemnity, seek to escape the consequences of their deeds!<sup>164</sup>

Currin from the LHR also argued that amnesty could only be considered by a democratically elected and legitimate dispensation.<sup>165</sup> Immediately after the Further Indemnity Act was signed into force, one hundred and forty-nine prisoners were released under the Act without any formal process.<sup>166</sup> Two particularly controversial releases were the releases of Barend Strydom and Robert McBride, both of whom committed serious human rights violations including murder.

The Further Indemnity Act came under increasing criticism as the indemnity process unfolded. The secrecy of the process was criticised not only because it inherently thwarted the objective of truth recovery but also because there was no monitoring of the process itself, or of decisions about who was granted indemnity and for what crimes. Instead, decisions about indemnity were at the sole discretion of President FW de Klerk. In 1993 Jody Kollapen from the LHR, in an important article reflecting ongoing debates within the human rights community, criticised the indemnity process for the fact that the entire application process and mechanisms were secret, that the public was not entitled to receive information about the process, that no provision was made for victims or interested parties to place their cases before the President, and that the definition of ‘act with a political objective’ was so wide that it virtually covered all serious human rights atrocities including murder, torture and disappearances.<sup>167</sup>

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<sup>164</sup> Ibid

<sup>165</sup> Currin 1992. Forgiveness belongs not to those who have sinned, p.19

<sup>166</sup> TRC Report, Volume 1, Chapter 4, para 15

<sup>167</sup> Kollapen, Jody. 1993. Accountability: SA Style. *Rights* 2, August. Paper also presented at a human rights conference at York University in early 1993.

In the context of the releases under the Further Indemnity Act, LHR developed its position on the issue of amnesty not only in this context but also on a possible general amnesty in the broader context of the transitional negotiations. In particular, a position paper produced by the LHR on the issue of a general amnesty in its August 1993 edition of *Rights* is worth taking a close look at.<sup>168</sup> The LHR firstly offered reasons why it would not accept a general amnesty and then made a ‘proposal’ as to how the issue of amnesty and accountability could be handled through an investigative “truth commission”.<sup>169</sup> Interestingly, this very early proposal, published months even before the Postamble in the Interim Constitution, included some of the key ‘building blocks’ of the eventual amnesty for truth arrangement in the TRC. While the ANC had made public statements insisting that a “general amnesty” would not be used to cover up the truth.<sup>170</sup> This ‘proposal’ by the LHR seems to be the earliest document of this kind setting out specific ways in which the issue of accountability could be dealt with through an investigative truth commission.

LHR offered six reasons why a ‘general amnesty’ granted by the apartheid government could not be supported:<sup>171</sup>

- 1) The apartheid government was not a legitimate government and therefore did not have a mandate from the victims and those who have suffered;
- 2) General amnesty “without disclosure” would perpetuate a culture of abuse and intolerance;
- 3) Unilateral and illegitimate granting of amnesty could result in revenge attacks and thus a further breakdown of law and order;
- 4) To grant amnesty is to absolve someone from their crimes and implies forgiveness – a right which only the victims themselves retain;
- 5) There is a need to understand the “anti-human rights ethos” that has pervaded South African life and culture and to place this within the context of the thousands of

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<sup>168</sup> Lawyers for Human Rights, “Pros and Cons of a General Amnesty.” Circa 1994 (the date written on the document is “circa 1994” but the context was Early 1993, after the Further Indemnity Act was signed into law.); also see LHR. 1993. No to general Amnesty. *Rights 2*, August, pp.18-19

<sup>169</sup> This proposal was under the heading: “LHR’s Proposals on the Nature and Extent of Amnesty,” in LHR Circa 1994. Pros and Cons of a General Amnesty

<sup>170</sup> See for example African National Congress. 1992. *Statement on the Question of a General Amnesty*, 17 August 1992, SAPA. This statement was made in the run up to the Record of Understanding and for various reasons which are beyond the scope of this thesis the ANC’s position on amnesty was far more complex and ambiguous than this suggests formulation suggestions.

<sup>171</sup> LHR 1993, No to general Amnesty, p.18

victims of human rights violations. A general amnesty couched in secrecy would prevent this and would amount to an “insensitivity” towards this suffering and does not give proper regard to the importance of developing a human rights culture in South Africa;

- 6) A general amnesty surrounded by secrecy will further discredit the ‘rule of law’ and the administration of justice in South Africa – this would not be conducive to attaining a “just and democratic society”.

Significantly, unlike the Argentine human rights organisations, the LHR did not reject outright the possibility of amnesty as a matter of principle. Instead they were prepared to go along with a compromise if it accommodated victim-oriented perspectives and promoted the interests of reconciliation and peace. However, the LHR was not prepared to accept a compromise at any cost; an amnesty was acceptable only so long as it served the purpose of encouraging truth recovery about the past and would not be a general, *self*-amnesty.

In its position paper, the LHR in effect offered key proposals how the government should deal with human rights abuses and the granting of amnesty.<sup>172</sup> The LHR suggested that a new democratic government establish an investigative body such as the Chilean Truth and Reconciliation Commission to investigate human rights abuses. The task of the commission would be to investigate and establish as complete a picture as possible of human rights violations as well as to grant amnesty to perpetrators on an individual basis and with full-disclosure as a pre-requisite for amnesty.<sup>173</sup> In order to do this the Commission should have wide powers allowing it to subpoena people and to access official documents as well as to gain “search and seizure” access to government and private premises. It should also be independent from the state. Proceedings should all take place in public except in rare exceptions and on completion it should publish a comprehensive report on its work which shall be submitted to government.<sup>174</sup>

For our purposes the crucial issue remained that of how to deal with those responsible for human rights violations. In this regard, the LHR position paper stated:

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<sup>172</sup> Ibid.

<sup>173</sup> LHR Circa 1994, Pros and Cons of a General Amnesty

<sup>174</sup> LHR 1993, No to general Amnesty, p.18-19



Provided there has been full disclosure to the satisfaction of the Commission, those implicated in serious human rights abuses may then apply for indemnity on an individual basis. The victims and families of such abuses shall be notified of such an application and shall have the right to submit evidence in rebuttal. A quasi-judicial body appointed by Parliament shall consider applications and shall be guided by the following criteria: 1) the nature and seriousness of the offence; 2) the interests of reconciliation; 3) the interests of the victim; 4) the promotion of a human rights culture; 5) any other criteria considered relevant by the body.<sup>175</sup>

This did not exclude the option of criminal prosecutions. As the LHR saw it the quasi-judicial body, having considered all the relevant criteria, could refuse the application for indemnity and refer the matter to the Attorney-General with the implication that investigations and prosecutions would follow. The LHR position paper considered this proposal to be a “healthy balance between the interests of justice and those of reconciliation” and a compromise that “the particular circumstances of our country and the interests of our future” required.<sup>176</sup>

LHR also held that a new democratic government should not consider itself bound by the Further Indemnity Act and that the LHR did “not feel that [the Further Indemnity Act] should in any way impact on the process of accounting.”<sup>177</sup> Its response to the prospect of amnesty being dealt with in the same secretive manner as the Further Indemnity Act was that “from a principled point of view as well as from a practical point of view [it] would be disastrous for our fledgling democracy.”<sup>178</sup> Kollapen went on to say that the LHR “must resist [the Further Indemnity Act] and all those who are committed to justice, truth and democracy must join us in resisting it.”<sup>179</sup>

This articulation of an investigative truth commission, to which applicants for amnesty would make full-disclosure represents one of the earliest articulations, if not the earliest articulation, of the notion of amnesty linked with full-disclosure in a truth commission. The LHR’s conception of the truth commission in its proposal was of a commission as an “accountability” mechanism. However, the LHR’s proposal also included considerations from the perspective of the victims (according to reasons 1 and 4 given above for why a general amnesty would not be acceptable). Significantly, discussion over a possible

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<sup>175</sup> Ibid, p.19

<sup>176</sup> Ibid.

<sup>177</sup> Ibid, p.17

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

investigative truth commission which included a mandate for amnesty conditional on full-disclosure was thus well under way within the LHR even *before* the Postamble was published.

At the same time, Boraine's own substantive developments for a possible truth commission and for setting up the organisation *Justice in Transition* had begun. It is relevant that around this time, Alex Boraine, a prominent political and human rights figure and at the time Executive Director of Idasa, had begun to form ideas around transitional justice options for South Africa. As director of Idasa Alex Boraine had played a major role in facilitating the general transitional process since the late 1980s but he had not been involved in the formal constitutional negotiations at CODESA I and II or in the *political* process around the Further Indemnity Act and leading to the amnesty provision in the Postamble of the Interim Constitution. Instead he had become involved in discussions and initiatives concerned with issues of transitional justice. In late 1992, Boraine and a group of other civil society figures participated in a study tour of Eastern Europe investigating the processes and mechanisms used in post-Communist societies in dealing with their pasts following the fall of the Berlin Wall.<sup>180</sup> Significantly this did not particularly involve the issues of amnesty or prosecution but did include an investigation of the opening of the STASI archives of the former East Germany. Subsequently Aryeh Neier, at the time director of Human Rights Watch, made Boraine aware of the analogous Latin American "truth commissions", especially those of Argentina and Chile, which had previously remained relatively unknown in the South African context.<sup>181</sup> By the end of 1993 he had established contact with the international transitional justice network facilitated by the New York-based *Justice in Times of Transition* and prepared the ground for launching a local NGO *Justice in Transition* with the sole purpose of coordinating a response for "dealing with the past" by promoting the idea of a truth commission.

At this juncture the Black Sash also expressed the need for those responsible and for society as a whole to openly acknowledge the truth about apartheid and the suffering it caused as a precursor to reconciliation in South Africa but also that "the need for justice requires the prosecution of human rights violators."<sup>182</sup> While this statement represents a principled human

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<sup>180</sup> Boraine 2000, p. 14

<sup>181</sup> Ibid., p. 16

<sup>182</sup> Chubb, et al. 1992. No to an amnesty, p.18

rights response to the issue of prosecution, there is little else to suggest that this was an issue that the Black Sash had considered seriously enough to form part of their agenda and pursue to any great extent. Certainly, the issue was not prioritised to the extent that it became a focus of their work in the same way as issues of land, housing, health, economic and education rights etc. did.

Among the human rights community there was consensus that 1) the importance of recovering and exposing the truth was paramount and therefore an effective amnesty that covered up the truth about the past was unacceptable and 2) that an 'illegitimate' government including those guilty of human rights violations did not have the right to grant amnesty/forgiveness to itself. Aside from this there was not much consensus on more specific aspects of the problem of amnesty versus prosecutions for apartheid-era human rights atrocities. Kollapen at the time observed this too in his article,

There is consensus that a general amnesty is not only unacceptable but would be insensitive and counter productive. There is however, no common position as to how we should in practical terms deal with accountability and what mechanisms should be put in place to enable us to resolve the matter satisfactorily.<sup>183</sup>

Within the human rights community, it was primarily the Black Sash, LHR and LRC that responded to the issue of a prospective 'general amnesty' posed by the Further Indemnity Act. Instead at this critical juncture in the SA transition the human rights community generally, with the exception of Boraine, extended and strengthened their projects that dealt with specifically developmental issues and issues related to socio-economic rights.<sup>184</sup>

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<sup>183</sup> Kollapen 1993, p.17

<sup>184</sup> There were also some responses to this issue from other quarters of civil society. The Western Cape Council of Churches, for example, produced a pamphlet of articles in which it condemned the prospect of a general amnesty that covered up the truth. (See Chubbet al. 1992. Amnesty. Forgiveness Without Confession? Cover-up of Crime? Christians need to know!) Archbishop Desmond Tutu stated quite early on, "I support an amnesty provided there is full disclosure of whatever it may have been that people have perpetrated." (Bishopscourt Update Item No 483, 11 November 1992, quoted in Sarkin 2004, 42) This statement demonstrates the relative absence of any stress on retributive justice and accountability compared to the need for truth recovery.

### 3.4 Conclusion

It is evident that while the issue of investigations and prosecutions of past human rights violations were on the radars of some human rights organisations and activists at this initial stage in the ‘transition’, the South African human rights community generally perceived its role as being largely in the sphere of socio-economic rights and post-conflict reconciliation and transformation. The focus of these organisations at the time, including Boraïne’s own initiative around a transitional justice-focused NGO, was significantly *not* the issue of amnesty and prosecutions. It is remarkable how much this focus contrasts with that of the human rights movements in Argentina in their struggle against impunity for human rights abuses such as murder, enforced disappearances, arbitrary detention and torture. Arguably, unlike South Africa, human rights atrocities in Argentina arguably took the form of direct human rights violations such as enforced disappearances, detention without trial, torture and murder.<sup>185</sup> In the case of South Africa, the context was different in that the entire socio-economic structure of society was based on apartheid – a system that was itself deemed a crime against humanity. Thus while similar direct human rights abuses against individual activists and dissidents did take place – detentions without trial, torture, deaths in detention, “third force” hit squads etc – to a much greater extent human rights violations were structural and systemic in nature. So whereas in Argentina, the intense repression was focused on a small percentage of the population, in apartheid South Africa virtually every non-white citizen was a victim of institutionalised racism and deprived of political, economic and social rights on a daily and ongoing basis.<sup>186</sup> It is therefore perhaps reasonable that the SA human rights community was focused on the socio-economic legacies of apartheid which were much more pervasive than other more direct human rights violations.

Importantly, it must also be remembered that the early 1990s was a time of extreme and intense political violence in South Africa. This violence was not necessarily secret and covert as in Argentina but took the form of killings in a civil war type of scenario. It is therefore also conceivable that with such high levels of killings and political violence, reported in the media, the priority of the human rights community at this stage reasonably also lied with finding a solution to stop the killings as opposed to gathering evidence to prosecute the authors of the violence.

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<sup>185</sup> See Rosenberg, Tina. 1995. Overcoming Legacies of the Dictatorship. *Foreign Affairs* 74(3), p. 137

<sup>186</sup> Ibid.

Although human rights organisations publicly condemned the Further Indemnity insofar as they believed that it represented the prospect of a ‘general amnesty’ for human rights violations, their responses were relatively piecemeal. Unlike in Argentina, the SA human rights community did not express a single and coherent agenda regarding the need for truth and prosecution but rather responded separately mainly in news articles and as press statements and position papers. . Comparable to the case in Argentina, this rejection did not take the form of substantial lobbying or campaigning around the issue.

Furthermore, there is no indication of a *human rights movement* comparable to the movement in Argentina. In the early stage of the transition, the Argentine human rights movement occupied centre stage in terms of its demands for truth and justice and at a time when the military was significantly weakened by their defeat in the Falklands war. However, by comparison the central development in South Africa regarding the transition was not the uprising of a human rights movement with similar demands, nor the defeat of the SADF, but rather involved mass demonstrations around the anti-apartheid struggle which by this stage had the ANC at its centre. So, while in South Africa there were major and significant social and political movements as part of the general anti-apartheid “struggle”, the human rights community was involved in a relatively minor and secondary capacity. Certainly the human rights community was not at the *core* of these movements in South Africa. The human rights community’s concerns generally reflected those of the broader anti-apartheid struggle, and in so far as it had distinctive human rights concerns around the issues of amnesty and prosecutions, it was hardly in a position to impose these on the agendas of the broader anti-apartheid social and political movements. Even had the human rights community presented more of a unified/coordinated response it is unlikely that they would have had a similar effect to that of the Argentine human rights movement

## CHAPTER 4: THE COMING TOGETHER OF TWO AGENDAS

### **4.1 The Postamble**

The inner history of just how the issue of amnesty arose for the various actors during the constitutional negotiations is complex and highly contested but outside the scope of this thesis. For our purposes, what is relevant is the extent to which the issue became a public issue to which the human rights community could respond.<sup>187</sup> Only a day or two before the Postamble was signed, reports in the media were limited to speculation on the possibility of an amnesty clause being included in the Interim Constitution as the outcome of the political negotiations.<sup>188</sup> The LHR was quoted on 6 December 1993 (before the publication of the Postamble which was only later on in the evening) as saying that it was unacceptable that a general amnesty for politically motivated offences was even being discussed and questioned “how the Government could be considering extending the cut-off date for indemnity.”<sup>189</sup> This statement by the LHR is indicative of the secrecy surrounding political discussions for amnesty which resulted in mixed messages being sent to the public regarding the prospective amnesty.

In the event, negotiators came to an agreement on the issue of amnesty, provided for in a carefully worded Postamble attached at the last minute to the Interim Constitution. The provision for amnesty in the Postamble was deliberately worded so as to avoid a hard and fast commitment to a *general* amnesty at this stage. The Postamble simply stated that “amnesty shall be granted” but left it up to the future political leadership to create legislation to deal with the mechanisms, procedures and criteria:

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<sup>187</sup> In line with most accounts of the constitutional negotiations, Sachs confirms in his retrospective account that the issue of amnesty had not explicitly figured in the “official” debates and discussions at CODESA but unexpectedly arose in a way that almost derailed the negotiated constitutional settlement. According to Sachs the Constitutional Committee had come to a point where they thought the Interim Constitution was “signed, sealed and delivered.” However, at the last minute, a crisis arose with the potential to threaten the negotiated settlement and the prospect of moving on to the founding democratic elections. (See Sachs. Albie. 1999. Truth and Reconciliation. *Southern Methodist University Law Review* 52, p. 1566).

<sup>188</sup> See for example: *The Argus*. 1993. Amnesty for earlier political criminals? December 3, p. 4; *The Sunday Star*. 1993. Murderers are likely to be walking free. December 5, p.8; Bulbring, Edyth, Ray Hartley & Claire Robertson. 1993. Nat amnesty plan to free mass killers. *Sunday Times*, December 5, p.1; *Business Day*. 1993. Freeing killers. December 6, p. 6; *Sowetan*. 1993. Comment. December 6, p.8; *Sowetan*. 1993. Hani’s killer to go free? December 6, p.4

<sup>189</sup> *Sowetan*. 1993. Amnesty talk ‘not on.’ December 7, p.4

...In order to advance such reconciliation and reconstruction, amnesty shall be granted in respects of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.<sup>190</sup>

Little about the amnesty was revealed by the negotiators at this time except for in an article by Kader Asmal just a few days after the publication of the Interim Constitution on the 6<sup>th</sup> December 1993.<sup>191</sup> Following an article in the Sunday Times which implied that the amnesty in the Postamble was a *general* amnesty, Asmal published an article entitled 'Amnesty is not amnesia' in which he assured members of the public that the amnesty would *not* be general amnesty.<sup>192</sup> Asmal stated his own principled objections to a blanket amnesty on the grounds that such an amnesty "would have prevented any inquests or commissions of inquiry into the past" and would have been "disastrous". In the article Asmal emphasised that the "council decision gives the new parliament the right to work out the mechanisms, criteria and procedures for amnesty." Asmal's article suggests that what the ANC had in mind at this stage was not a truth commission in the form of the eventual TRC process, but rather an amnesty process along the lines of the Amnesty Committee within the eventual TRC.

The Postamble's provision for amnesty was reported on in newspapers around the country in the days and weeks following its publication, often times incorrectly reporting that the amnesty was a general amnesty.<sup>193</sup> For example, on 7 December 1993, the day after the Postamble was signed, *The Argus* reported that an agreement had been signed by negotiators empowering the new parliament to grant a "general amnesty".<sup>194</sup> However, the National Unity and Reconciliation clause was extensively quoted in the article indicating that members

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<sup>190</sup> Republic of South Africa. Postamble to the Interim Constitution, Act 200 of 1993

<sup>191</sup> Asmal, Kader. 1993. Amnesty is not amnesia. *The Sunday Times*. December 12, p.26

<sup>192</sup> Ibid.

<sup>193</sup> Newspapers that carried the story were *The Star*, *The Sowetan*, *The Argus*, *The Sunday Times*, *The Citizen*, *The Herald*, *Business Day*. Morris, Morris, Michael. 1993. New batch of political criminals to get amnesty from parliament. *The Argus*, December 7, p.4; *Financial Mail*. 1993. Deals without honour. December 10, p.17 ; *The Star*. 1993. Amnesty deal on the cards. December 13, p.1; Waugh, Esther & Chris Whitfield. 1993. General amnesty for political crimes. *The Star*, December 8, p.8; Leon, Tony. 1993. Amnesty dilemma for new South Africa: the Truth must out. *The Herald*, December 10, p.6; Breier, David. 1993. No pardon for racist murderers. *The Sunday Star*, December 13, p.6; Challenor, Martin. 1993. Amnesty rules not finalised. *The Daily News*, December 7, p.2

<sup>194</sup> Morris 1993, New batch of political criminals to get amnesty from parliament

of the human rights community, whether directly, or through news reports, did have access to the actual text of the Postamble.

Graeme Simpson, then executive director of CSV, wrote an article in the *Business Day* in which he responded to a report in the *Sunday Times* that the government intended to use a general amnesty. In his article, Simpson argued that a “blanket amnesty posed a threat to reconciliation”:

These blanket amnesties in respect of human rights abuses by the state during the apartheid era, without any parallel obligation to disclose the nature of the “crimes” perpetrated, have grave implications for the prospects of national reconciliation. In particular, for the victims of these abuses of power, on whichever side of the political spectrum they may reside, the implication is that they may never have access to the information essential to their rehabilitation.<sup>195</sup>

Simpson’s response indicated a victim-centred approach to the matter of amnesty which prioritised the imperative of truth and also of national reconciliation.

A thorough scan of news publications after the 6 December 1993 indicate that responses from the human rights community, if any, did not feature to any great extent in the media. There is little evidence to suggest that the publication of the provision for amnesty in the Postamble occasioned strong reactions from the human rights community. In fact, a few days after the publication of the Postamble, LHR featured in the media to some extent in connection not to the Postamble and the issue of amnesty but rather in connection to its support for a Bill of Rights, its human rights education and a new joint campaign with LRC, HRC and other organisations to encourage citizens to participate in the upcoming elections.<sup>196</sup>

Significantly, even after the publication of the Postamble, the human rights community continued to be preoccupied with socio-economic issues. LRC’s annual report for the year ending on 31 March 1994 made no special mention of the issue of amnesty, the more surprising considering that the amnesty provision had been included in the Postamble of the

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<sup>195</sup> Simpson, Graeme. 1993. Blanket amnesty poses a threat to reconciliation. *Business Day*, December 12, p.6.

<sup>196</sup> See Bizos, George. 1993. Don’t leave human rights to government. *Weekly Mail & Guardian*, December 10, p. 8; Staff writer. 1993. “Explaining need for human rights.” *The Sowetan*, p.31, 10 December; *Sowetan*. 1993. Explaining the need for human rights. December 10, p.3; Carmel, Rickard. 1993. LHR promotes a secret vote. *Weekly Mail & Guardian*, December 16, p.8



Interim Constitution in December 1993. Likewise Geoff Budlender gave an address as National Director at the Annual General Meeting of the LRC in March 1994 in which he signalled important areas of focus for the LRC in the future: 1) Giving life to the Bill of Rights and making sure that it did not entrench inequalities but addressed the inequalities of apartheid; 2) access to land, housing and development as well as claims to land restitution, in all of which civil society could play a critical role; 3) building more advice offices 4) advocacy outside the courts for a more open process in devising the Bill of Rights and the permanent constitution; 5) change in strategy for working with government.<sup>197</sup> Again this list of human rights priorities made no mention of the Postamble's provision of amnesty as an issue of concern.

Boraine made his own response to the publication of the Postamble clear in a recent interview: "As soon as I saw the Postamble and that there would be an amnesty I started thinking of ways we were going to get around a general amnesty. What are the victims going to get?"<sup>198</sup> Thus, Boraine's immediate response was not to reject the amnesty but rather amounted to an effort to temper it by responding to the needs of the victims.

For our purposes, it is significant that the publication of the amnesty provision in the Postamble did *not* at the time occasion any strong public reactions from within the SA human rights community. Certainly, this stands in stark contrast to the public mobilisation of the Argentine human rights movement in 1982 protesting the military junta's self-amnesty. There are two possible reasons for this. The one is that the human rights community did not pay any particular attention to the amnesty provision in the Postamble. An alternative explanation would depend on how the human rights community interpreted the Postamble. In terms of the viewpoints of the human rights community articulated in various articles and statements during 1992-1993 as discussed in Chapter Three, there had been little indication of a principled rejection of amnesty as such. The human rights community's main concerns had been that 1) the amnesty should not be a self-amnesty issued by the National Party government and 2) that the amnesty should not be a general amnesty. The negotiated amnesty included in the Postamble of the Interim Constitution was arguably in line with 1) in so far as it did not amount to a unilateral self-amnesty issued by the NP government. As for 2), the

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<sup>197</sup> Budlender, Geoff. 1994. LRC's role in the new South Africa: Report of the National Director. *LRC Annual Report: March 1994*, pp. 9-12

<sup>198</sup> Interview with Alex Boraine, 17 January 2011, Cape Town

objection to a general amnesty, the Postamble did provide for amnesty but left open its “mechanisms, criteria and procedures, including tribunals” which would have to be debated and decided in parliament. It was therefore conceivable that the amnesty need not be a general amnesty or along the lines of the controversial Further Indemnity Act. It was also conceivable that guidelines and processes could be created so as to make the amnesty more acceptable from a human rights perspective. The text of the Postamble, as well as Asmal’s article in the Sunday Times would presumably have alerted the human rights community to this possibility from early on. This may explain the lack of response from the human rights community to the Postamble at the time. In particular it might be that the LHR’s relative ‘silence’ at the time that the Postamble was published might have been because the text of the Postamble actually implied that there would, in due course, be a process around amnesty and that this could be made compatible with some of their own proposals for an “acceptable” amnesty process.

The retrospective accounts of Albie Sachs and Kader Asmal, who were both involved in the ANC’s Constitutional Committee during the negotiations, show that they did have major objections to a general amnesty.<sup>199</sup> Their objections concerned the lack of any sense of accountability as well as the implications that amnesty would have for truth – blanket amnesty would mean there would be “no knowledge of what really happened.” Of his own response to the NP’s alleged last-minute demand for a general amnesty, Sachs writes:

I felt a blanket amnesty would be completely wrong. There would be no sense of accountability. There would be no knowledge of what really happened, who had done what to whom...<sup>200</sup>

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<sup>199</sup> Sachs 1999, p.1566. Of course, the issue was far more complex than this and in reality the provision for amnesty in the constitution is open to claims and counter-claims regarding its historical development and eventual culmination in the Postamble.

<sup>200</sup> In the rest of his account, Sachs claims that the compromise in the Postamble was *at the time* informed by the linking of amnesty to full truth disclosure and also to a “truth commission”: “So I made the proposal that we should link the amnesty concept to the truth commission concept. In other words, people could get amnesty to the extent that they owned up to what they had done, and told the truth on an individual basis. And that is how the idea of linking the two came about” (Sachs 1999, pp.1566-1567). Sachs makes two kinds of claims in the above account. Firstly, Sachs is claiming that the amnesty provision in the Postamble was informed *from the very beginning* by a compromise which made amnesty conditional on individual truth disclosure. . Secondly, Sachs is claiming that the provision for amnesty in the Postamble was *at the time* a compromise which actually linked this “amnesty concept” to the “truth commission concept.” There is certainly no support in the actual text of the Postamble that the idea of linking the “amnesty for truth” idea with a “truth commission” (conceived of as a victim-centred truth commission) was already entertained in the context of the Postamble. Sachs says in this account that he had heard from a political negotiator from the other side that they “failed to realise that there would be a truth commission associated with the amnesty.” Sachs 1999, p. 1567. Kobie Coetsee, in an interview with P O’Malley (interview on 6 November 1999 available at: <http://www.nelsonmandela.org/o>

The roles of Asmal and Sachs in the formulation of the amnesty are particularly complex. On the one hand both Sachs and Asmal were involved in the political negotiations as the ANC's representatives of the CODESA II Constitutional Committee which had the responsibility of drafting the Postamble of the Interim Constitution including the provision for amnesty<sup>201</sup> On the other hand, both Asmal and Sachs also had significant 'human rights' profiles.<sup>202</sup> For this reason, we pay particular attention to their role and impact on the formulation of the amnesty provision in the Postamble of the Interim Constitution, as well as the (subsequent) development of the amnesty-for-truth arrangement linked to the TRC.

#### **4.2 Fusing the amnesty issue with a victim-centred truth and reconciliation process**

This thesis argues that the complex set of developments from late 1993 which resulted in the TRC Bill by the end of 1994 may best be understood by making a distinction between two different kinds of processes which came together in the conception of the eventual TRC.

One set of developments concerned the unresolved issues raised by the amnesty provision in the Postamble. This process was driven by political figures associated with the constitutional negotiations and the new Government of National Unity including Kader Asmal, Albie Sachs and the new Minister of Justice Dullah Omar. They were concerned with developing a framework for the "mechanisms, criteria and procedures" through which the amnesty entrenched in the Postamble of the Interim Constitution could be implemented in ways that would avoid the impunity and amnesia of a general amnesty. This took the form of a perpetrator-focused individual and conditional "amnesty for truth" compromise.

The other set of developments related to the articulation and promotion of the notion of a victim-centred "truth and reconciliation" process. In effect this was a civil society-based initiative involving key members of the human rights community such as Alex Boraine and *Justice in Transition*. The remainder of this chapter will show that the notion of a victim-

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malley/index.php/site/q/031v00017/041v00344/051v01258/061v01301.htm> [accessed 10 December 2010]), claimed that at the time he warned FW de Klerk that the ANC had in mind a truth commission and that if de Klerk agreed to the Postamble as it was, he was agreeing to a truth commission. De Klerk denied to Coetsee that this was the case.

<sup>201</sup> Kader Asmal was also on the ANC's National Executive Committee at the time of the transition

<sup>202</sup> Kader Asmal was a human rights lawyer and professor of Law at Trinity College, Dublin during exile in the 1980s At this time he was Professor of Human Rights Law at the University of the Western Cape while Albie Sachs also had a long history as a prominent human rights activist and lawyer

centred truth and reconciliation commission was largely developed from the side of Boraine who, as a member of the human rights community, was not primarily concerned with ensuring the accountability (or amnesty) of the perpetrators of past human rights violations.

In the course of 1994 these two ‘separate’ but parallel agendas came to be linked in a particular way that proved to be definitive for the nature and structure of the eventual TRC process. In effect the civil society-based notion of a victim-centred truth commission proposed by human rights figures like Boraine was conjoined with the truth-for-amnesty compromise supported by key political figures such as Asmal and Sachs. In this way the TRC as a victim-oriented truth process with a mandate for amnesty for perpetrators of past human rights violations came about. We will first deal with the origins of the civil society and human rights-based proposals for a victim-centred “truth and reconciliation” process, and then with the complex interactions which resulted in this initiative being conjoined with the “truth-for amnesty” compromise.

#### *4.2.1 The Civil Society-based Initiative for “Dealing with the Past”*

Subsequent to the publication of the Postamble of the Interim Constitution at the end of 1993 there was little further official action or immediate public responses regarding the issue of amnesty. Instead, politicians and indeed most of the country were focused on the impending democratic elections scheduled for April 1994. Furthermore, unlike in the Argentine case in 1983, the issue of “dealing with the past” was not on the agenda of the 1994 elections. Instead, the ANC’s electoral campaign was centred on its manifesto of “a better life for all” emphasising job creation, new housing schemes and a new education system, general social-economic upliftment etc. Apartheid ‘human rights violations’ were not a key focus of the ANC’s electoral campaign or that of any other political party; rather the ANC focused on ‘forward-looking’ strategies to correct the legacy of structural and systemic injustices left in the wake of apartheid through a comprehensive reconstruction and development (RDP) policy.<sup>203</sup> It did not prioritise any objectives regarding matters of truth and justice, responsibility and accountability for apartheid itself – a crime against humanity – or for human rights atrocities committed during the apartheid era.

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<sup>203</sup> Lodge, Tom. 1995. The South African General Election, April 1994: Results, Analysis and Implications. *African Affairs* 94, p 480, pp. 471-500

This was quite different to Alfonsín's campaign in the lead-up to the civilian elections in Argentina in 1983 which focused very specifically on the issue of human rights in relation to the abuses of the military junta and explicitly promised to seek "truth and justice" and guard against possible impunity for the perpetrators of past human rights violations. This human rights platform was adopted by Alfonsín's Reform Party in response to the popular demands of the human rights movement which had, prior to the elections, mobilised public protests of up to 70 000 people around the issues of truth and retributive justice for human rights violations. In the case of Argentina, the human rights movement set the agenda to which politicians then had to respond.

However, during the lead-up to the elections a significant initiative was beginning to develop around the question of "dealing with the past" in South Africa. Significantly this initiative developed from within civil society and outside the terrain of the constitutional negotiations or that of the founding democratic elections. Two months after the publication of the Interim Constitution in February 1994, Alex Boraine, who was at the time executive director of Idasa, took the initiative to set up a national workshop on the topic of "dealing with the past." As discussed earlier, by the end of 1993 Boraine had begun to prepare the ground for launching the NGO *Justice in Transition* with the sole purpose of coordinating a response for "dealing with the past" by promoting the idea of a truth commission. At the time, Boraine wrote:

This small organisation will focus on how South African can come to terms with its past. In particular the emphasis will be on reconciliation through facing up to and dealing with the violations of human rights during the apartheid era. In the second place, an attempt will be made to address the gap between myth and reality in the perception of the history of the traumatic years which South Africa has endured.<sup>204</sup>

At the "Dealing with the Past" conference in February 1994, which still took place under the auspices of Idasa, Boraine argued for setting up a truth commission supported by civil society and the human rights community.<sup>205</sup> In an article published in Idasa's *Democracy in Action*, he argued that a truth commission would serve as a mechanism for the voices of the victims to be heard: "those who say we shouldn't rake up the past should tell that to the victims of

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<sup>204</sup> Boraine, Alex. 1994. New chapter for Idasa and 'child of Idasa.' *Democracy in Action*, 8(4) July, p. 3

<sup>205</sup> Boraine, Alex. 1994. Discussion on Priorities & Options. *Dealing with the Past*, p. 151

apartheid. We have to listen to those who have suffered.”<sup>206</sup> From this article, written by Boraine immediately after the conference, it is not entirely clear where the issue of amnesty would come into the compass of a truth commission, if at all. Instead, it would appear that Boraine’s own understanding of a truth commission at this stage was in terms of a victim-centred process of truth telling and an official acknowledgement of that truth as a means to ‘healing’ for the victims. Immediately following this workshop, Boraine left Idasa to found *Justice in Transition* as an independent NGO.

The published proceedings of the workshop *Dealing with the Past: Truth and Reconciliation in South Africa* (1994) provide a valuable record of the approach and responses of selected members of the SA human rights community at this transitional moment. The workshop was the most high profile civil society-based initiative to articulate and promote the notion of dealing with the past as a response to the needs of the victims of apartheid. Most of the presentations made were by international scholars and practitioners of transitional justice. In Boraine’s words this “preparatory conference focused on the experiences of Eastern Europe and Latin America in order to assist South Africans towards a better appreciation of the complexity and extent of the problem and to narrow the options which might be open to us.”<sup>207</sup> But a good part of the conference was set aside to hear the views of South African participants. In this regard it is significant that the focus of the workshop was not on the issue of amnesty. While the issue of amnesty did emerge in the debates and discussion the overarching imperative for the workshop was not framed in terms of a response to the issue of amnesty. Bearing in mind that the workshop took place within two months of the publication of the Interim Constitution and the Postamble including the provision for amnesty, we might well have expected that this would figure prominently in the workshop especially on the part of members of the SA human rights community. But as the record of the workshop proceedings make clear the issue of amnesty as such did not emerge as a central issue in these presentations and discussions.<sup>208</sup> The one exception was a presentation by the legal scholar Lourens du Plessis which provided a legal analysis of the amnesty provision in the Interim Constitution. Du Plessis however was more concerned with how the amnesty in the Postamble could affect the existing Indemnity and Further Indemnity Acts

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<sup>206</sup> Scheffer. Ronel. 1994. Truth sets a nation free. *Democracy in Action* 4(8) February, p1, 12

<sup>207</sup> Boraine 2000, p. 16

<sup>208</sup> In the panel on “Discussion on Priorities and Options”, participating South Africans were Kader Asmal, Lourens du Plessis (academic), Alex Boraine, John de Gruchy (academic and theologian), Heribert Adam (academic), Albie Sachs, Mary Burton and Andre du Toit (academic at University of Cape Town).

rather than with its nature and significance from a principled human rights perspective.<sup>209</sup> Du Plessis did provide a succinct and striking summary of what he took to be the thrust of the Postamble's framing of the amnesty provision: "*For the sake of reconciliation we must forgive, but for the sake of reconstruction we dare not forget.*"<sup>210</sup> This suggests that while the amnesty provision ruled out criminal prosecution of the perpetrators of past human rights violations it could still be made compatible with a truth and reconciliation process. The contributions of most of the South African participants were similarly concerned not with a perpetrator-focused need for retributive justice but with developing a victim-oriented perspective for "dealing with the past": acknowledging the pain and suffering of victims of apartheid and in this way to bring some measure of "healing" to the victims.<sup>211</sup> As such this first workshop functioned as a significant expression of a civil-society based articulation and promotion of a truth commission as a victim-centred process.

Some South African participants did comment on the issue of amnesty although this was either done in passing or else in reference to the imperative of "reconciliation". Mary Burton from the Black Sash for example stated:

We need to dismantle the security apparatus and deal with whatever files may be left ... though I have grave doubts about disqualification or lustration without some other process. I do not think a commission report can lead to that. We need to prosecute the guilty. We need to stop the hit squads and assassinations that still continue. We need mechanisms to find those people and bring them to court.<sup>212</sup>

Burton's statement represented the kind of principled human rights rejection of amnesty and a personal commitment to criminal prosecution which has not been found so far from any other in the human rights community. Burton's statement also implied a rejection of the amnesty provision in the Postamble. Burton did not however elaborate on the implications of the Postamble for her own view regarding the need to prosecute the guilty. Neither did she attempt to make a case for the prosecution of perpetrators. As a result, the assertion cannot be said to be indicative of a serious agenda on behalf of Burton or Black Sash regarding the issue of prosecutions.

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<sup>209</sup> Du Plessis, Lourens. 1994. Amnesty and Transition in South Africa. *Dealing with the Past*, pp. 107-116

<sup>210</sup> Ibid., p. 109

<sup>211</sup> A number of South African participants also focused on the need for development and a major improvement on service delivery for black people

<sup>212</sup> Burton, Mary. 1994. South African Response. *Dealing with the Past*, p. 123

For various reasons Sachs's few comments on the amnesty issue in the course of his contribution to this conference deserves special attention. Unlike the other SA participants he had been directly involved in the drafting of the eventual amnesty provision in the Postamble. While a leading ANC figure he had also established a strong human rights profile; as we discussed earlier in this chapter, he later indicated that he had had principled objections to the prospect of a general amnesty when this was put to the Constitutional Committee of CODESA II. Sachs also contributed to the compromise formulation in the Postamble. At the conference Sachs said:

There will be amnesty. We are constitutionally committed to an amnesty. One can lament and criticise and argue about its terms. But the amnesty is balanced out with the concept of reconciliation and reconstruction. It is not a reconciliation to bury and forget the past, which means to continue with the past, it is to assume responsibility for the past and correct the imbalances and injustices.<sup>213</sup>

Sachs's formulations indicate his acceptance of the amnesty provision as a fixed and legitimate outcome of the Constitutional negotiations. Interestingly, while Sachs's accounts did have strong overtones of a theological approach oriented around notions of "reconciliation" and "healing", there is no indication in his account of the "truth for amnesty" approach that might make the amnesty provision more acceptable from a human rights perspective. Instead Sachs emphasised forward-looking measures that would contribute to healing: "it will be street lights, education, the health system, the sense of dignity, participation and true equality. That will be the greatest healer. We must focus on the healing side and let the rascals be swept away by history to be lashed by their own consciences."<sup>214</sup> Taken literally, Sachs is suggesting that not only would there be no option for criminal prosecutions for perpetrators, but that their consequent impunity would have to be accepted. Again, there is no evidence of an attempt by Sachs to temper the amnesty with the objective of truth and disclosure.

Asmal's account of the amnesty issue in the conference was also revealing. Referring to the NP government's demands for a "general amnesty" during the final stages of the

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<sup>213</sup> Sachs, Albie. 1994 South African Response. *Dealing with the Past*, p. 128

<sup>214</sup> *Ibid.*, p. 130



constitutional negotiations, Asmal said that it was for this reason that “ANC negotiators offered a clause in the constitution concerning *reconciliation*” (own emphasis).<sup>215</sup> This was a somewhat disingenuous reference to the amnesty provision in the Postamble of the Interim Constitution. Asmal claimed that South Africa was unique in the African context in entering a transition “without a general amnesty law” and stressed the significance of the ANC’s resistance of the NP government’s attempts to implement “blanket self-amnesties”.<sup>216</sup> However, despite emphasising the importance of truth-telling he significantly gave no indication of the negotiated amnesty as a prospective “truth-for-amnesty” compromise. Arguably, like Sachs, Asmal’s approach to the issue of amnesty as a means to ‘reconciliation’ reflected a shift from the perpetrator-focused concerns of the CODESA negotiations to the victim-oriented perspective of the “Dealing with the Past” conference. Although, given their involvement in the political process and negotiations, as well as their involvement in the amnesty compromise itself, their responses cannot be taken at face value and may rather represent a strategic interpretation.

#### *4.2.2 The intersection of the amnesty provision and the initiative for a victim-oriented truth process*

The “Dealing with the Past” conference in February 1994 was followed by another conference on *The Healing of a Nation?*, now officially under the auspices of *Justice in Transition*, in July 1994. During the intervening few months the founding democratic elections took place on 27 April 1994 and Nelson Mandela was inaugurated as President of the new Government of National Unity on 10 May 1994. These workshops, it will be argued, also marked the intersection of the new government’s political agenda to give effect to the provision for amnesty in the Postamble and a civil-society based initiative, led by Alex Boraine, for a victim-oriented truth and reconciliation process. More generally, it will be argued that certain interactions in the interim between the two workshops led to the linking of two ‘separate’ but parallel agendas that issued in the eventual TRC process. These events involved a series of complex interactions between Sachs, Asmal and also the new Minister of Justice Dullah Omar on the one hand, and Alex Boraine and other members of the human rights community on the other hand. Through these interactions, it will be argued, the political “truth for amnesty” compromise became linked to the civil society-based initiative

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<sup>215</sup> Asmal, Kader. 1994. Discussion on Priorities & Options. *Dealing with the Past*, p. 139

<sup>216</sup> *Ibid*, p. 139

for a victim-centred truth commission. The fusion of these different ‘agendas’, which had their respective origins in the negotiated constitutional settlement at CODESA and in the concerns of Boraine and other in the human rights community and civil society, account for key structural features of the eventual “dual” TRC process. The Truth and Reconciliation Commission encompassed both a victim-centred process involving truth-telling and testimony as well as reparations for victims (the Human Rights Violations Committee and the Reparations and Rehabilitation Committee) and also a perpetrator focused process with the mandate of implementing the amnesty in the Postamble (the Amnesty Committee). That the TRC always battled to reconcile the different imperatives, discourses and practices involved in the amnesty process with those driving the victim hearings may be traced back to these different genealogies.

According to Boraine, Asmal and Sachs approached him soon after the “Dealing with the Past” conference to draw up a proposal regarding a possible truth commission to be forwarded to Mandela.<sup>217</sup> As discussed in Chapter Three Asmal and Sachs had been centrally involved in the CODESA Constitutional Committee’s “crisis” which resulted in the last minute amnesty compromise included in the Postamble. Both had also participated in Boraine’s February conference and were aware of the civil society initiative around the idea of a victim-oriented truth commission. It seems plausible that the reason they approached him was to suggest that this victim-oriented initiative could be linked to a “truth-for-amnesty” compromise that might make the amnesty provision entrenched in the Interim Constitution more politically acceptable. Such a suggestion would not have been alien to Boraine in the context of his own concern for the needs of victims. The letter Boraine sent to Mandela with a proposal for a truth commission based on the proceedings of the February conference was notably silent on the issue of amnesty. In the main text of his letter Boraine emphasised the value and importance of uncovering the truth in order to give effect to reconciliation while only mentioning amnesty in passing and cautioning that it should not be confused with amnesia.<sup>218</sup> However, a more specific proposal with the motivation, objectives and terms of reference of a truth commission was attached to the letter.<sup>219</sup> Under the heading ‘Terms of

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<sup>217</sup> Boraine 2000, p. 30

<sup>218</sup> Ibid., pp. 30-34

<sup>219</sup> Only the letter detailing the risks of and reasons for having a truth commission are printed in Boraine 2001. The attachment containing the proposed motivation, objectives and terms of reference for a possible truth commission are on file Paddy Clarke, International Institute for Transitional Justice, Cape Town office.

Reference' it did address the issue of amnesty in formulations directly based on those of the Postamble:

Where the Interim Constitution provides for amnesty to be granted “for acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past” it should be ensured that such amnesty is fully compatible with the requirements of public accountability. It should be the responsibility of this Commission to make recommendations providing for the “mechanisms, criteria and procedures, including tribunals, if any, through which amnesty shall be dealt with” as envisaged by the Interim Constitution, and to monitor and assess the implementation of amnesty granted in this way.<sup>220</sup>

Significantly this included the “mechanisms, criteria and procedures” for the granting of amnesty, which had been left open in the Postamble, as part of the objectives and functions of the proposed truth commission. Though there is no specific mention of the “amnesty-for-truth” compromise, or of full disclosure as a condition for individual amnesty, the reference to “the requirements of public accountability” is consonant with Sachs’s later retrospective account of their principled objections to blanket amnesty. The fusion of the two initiatives in these formulations had a dual significance: on the one hand Boraine’s taking on board of amnesty as one of the functions of his proposed commission meant that the victim-oriented truth and reconciliation process had now been extended to become a mechanism for dealing with the perpetrators as well; on the other hand, the “truth-for-amnesty” compromise arising from the negotiated settlement of the Interim Constitution had in effect been endorsed from a key member representing a civil society and human rights perspective at this time.

Boraine’s letter to Mandela and the proposal for a truth commission did not get any immediate response. There were no further developments until the end of May 1994 when Boraine, “anxious” to discuss the matter of a truth commission, requested a meeting with Omar as Minister of Justice. Boraine relates that in the meeting:

[Omar] made it very clear that he was totally committed to a truth commission. He reminded me that the ANC NEC had made that decision in 1993 and he was anxious that amnesty, which was allowed for in the Postamble of the Interim Constitution, should not be the dominant theme in dealing with the past but that we should be concerned always with victims, with reparation and with truth. I was delighted to hear his own response because it coincided

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<sup>220</sup> Ibid.

very much with my own views, and from that day on we had a quite remarkable partnership which contributed towards an Act of Parliament creating the Truth and Reconciliation Commission.<sup>221</sup>

It was following this meeting that Boraine and a small group including Dullah Omar and Johnny de Lange began to discuss preliminary drafts for a possible TRC. According to Boraine, these discussions were very informal and most of them were held either at his own or at Omar's home. The group debated issues in relation to a possible truth commission and produced drafts for a possible TRC<sup>222</sup>

Omar, Asmal and Sachs had definite political incentives for having the conceptualisation of the TRC prepared outside the official structures of the Government of National Unity at this stage. Taking into account the already fragile relationship between the ANC and the NP, the two main parties in the transitional Government of National Unity, the ANC strategically opted to instigate the drafting of the TRC legislation in its early stages outside of official GNU structure and rather to proceed in consultation with selected agents of civil society.<sup>223</sup> In an interview Medard Rwelamira, who was a key advisor to Omar at the time and closely involved in the drafting processes for the TRC legislation, confirmed that Omar "wanted to assist civil society in pushing the idea of a TRC."<sup>224</sup>

Omar's strategy may be understood in the context of the ambiguous nature of the amnesty compromise as formulated in the Postamble. As has already been discussed, according to Sachs's account the compromise formulations in the Postamble were, at least on the part of the ANC representatives in the Constitutional Committee, informed by the notion of an "amnesty-for-truth" conception. However, as Sachs also admitted, this may not have been understood by the negotiators on the side of the NP.<sup>225</sup> If that had been the case, then taking the drafting of the proposed conditional "amnesty for truth" legislation to the GNU structures might have alerted the NP members of the cabinet to the different interpretation of the amnesty provision in the Postamble that was under way. Keeping the initial drafting process away from the GNU structures and doing it along with selected civil society figures may have served to prevent the "amnesty-for-truth" interpretation being challenged from the outset. But

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<sup>221</sup> Boraine 2000, p. 37

<sup>222</sup> Interview Boraine 2011

<sup>223</sup> Interview with Medard Rwelamira (Department of Justice) on 25-2-1998, in van der Merwe et al 1999, p. 57

<sup>224</sup> Ibid.

<sup>225</sup> See footnote 199

doing it in this way also had the consequence that it closely involved these civil society and human rights figures in the drafting of the amnesty legislation and provisions (as well as of the rest of the TRC structures).

It is interesting that Omar/Sachs/Asmal did not approach members from other human rights organisations such as the LHR or the LRC at this stage. In fact, given that the LHR had already made a start on how the arrangement of full-disclosure in exchange for amnesty could work<sup>226</sup> it might have been appropriate for the Minister of Justice to approach the LHR for assistance with drawing up the legislation for amnesty. However, given the LHR's more legalist orientation and perpetrator focus, this might well have resulted in an initial draft proposal with a primary focus on the issue of amnesty itself, which was what Omar was eager to avoid at this stage. Instead, it was Alex Boraine, who had coordinated various civil society meetings and conferences in order to promote and encourage debate around a victim-oriented truth process, who emerged as the key interlocutor facilitating the fusion of the official agenda and the civil society-based initiative.

Previously Boraine's own agenda regarding a "truth commission" had been focused on 'victims', 'reparations' and 'truth', and *not* on the issue of amnesty. For his part Omar, as the new ANC Minister of Justice, had the unenviable responsibility to give effect to the amnesty provision in the context of the Postamble. Linking the amnesty to a truth commission and its associated objectives gave more validity to the Postamble's stated goal of promoting national unity and reconciliation.<sup>227</sup> Arguably, it therefore suited Omar strategically to locate the state's implementation of amnesty within the notion of a truth commission that was patently victim oriented and supported by civil society. Certainly, Omar stressed the victim-oriented objectives of the truth commission which this thesis argues was more a strategic emphasis on Omar's part to maximise the ANC leadership's distance from the implementation of the amnesty provision in the Postamble than anything else. It is possible to argue that the decision to approach Boraine as part of getting the initial drafting of the TRC underway may be interpreted as part of the ANC's agenda to downplay the amnesty aspect and rather emphasise the "victim" centred imperative for a truth commission.

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<sup>226</sup> Discussed in Chapter 3

<sup>227</sup> Llewellyn, Jennifer J. & Robert, Howse. 1999. Institutions for Restorative Justice: The South African Truth and Reconciliation Commission. *The University of Toronto Law Journal* 49 (3): 355-388. Llewellyn and Howse argue that if justice is properly understood then the TRC achieved justice through an alternative mechanism that was restorative instead of retributive.

More generally, the involvement of Alex Boraine, perhaps the strongest civil society-based advocate of a truth commission, also represented a significant moment in the development of the TRC *concept* as not just a mechanism to dispense amnesty but also a victim-centred mechanism. It is arguable that it was at this juncture that the linking up of two different concepts occurred that came to inform the eventual dual TRC process: the one dealing with amnesty-for-truth, and other pertaining to a victim-centred truth commission with victim hearings and reparations.

### 4.3 Second TJ Workshop on “The Healing of a Nation?”, July 1994

In the time between the first transitional justice workshop and the second workshop, the new Minister of Justice Dullah Omar had made two important public statements regarding the setting up of an official truth commission. The first was a statement in parliament in which Omar referred to his task to prepare appropriate legislation to provide for amnesty. In parliament on 27 May 1994, Omar stated:

I want to give an assurance to those who have fears and who may have perpetrated human rights violations and who want to join in reconciliation, that in respect of politically motivated crimes there will be no Nuremburg-type trials. There will be no vengeance or witch-hunts, there will be no revenge and there will be no humiliation of any person.<sup>228</sup>

Omar also said that at the same time there would be “no sweeping under the carpet and there will be no suppression of the truth. There will be no amnesty without disclosure.” Of the actual criteria and legislation Omar merely said that a cut-off date would be set, that there should be full disclosure and acknowledgement; that ordinary crimes would not be covered; that perpetrators would be indemnified against civil and criminal actions.

On the 7<sup>th</sup> June 1994 Minister Omar made a public statement elaborating on his 27 May statement made in parliament regarding the setting up of a truth commission and a mechanism to deal with amnesty.<sup>229</sup> The Minister stated that in “finalising” their proposals they were considering a number of factors for a truth commission to enable South Africans to

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<sup>228</sup> Minister of Justice, National Assembly. 1994. *Hansard*. May 27, col. 188-190

<sup>229</sup> Omar, Dullah. 1994. *Statement by Minister of Justice Dullah Omar on Amnesty/Indemnity*. Issued by the Ministry of Justice, Sapa, June 7

“come to terms with our past on the only moral basis possible namely that the truth be told and the truth be acknowledged.”<sup>230</sup> The Minister stated that the terms of reference of the Commission would include “investigating and establishing the truth about human rights violations and their acknowledgement” as well as making provision for “amnesty/indemnity”. He said that the Commission may include a specialised structure to deal with all applications and recommendations and that “offences in respect of which amnesty may be applied for will be defined strictly within the framework of the constitutional provision on national unity and reconciliation.”<sup>231</sup> Omar’s announcement called for the public to submit comments and proposals by 30 June iterating that “participation in the process will help the nation to heal itself.” These submissions are discussed in the next chapter.<sup>232</sup>

It was after this announcement made by Omar that a second workshop, also organised by Boraine but this time officially under the auspices of *Justice in Transition*, took place in June 1994. Again this workshop was not specifically on the topic of amnesty; entitled “The Healing of a Nation?” it concerned a range of general transitional justice issues in dealing with the past in South Africa.

Minister of Justice Dullah Omar gave the keynote address to the conference and announced some more specifics concerning the objectives and nature of the proposed truth commission.<sup>233</sup> With regard to the proposed amnesty process Omar announced that one of three specialised committees of the proposed TRC would be the “Committee on Amnesty or Indemnity”.<sup>234</sup> He also set out some of the parameters for the individual and conditional amnesty process that were envisaged:

The cut-off date for offences committed is 5 December 1993 in respect of which applications may be made for indemnity or amnesty. In respect of indemnity, applications will have to be made by a date fixed by law. Political offences are defined to cover certain actions not only of the liberation movements, but also of state security forces and other organisations. There is

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<sup>230</sup> Ibid.

<sup>231</sup> Ibid

<sup>232</sup> While the deadline for the submissions was 30 June, a number of submissions responding to this call were submitted after this deadline and indeed after the second June TJ conference

<sup>233</sup> Omar, Dullah. 1995. Building a New Future. *Healing of a Nation?*, pp. 2-8

<sup>234</sup> Ibid., p. 5

broadly speaking a return to the criteria set out in the Indemnity Act of 1990, namely the Norgaard principles. A precondition for indemnity or amnesty is full-disclosure.<sup>235</sup>

From this it was clear that the proposed TRC and in particular its Amnesty Committee would serve to provide the “mechanisms, criteria and procedures, including tribunals” through which amnesty would be dealt with as required in the Postamble of the Interim Constitution. It would not be a general amnesty but an individual and conditional process with “full disclosure” as a precondition for amnesty. This criterion reflected the “truth for amnesty” compromise left implicit by the Constitutional Committee in drafting the Postamble.

In his address, Omar stressed the need for a commission that would be victim-oriented and which would enable victims a chance to tell their stories of human rights abuses as well as to claim reparation. Inter alia, this commission would also give effect to the amnesty for perpetrators of human rights violations as required by the Interim Constitution. With his address and announcements at the second conference Dullah Omar thus firmly and publicly linked the state-initiated concern with “amnesty-for-truth” with the civil society-based initiative for a victim-oriented truth and reconciliation process. There were many aspects of the amnesty process that were still to be decided. Omar’s announcement did not say how the hearings would be conducted, whether they would be in public, who would sit on the Amnesty Committee or what more specific criteria and procedures would be adopted.

Significantly though, the matter at the heart of the discussions at the “Healing of a Nation?” conference was not the issue of amnesty but rather the best way to move forward in South Africa while ensuring that the past would be remembered and the victims of apartheid acknowledged. A content analysis of the submissions by members of civil society and the broad human rights community is revealing. The discourse generally was one that framed choices about the future of the country in terms of a need for ‘truth’ about the past, ‘acknowledgement’ of the victims, ‘healing’, ‘reconciliation’, and reparations for victims. Indeed the conference as a whole was primarily concerned with the need for ‘reconciliation’ and ‘healing’ which it took to be the central task of the proposed truth commission. Typically participants made strong normative claims about the healing potential of truth and acknowledgement and conceived of the proposed TRC as a “process of moral

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<sup>235</sup> Ibid.



reconstruction”.<sup>236</sup> The speakers repeatedly prioritised the need for uncovering and exposing the truth about apartheid-era human rights violations.<sup>237</sup> Currin from the LHR postulated a truth commission as the source from which understanding, forgiveness, reconciliation and the healing of the nation could stem.<sup>238</sup> Much time was spent discussing the preconditions for healing, forgiveness and reconciliation in the new South Africa.

This sort of terminology was employed not only by members from the religious community or the therapeutic professions, as one might expect, but also by members of the human rights community. However, from a human rights perspective the notion of amnesty and “taking responsibility for the past and correcting injustices” do generally not go together. Rather, it is an axiom of principled human rights activists and lawyers that this goal needs to be achieved through criminal prosecutions and punishment of perpetrators of past political atrocities. This was certainly not the case amongst the human rights community present at these conferences. No one explicitly argued for ‘dealing with the past’ in the sense of (retributive) justice and prosecution as a precondition for national healing and reconciliation. The fact that no-one entertained this prospect may be taken to indicate an acceptance of the negotiated CODESA amnesty pact as legitimate. Indeed, at the conference, there was scant reference made to issues of retributive justice, punishment and retribution except to denounce these as antithetical to the more desirable objectives of forgiveness and healing. The option of opening dockets, seeking evidence and prosecuting offenders was mentioned in passing by Kader Asmal as “the hard option, the divisive option”.<sup>239</sup>

Some references were made to the issue of amnesty near the end of the conference by Judge Richard Goldstone and Professor Andre du Toit who raised problems they envisaged as arising out of the amnesty, such as issues of due process.<sup>240</sup> Goldstone also raised the matter of whether or not all offences should be indemnified under the TRC and how the commission would deal with the question of proportionality of the offence in relation to its *political* objective.<sup>241</sup> That the truth commission should take an ‘even-handed’ approach to crimes

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<sup>236</sup> Sachs 1995, p.106. See also Ramphela, Mamphela. 1995. The Challenge Facing South Africa. *The Healing of a Nation*, pp. 33-36. Frank Chicane.1995. The Task for Civil Society. *Healing of a Nation*, p.102; Sachs 1995, pp. 103-109

<sup>237</sup> See Currin, Brian. 1995. Coexistence and Community. *The Healing of a Nation?*, pp. 82-83

<sup>238</sup> Ibid.

<sup>239</sup> Asmal, Kader. 1995. The Challenge Facing South Africa: Fears and Hopes. *Healing of a Nation?*, p., 28

<sup>240</sup> Goldstone, Richard. 1995. To Remember and Acknowledge: The Way Ahead. *Healing of a Nation?*, p. 123; du Toit, Andre. 1995. The Task for Civil Society. *The Healing of a Nation*, pp. 94-98

<sup>241</sup> Goldstone 1995, pp. 124-125

committed by both sides of the conflict was mentioned in a sentence by Sachs, “Now that we have democracy in South Africa there is no need to distinguish between an ANC bomb or a military intelligence bomb – it is simply a matter of a bomb that injured someone.”<sup>242</sup>

#### **4.4 Last minute releases under the Further Indemnity Act, June 1994**

A separate but related development elicited strong reactions from the human rights community around the same time as the two conferences were underway. Just moments before Nelson Mandela’s inauguration in May 1994, a number of prisoners were released under the Further Indemnity Act. Outgoing President de Klerk released sixty-three prisoners including a number of prisoners convicted of serious human rights atrocities; especially controversial was the release of those responsible for the “Trust Feed Massacre” in which policemen killed eleven innocent civilians on suspicion that they were pro-ANC activists. On 30 April 1992 Brian Mitchell, the Captain responsible, had been handed 11 death sentences and his four accomplices 15 years imprisonment. The prosecution and sentencing to death of a policeman for so-called ‘third force’ violence, was the first of its kind in South Africa and was regarded as a victory for human rights lawyers.<sup>243</sup> Not surprisingly, the release of Mitchell and the four accomplices, just two years after being sentenced caused a great public furore and prompted widespread public condemnation especially from human rights organisations.<sup>244</sup>

The human rights community demanded an immediate freeze on indemnities granted through the Further Indemnity Act.<sup>245</sup> The LHR, the LRC and the Black Sash were particularly outspoken in their condemnation of the granting of indemnity to the killers. Howard Varney from the LRC criticised the releases for being “anything but transparent” in that no members of the public, lawyers, prosecutors, police or organisations were invited to make representations before decisions about granting the indemnities were made. Furthermore, Varney criticised that the releases had been unconditional and did not require the convicted perpetrators of human rights violations to give assistance in ongoing investigations against their colleagues who remain in senior positions in the police force.<sup>246</sup> Geoff Budlender from

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<sup>242</sup> Sachs 1995, p. 107

<sup>243</sup> Ottaway, David. 1992. Senior South African Police Officer Sentenced to Death. *The Washington Post*, May 1

<sup>244</sup> Blow, Desmond. 1994. Outrage as killers go free. *City Press*, June 26, p.1

<sup>245</sup> *Weekend Argus*. 1994. Call for immediate stop to granting of indemnities. June 26, p. 2

<sup>246</sup> Quinlan, Vicky. 1994. Disquiet about releases. *The Natal Witness*, June 24, p.3

LRC considered the granting of these indemnities an act that undermined the prospective Truth Commission, saying that it would be undermined from its inception “if while legislation being considered and principles for future amnesty and indemnity are being debated, people are being released hastily and according to criteria which we don’t know or understand... If people are going to have confidence in the law and the legal system, it is absolutely crucial that criteria for amnesty and indemnity are publicly known and publicly debated.”<sup>247</sup> The LHR was especially outraged as just weeks prior to the release of these prisoners, Currin had been approached by Minister Dullah Omar “to frame new amnesty provisions”. Omar had in fact set up a committee to review outstanding applications for indemnity and appointed LHR’s Brian Currin the head of the committee.

It is to be expected that the controversy around this process informed the human rights community’s submissions on the amnesty that was to be implemented as part of the prospective truth commission. The submissions will be considered in the next chapter.

#### **4.5 Conclusion/discussion**

It is clear that the human rights community’s overall response to the proposal for amnesty was *not* to reject it on human rights grounds but rather to discuss more general problems related to transitional justice such as the problem of truth and also reconciliation. By this stage however, the interests of the human rights community seemed to converge around a more coordinated agenda which had a dual concern for the victims and for the truth to come out. However, this was still not to the same extent, nor on the same scale that the Argentine movement presented its demands for truth and justice.

These differences in the South African and Argentinean human rights communities’ responses to the amnesty issue reflect underlying contrasts in their social contexts and make-up. The composition of the Argentine human rights movement compared to that of the SA human rights community was substantially different. While in the case of Argentina, the human rights movement was comprised of a significant number of *victims* movements, victim and family-based groups or organisations were completely absent from the debate around dealing with the past in South Africa. Certainly, at this crucial stage there was no apparent

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<sup>247</sup> *Weekend Argus*. 1994. ‘Call for immediate stop to granting of indemnities. June 26, p. 2

response from, or contributions made by, groups of victims and their families to the proposal for an amnesty as published in the Postamble and announced by Minister Omar. In Argentine victims and families of the victims were a dominant component of the human rights movement and their agenda for truth and maximum retributive justice for human rights atrocities. Indeed it was the victims and the families of the victims who were the most outspoken about and even *extreme* regarding their demands for retributive justice during the transitional period while some of the Argentine legal human rights organisations were at times prepared to go along with Alfonsín's 'limited justice' strategy, the victims associations remained steadfast in their demand for maximum retribution.

In the South African case the dominant discourse around amnesty by and large conformed to a more general discourse of reconciliation and national unity and healing rather than a distinctive human rights perspective on the issue of amnesty and "dealing with the past." The provision for amnesty in the Postamble did not occasion protests from the human rights community. Instead, apart from the initiatives of Boraine, there was relative silence around the issue and the responses from the human rights community were articulated only much later in the February and June transitional justice workshops. Even so, the human rights community did not articulate a response to the issue of amnesty along principled human rights grounds as might have been expected.

At this stage of the transition some representatives of civil society were involved in the initiative for a truth commission to the extent that they attended the conferences and that their input was channelled through Boraine to the informal drafting committee responsible for the initial drafting of the legislation. However, the broader human rights community was not directly involved in this initial process. Indeed, the above account has shown that the involvement of the "human rights community" in the legislation of the TRC was a complex matter and that it involved individual members of the human rights community who did not come from the *legal* human rights community but whose roles overlapped between the categories of political society/civil society/human rights community.

Boraine's *Justice in Transition* initiative had a specifically victim-centred notion of transitional justice while his close relationship with Omar meant that he emerged as the key initial contributor to the TRC legislation from the side of the human rights community. The human rights community generally supported a victim-focused truth and reconciliation

process. Most HROs referred to the need for the truth be exposed and acknowledged and none specially argued for prosecutions or that perpetrators be held legally accountable. This implied the human rights community's acceptance of the need for amnesty as an outcome of the negotiations. To the extent that Boraine was a member of the human rights community, one can say that the human rights community was responsible for the incorporation of the "victim oriented" agenda of the TRC along with the "amnesty-for-truth" compromise.

Saying that, the discourse at the two conferences dealt more with the need for truth, healing and reconciliation than anything else. A number of the participants at the conference were from the academic, religious and therapeutic professions. These participants for the most part articulated their response to the notion of a truth commission in terms of a specifically victim-centred approach. So, in actual fact the agenda for a specifically victim-oriented process was not necessarily an initiative of the human rights community as a whole but emerged as a result of Boraine's emerging as a key figure representing the human rights community and civil society in the early stages of the conception of the TRC. Indeed Boraine's agenda for a victim-centred process can be characterised as a broader civil society' agenda which included members from the academic, religious and therapeutic professions as well as from the human rights community.

It is perhaps surprising that the LHR did not play a particularly prominent role at this early stage. The day before the Postamble was published, the LHR made a public statement that it would not accept a general amnesty; however the publication of the Postamble a day later does not appear to have elicited any public response from the LHR. One explanation for this is that the LHR, as did other members of the human rights community, understood the wording of the Postamble to be open-ended enough to allow for the possibility of an "acceptable amnesty" from a human rights perspective. It is still surprising, given its well-developed and sophisticated views on the issue of amnesty, that the LHR did not play more of a central role in the early drafting sessions of the TRC legislation.

As van der Merwe et al state, it was only at a later stage, when the Bill was put to the public for comment in as late as November 1994 that "the NGO sector mobilised effectively to put their concerns on the table."<sup>248</sup> My own research points to the same conclusion with the

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<sup>248</sup> Van der Merwe et.al 1999, p.58

exception of Alex Boraine, Albie Sachs and Kader Asmal and the important but indirect involvement of some members of civil society and the human rights community in the conferences. The next chapter goes on to deal with the actual submissions made by members of the human rights community on the amnesty aspect of the draft TRC legislation.

## **CHAPTER 5: THE HUMAN RIGHTS COMMUNITY'S RESPONSE AND CONTRIBUTION TO THE TRC LEGISLATION**

The previous chapter traced the linking up of the different agendas of the political elite, concerned with amnesty in the context of the negotiated constitutional settlement, and the civil society/human rights initiative led by Boraine who was concerned with the need for a victim-oriented truth and reconciliation process. Boraine was at the forefront of the initiatives by civil society and the human rights community in organising and coordinating the two major transitional justice workshops discussed in the previous chapter. These workshops presented the human rights community with an opportunity to voice any principled objections they might have had against the prospect of an amnesty from a human rights perspective. There was however no such principled rejection of amnesty from the human rights community. Instead the discourse surrounding of the issue of the “dealing with the past” was one of “truth” and “reconciliation”. This implies that amnesty had not been a major human rights issue for the human rights community as compared to other priorities.

An initial drafting process in which Boraine and other “insiders” were involved had already taken place by the time that civil society more broadly was given the opportunity to make proposals/comments on legislation for the TRC. This happened in two main phases which are discussed separately in this chapter. The first opportunity came on 7 June 1994 when Minister Omar invited proposals from the public regarding the setting up of a truth commission to be submitted by the end of June 1994. The second opportunity for civil society and the public to comment on the draft TRC Bill was in November 1994 when the Ministry of Justice released a copy of the draft TRC legislation into the public domain and invited submissions from the public.

In Omar’s announcement in June 1994, and also his address at the second transitional justice conference, it was made clear that the two agendas for a victim-centred truth process on the one hand and an “amnesty-for-truth” process on the other would be linked to form a truth commission. This was further entrenched in the draft legislation that was published in November 1994. It is significant that once the two agendas for a victim-centred truth commission and an amnesty process were linked up with the inclusion of Boraine in the initial informal drafting phase of the TRC legislation, the issue of amnesty could no longer be separated out from the issue of a truth commission. Therefore, in responding to Omar’s June

announcements and the draft TRC Bill, the human rights community was responding not only to the idea of a truth commission as such but also to the issue of amnesty. One can conceive of a range of possible responses from the human rights community: i) the human rights community could have rejected the notion of linking a victim-centred truth process with the amnesty and insisted that the truth commission remain an exclusively victim-centred process; ii) they could have largely ignored the provision for amnesty focusing only on the other aspects of the proposed truth commission; iii) they could have been specifically concerned with whether the amnesty provided for in the TRC Bill would amount to a general and unconditional amnesty and/or to what extent the provisions in the Bill for an individual and conditional amnesty were more justifiable from a human rights perspective and/or from the perspective of the victims.

The two rounds of proposals and submissions are discussed separately in this chapter paying particular attention to the aspects of the submissions that dealt with the amnesty provision. Together, the submissions on a wide range of issues are taken as indications of the approach of the human rights community to the issue of amnesty. The significance of the human rights community's response is gauged according to what extent their responses represented a principled human rights approach to the issue of amnesty. A secondary objective of the chapter is to establish what impact the submissions from the human rights community had on the eventual TRC legislation.

### **5.1 First round of submissions, June/July 1994**

The first round of submissions were based on Omar's June announcement of an official truth commission that would incorporate the mandate to receive applications for amnesty and that would make a space for the voices of victims to be heard.<sup>249</sup> Some of the submissions only came after the 30 June deadline following Minister Omar's address at the second *Healing of a Nation?* Conference held in June 1994. The June announcement, as discussed in the previous chapter, only set out the very basic tenets of the proposed truth commission including the amnesty process. Essentially Omar announced that a truth commission would be set up with the overall objectives of truth and acknowledgement for the sake of "avoiding a multiplicity of legal actions", "healing the wounds of the past", avoiding future violations,

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<sup>249</sup> Omar, Dullah. 1994. *Statement by Minister of Justice Dullah Omar on Amnesty/Indemnity*. Issued by the Ministry of Justice, Sapa, June 7



and also hearing the “voices of the victims.” Omar announced that the terms of reference of the commission would be to investigate and establish truth and acknowledgement of human rights violations, with regard to “fair procedures” and thus making the victims as well as the perpetrators known. He also said: “Truth telling responds to the demand for justice for the victims and facilitates national reconciliation.” In terms of the provision for amnesty, Omar announced that in the context of the overall truth commission legislation provision would be made for amnesty/indemnity. Omar set out the following in relation to “amnesty/indemnity”:

1. The Commission may set up a specialised structure to deal with all applications and recommendations
2. The cut-off date in respect of offences committed will be no later than 5 December 1993
3. The offences in respect of which amnesty may be applied for will be strictly defined within the framework of the constitutional provision on national unity and reconciliation
4. The recommendations of the Commission shall be referred to the president whose decision will be final
5. There will be a fixed cut-off date for applications. All persons seeking amnesty/indemnity will be required to submit applications by not later than such date.

Significantly, Omar did not explicitly say that the granting of amnesty for human rights violations would be conditional on full-disclosure. In his address at the *Healing of a Nation?* conference, Omar announced that there would be three committees operating under the TRC, one of which would be the amnesty committee and that each would be chaired by a Commission member.<sup>250</sup> On the “Committee on Amnesty or Indemnity” Omar reiterated the provisions made in his 7 June announcement but this time announced that a “precondition for indemnity or amnesty is full disclosure” and that there would “broadly speaking” be a return to the Norgaard principles applied in the 1990 Indemnity Act. Again Omar couched his address in terms of “healing the wounds of the past” while taking care to stress that “the object of the [commission] is not to conduct a witch-hunt or to haul violations of human rights before court to face charges” but rather “a necessary exercise to enable South African to come to terms with their past on a morally acceptable basis and to advance the cause of

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<sup>250</sup>Omar, Dullah. 1995. Building a New Future. *Healing of a Nation?*, p. 5

reconciliation.”<sup>251</sup> Omar left open questions such as whether the hearings would be held in camera or in public, whether perpetrators implicated in testimonies should be named, whether perpetrators should be allowed to hold public office and what procedures should be enacted so as to ensure fairness and the manageability of the commission.<sup>252</sup>

It should be noted that by the time of Omar’s June announcements, and indeed, by the time the initial round of comments and proposals had been submitted by some organisations, a draft legislative framework for a truth commission had already been drawn up by the ‘insider’ group of which Alex Boraine was a key instigator and member, discussed in the previous chapter.<sup>253</sup> This draft was not however made public. Whether or not the human rights community had any knowledge of this first ‘insider’ draft is not entirely clear.

In the event, proposals in response to Omar’s 7 June call were submitted by Legal Resources Centre<sup>254</sup>, the LHR<sup>255</sup>, CSV<sup>256</sup> and the Human Rights Commission.<sup>257</sup> These submissions were distinct to the subsequent submissions responding to the draft legislation published in November 1994. The proposal made by Graeme Simpson on behalf of CSV took the format of a draft framework for TRC bill with detailed explanations, while other proposals focused only on a few general issues relating to the TRC and the amnesty process. This subsection focuses on the *general* approach of these human rights organisations in the first round of submissions to the concept of an amnesty process as part of a truth commission process. A discussion of the more specific proposals for the implementation of the amnesty process is held over for the discussion of the second round of submissions as there are a number of repetitions and overlaps.

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<sup>251</sup> Ibid., p. 7

<sup>252</sup> Ibid.

<sup>253</sup> Truth Commission Panel. July 1994. *Working Document: Draft legislative framework for proposed bill to set up a Truth and Reconciliation Commission*. (Not for publication). This group included but was not limited to Medard Rwelamira, Johnny de Lange, Willie Hofmeyr, Enver Daniels, Dullah Omar and Alex Boraine. See Boraine 2001, 49

<sup>254</sup> Kahanovitz, Steve. 1994. Letter: Commission on Truth and Reconciliation, August 10

<sup>255</sup> Lawyers for Human Rights. 1994. *Proposal for a Commission on Truth and Reconciliation*, July 19

<sup>256</sup> Simpson, Graeme. June 1994. *Proposed Legislation on: Amnesty/Indemnity and the establishment of a Truth and Reconciliation Commission*. Submission to the Minister of Justice, Mr Dullah Omar.

<sup>257</sup> Human Rights Commission. [1994]. *Proposal to the Ministry of Justice on the Commission of Truth and Reconciliation*. (the official document found on [www.tracesofthetruth.com](http://www.tracesofthetruth.com) is dated “circa 1993” however the context of the Proposal is around the end of May or June 1994). The HRC also makes suggestions concerning 1) period under investigation, 2) definition of human rights violations, 3) even handedness, 4) powers of the Commission.

Overall, the first round of submissions by the human rights community in response to Omar's call of 7 June 1994 were supportive both of the idea of a truth commission generally as well as of the linkage of such a truth commission to a mechanism to grant amnesty to perpetrators of gross human rights. Significantly, these human rights organisations did not reject the notion of amnesty for human rights violations in their responses but instead accepted the amnesty provision and offered proposals for the ways in which it could be implemented. Thus the CSVR accepted that, in the context of the negotiated settlement, amnesty had become necessary for a peaceful transition and political stability.<sup>258</sup> However the CSVR's general conception of the TRC was as a truth-telling process that "must be responsive to the demands of the victims rather than those of the perpetrators."<sup>259</sup> Steve Kahanovitz on behalf of the Legal Resources Centre in August 1994 wrote a short letter to the Minister of Justice Dullah Omar, of "some thoughts" that the Minister might consider incorporating into the concept of a truth commission.<sup>260</sup> In the letter Kahanovitz also emphasised that victims should "feel as if the new state is listening to them."<sup>261</sup> As with the LRC, the Human Rights Commission, a civil society-based human rights organisation, which had been involved in recording and monitoring political violence and human rights abuses in the apartheid era, commended the Ministry of Justice for committing itself to a truth commission that would investigate human rights abuses on the one hand and also grant amnesty to perpetrators on the other.<sup>262</sup> These statements may indicate that these organisations were not particularly concerned with the implications of linking the amnesty process and the truth commission process. In practice (and in retrospect), the incorporation of the amnesty into the TRC amounted to a considerable shift from a victim-oriented truth process to one that included a focus on perpetrators. From the LRC and CSVR's submissions it appears that despite the inclusion of a mechanism for amnesty they considered that the TRC could still be sufficiently victim-focused.

In his submission on behalf of the CSVR's Graeme Simpson engaged with the "punish or pardon" debate but conceded that ultimately "it is the complex politics of the transition which

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<sup>258</sup> Simpson 1994, p.1

<sup>259</sup> Ibid., p. 31

<sup>260</sup> This letter was written after Steve Kahanovitz had recently attended the second "Healing of a Nation" Conference organised by Justice in Transition.

<sup>261</sup> Kahanovitz 1994, section 1.1

<sup>262</sup> Human Rights Commission. [1994]. *Proposal to the Ministry of Justice on the Commission of Truth and Reconciliation*.

largely shapes the policy debate involved.”<sup>263</sup> CSVR noted an earlier argument put forth by Africa Watch, the African division of the international human rights organisation Human Rights Watch, in the context of the 1992 Indemnity Act, that the state has an obligation under international law to investigate and punish gross human rights abuses but argued that it was sufficient for the government to be *committed to the principle of accountability*.<sup>264</sup> The implication of this argument is that the CSVR considered that providing an amnesty for gross human rights abuses in exchange for full truth disclosure could be compatible with the “principle of accountability”. According to the CSVR submission this could consist of a process of full public disclosure through a truth commission which entailed an extra-judicial punitive element (public shaming), but should also include an “additional punitive element which may fall short of criminal prosecution” such as the removal from office of human rights perpetrators, or lustration.<sup>265</sup> CSVR’s concern was that such an additional punitive element should not be so harsh that its effect would be to deter perpetrators from coming to the commission to seek amnesty and compromise the objective of information gathering “which is ultimately vital to national building and reconciliation.”<sup>266</sup> Since the CSVR had not been privy to the “insider” discussions on linking the Postamble’s amnesty to a truth commission, its proposal suggested that the CSVR independently agreed with the notion of the “truth for amnesty” compromise. The CSVR’s submission was submitted well before Omar’s announcement of the proposed TRC at the *Healing of a Nation?* Conference and therefore indicates a remarkable anticipation of later developments addressed by most only in response to the November 1994 draft of the TRC legislation.

The LHR submitted a proposal in June/July 1994 supporting the principle of a truth commission which would “be a departure from the practices of the past government granting amnesty by means of secret deliberations” and that would establish and acknowledge the truth about human rights violations as well as ensure that such human rights atrocities were not repeated in South Africa.<sup>267</sup> The LHR stated a number of “aims and objectives” for a

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<sup>263</sup> Simpson 1994, pp. 5-8. CSVR referred to the case of Argentine in which an over-ambitious attempt to prosecute perpetrators of human rights violations was unsuccessful. CSVR argued that the example of Argentine was a warning of “the potential of a discredited or failed punitive process to do more damage than a less ambitious one”. See page 8

<sup>264</sup> Simpson 1994, p. 6. Also see *Africa Watch*. 1992. South Africa: Accounting for the past - lessons from Latin America, *Africa Watch* 4(11), p. 18.

<sup>265</sup> Simpson 1994, p. 7

<sup>266</sup> *Ibid.*

<sup>267</sup> LHR 1994, p.1 As did CSVR, LHR made comments of specific aspects of the amnesty process including 1) definition of gross abuses of human rights, ‘political object’, and indemnity/amnesty, 2) public hearings, 3) time period under investigation.

proposed truth commission two of which were 1) “to consider applications for amnesty/indemnity, upon confession from perpetrators of human rights violations” and 2) “to hold those who committed human rights violations accountable and to recommend measures to be taken against them.”<sup>268</sup> Exactly what measures the LHR had in mind was not made clear in their proposal. Overall however, it appears that, as with the CSV, the LHR did not have principled objections to the provision for amnesty as part of a truth commission.

Taken together the proposals from these members of the human rights community represent a general acquiescence with the provision for amnesty linked to a truth commission. Rather than taking a principled stand against amnesty the proposals generally took a ‘cooperative’ approach making suggestions for how the amnesty process and truth commission could be implemented. Importantly, these organisations conceived of the truth commission which included the mechanism for amnesty as still being responsive to the demands of victims. However, the inclusion of the “amnesty for truth” compromise in the mandate of the truth commission represented a significant shift to a focus on perpetrators. It seems that the human rights community were not at the time aware of the implications of this shift for the TRC as a primarily victim-centred process. The proposals represent an approach taken by the human rights community that accepted the provision for amnesty but that still made some efforts to modify the amnesty so as to be more compatible with human rights principles.

## **5.2 Second round of submissions on draft TRC Bill, November 1994**<sup>269</sup>

An official draft of the TRC legislation was published in November 1994 providing a second opportunity for civil society to make an input. This round of submissions elicited contributions from a wider range of civil society and human rights organisations. Various working groups or coalitions of NGOs were formed for the sake of coordinating a response; these included the KwaZulu Natal NGO Forum and the Religious Response to the TRC. *Justice in Transition* also played a crucial facilitating role in encouraging NGOs to make submissions.<sup>270</sup> In the event there were in excess of 70 submissions on the TRC Bill made between November 1994 and May 1995.

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<sup>268</sup> LHR 1994, section 2(e), 2(g)

<sup>269</sup> The official title of the legislation for the TRC was actually *The Promotion of National Unity and Reconciliation (PNUR) Act*. This thesis uses the more popular TRC Bill/Act to refer to the legislation.

<sup>270</sup> Van der Merwe et al 1999, p, 59

While many organisations made independent submissions, others signed off on joint submissions made on behalf of a number of organisations. For example, the *Justice in Transition* network made a single submission, presented by Alex Boraine on behalf of 21 non-governmental organisations including academics, human rights organisations, legal NGOs and religious groups.<sup>271</sup> The KwaZulu Natal NGO Forum also made a submission on behalf of a number of organisations.<sup>272</sup> Human rights organisations that made separate submissions were the Centre for the Study of Violence and Reconciliation (CSVR), the Black Sash, Lawyers for Human Rights (LHR), the Legal Resources Centre (LRC). Other civil society organisations,<sup>273</sup> members of the legal community (professional lawyers, judges, and advocates),<sup>274</sup> religious groups,<sup>275</sup> and international organisations<sup>276</sup> also made separate submissions. Taken together these submissions by civil society and core representatives of the human rights community indicated a substantial involvement in the parliamentary process shaping the TRC legislation. The following account and discussion will pay particular attention to submissions on the amnesty aspect of the draft Bill by members of the SA human rights community.

### 5.2.1 General responses from the human rights community to the draft TRC Bill

On the whole the human rights community responded positively to the call for submissions on the draft bill and generally acquiesced with the amnesty provisions for perpetrators of

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<sup>271</sup> South African Council of Churches (SACC); Legal Resources Centre (LRC); Trauma Centre for Victims of Violence & Torture; Black Sash; Lawyers for Human Rights (LHR); Department of Justice; Institute for Democracy in South Africa (IDASA); Black Lawyers Association (BLA); Centre for Socio-Legal Studies, University of Natal; Mayibuye Centre; Department of Psychology, University of Western Cape; Law Faculty, University of Western Cape; Law Faculty, Wits University; Department of Public Law, University of Natal; Dept of Religious Studies, University of Cape Town; Department of Political Studies, University of Cape Town; National Association of Democratic Lawyers (Nadel); Centre for Study of Violence and Reconciliation (CSVR); World Conference on Religion and Peace; Independent Board of Inquiry (IBI)

<sup>272</sup> SA Chapter of Amnesty International; Black Sash; Community Law Centre; Diconia; Institute for Multi-Party Democracy; Human Rights Committee; Lawyers for Human Rights Natal; the Methodist Church; Nadel; the National Street Law Programme, the Network of Independent Monitors; the Women's Forum; the LRC; Independent Proposals Trust. LHR, LRC and Independent Projects Trust (IPT) did not sign onto the submission but they did form part of the forum.

<sup>273</sup> South African Society of Archivists, Trauma Centre for Victims of Violence and Torture; Politics Rights Organisation; the Freedom of Expression Institute (FXI); Mayibuye Centre; National Institute for Crime Prevention and Reintegration of the Offender (Nicro).

<sup>274</sup> For example: the National Association of Democratic Lawyers, the Independent Board of Inquiry, Black Lawyers Association. For a discussion of the legal community's submissions on the TRC legislation see Rombouts, Heidi. 2002. *The Legal Profession and the TRC: A Study of a Tense Relationship*. Research report written for the Centre for the Study of Violence and Reconciliation.

<sup>275</sup> World Conference on Religion and Peace SA Chapter; South African Catholic Bishops Conference; Research Institute on Christianity in South Africa.

<sup>276</sup> Amnesty International, Human rights watch.

human rights violations.<sup>277</sup> Submissions by members of the human rights community, whether made separately or as joint submissions with other civil society-based organisations, indicated broad support for the proposed truth commission as well as an acceptance of the amnesty process.

Human rights organisations such as CSVR, LHR and the Black Sash indicated that while they were otherwise opposed to amnesty in principle they were prepared to go along with it in the South African case. They justified their acquiescence with the amnesty process on the basis that in the context of the political negotiations amnesty was necessary to secure a peaceful transition.<sup>278</sup> This reasoning was generally along the lines of that given by the Black Sash:

...We believe that amnesty provisions are in contravention of the rule of law and in contravention of many international human rights instruments. And we are very concerned [that] the granting of amnesty to those who have committed gross human rights violations of human rights may even further erode the rule of law in this country.

Nevertheless we recognise that the transition to a democratically elected Government has had to be affected through a process of negotiation and compromise and that ... amnesty has been part of that process and so therefore we are not opposing the concept of amnesty.<sup>279</sup>

There was unanimous agreement amongst these human rights organisations of the need for, and value of, exposing the truth about past human rights violations through a truth commission. Many organisations perceived this to be the main objective of the proposed truth commission and offered it also as a reason for their support of the amnesty process implying that the amnesty provisions in the TRC Bill were clearly understood as different from a general amnesty with full disclosure as a key condition.<sup>280</sup> This was largely on the basis of the belief that the truth regarding their human rights violations to be disclosed by amnesty applicants would serve to promote reconciliation. Black Sash for example said: “We believe that it will be possible through the amnesty provision to arrive at the truth of the past and

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<sup>277</sup> Notes from the Justice in Transition workshop, as well as the submission that emanated from that workshop included a long list of NGOs, including many human rights organisations that had been involved

<sup>278</sup> See Simpson 1994, Centre for the Study of Violence and Reconciliation. 1995. *Submission to the Select Committee on Justice: The Promotion of National Unity and Reconciliation Bill*, January 13, p.7; LHR 1994,

<sup>279</sup> Black Sash. 1995. Oral Submission to the Justice Portfolio Commission, February 8, p. 3 of transcript

<sup>280</sup> See KwaZulu Natal NGO Forum. 1995. Oral Submission to the Justice Portfolio Commission, February 14. LHR Submission 1995, Introduction, section 3.1;

thereby reach reconciliation”<sup>281</sup> while the KZN NGO forum “agree[d] unanimously that a commission of this nature is necessary to enable the country to heal its wounds, to promote a sense of tolerance and forgiveness and to recognise the suffering and hardship of those who have not lived to share this moment with us.”<sup>282</sup>

However, this did not quite amount to a unanimous consensus among the human rights submissions. Lawyers for Human Rights (LHR) was the one organisation that came close to an outright rejection of the amnesty on principled human rights grounds. This time around, the LHR submission supported the notion of a truth commission to establish and disclose the truth about human rights violations but did not support the amnesty component of the proposed Commission.<sup>283</sup> As such, and unlike others in the human rights community, the LHR did not view the proposed TRC as an acceptable alternative to retributive justice through criminal prosecutions of the perpetrators of human rights violations. LHR argued that the amnesty as it was defined in the draft Bill amounted to impunity and that amnesty should instead be defined as “a pardon from the state granted to *convicted persons* with or without conditions.”<sup>284</sup> The qualifications of individual and conditional amnesty, instead of a general amnesty, did not make a relevant difference in the LHR’s view. In their opinion, the “amnesty” proposed in the draft Bill amounted to de facto impunity, effectively placing perpetrators above the law. Referring to the Interim Constitution and to the norms of international law, the LHR argued that the rights of victims to judicial redress, equality before the law and equal protection by the law were contravened by the amnesty as proposed in the Bill.<sup>285</sup> This comes close to a clear and principled rejection of the amnesty provisions from a human rights perspective. However, the LHR stopped short of rejecting the amnesty outright by proposing that only convicted perpetrators could be considered for a presidential pardon. The LHR indicated that it valued and shared the general commitment to reconciliation as an objective of the proposed TRC but unlike other submissions proposed that reconciliation would be better advanced if convicted perpetrators only were considered for amnesty.<sup>286</sup> Accordingly it was argued that granting amnesty to perpetrators without first prosecuting and convicting them would “...in the long term, fail to achieve even the objective enshrined in its

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<sup>281</sup> Black Sash 1995, Oral Submission, p. 2

<sup>282</sup> KZN NGO Forum 1995, p. 71 of transcript

<sup>283</sup> LHR 1995, p.1

<sup>284</sup> Ibid., section 1.1; own italicisation

<sup>285</sup> Ibid., section 1.6-1.13, section 2

<sup>286</sup> Ibid., section 1.10: “We submit further that the Bill needs to be amended to provide for the Amnesty Committee to consider applications for amnesty after the prosecution and conviction of perpetrators of human rights violations.”



name - that of the promotion of genuine national unity and reconciliation.”<sup>287</sup> The LHR contended that investigations and prosecutions were “essential steps towards achieving national reconciliation and lasting peace” in South Africa.<sup>288</sup>

The LHR’s approach to the amnesty provision as contained in the draft bill was markedly different from the approach taken by other members of the human rights community. LHR argued on these grounds that investigations and prosecutions of human rights atrocities should take place as part of addressing past human rights violations. Bearing in mind the analogous human rights movement in the Argentine case this approached the kind of principled human rights approach to the issue of amnesty that might have been expected from the South African human rights community more generally. However, the LHR’s proposal that only convicted perpetrators be eligible for amnesty stopped short of an outright rejection of amnesty and so cannot be said to represent a principled human rights stand on amnesty analogous to that taken by the Argentine human rights movement.

It appears that overall the human rights community viewed the TRC (as a truth process and as a mechanism for not a general amnesty but an amnesty that was individual and conditional) as compatible with their concern for the needs of victims as well as in line with their previous criticisms of the previous indemnity acts which were shrouded in secretive process and did *not* facilitate truth recovery.

### *5.2.2 The “truth-for amnesty” compromise: Full-disclosure as condition for amnesty*

The stated objective of the draft TRC Bill to investigate and expose the truth about past gross human rights violations was enthusiastically welcomed by the human rights community. According to these organisations the aims of the truth commission should be to acknowledge the truth about past political atrocities and especially the suffering of victims with a view to restore the dignity of victims and to promote reconciliation and healing as well as forgiveness. The human rights community understood the central objective of the truth commission as that of a victim-oriented truth process.<sup>289</sup>

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<sup>287</sup> LHR 1995, p.1

<sup>288</sup> Ibid., Section 1.12

<sup>289</sup> KZN NGO Forum 1995, p.68, 71; CSVR in its 1994 submission described what it perceived to be the central objective of a possible truth commission: “The central objective of this legislation [proposed by the TRC] is to foster meaningful national reconciliation premised on a primary concern for full disclosure and public

Most submissions did not explicitly refer to the significance of the full-disclosure condition for amnesty. However, the demand from the human rights community that full-disclosure be made in public, as discussed in the next subsection, implied that the full-disclosure aspect of the amnesty was a crucial condition for their support of the commission and its overall objective of uncovering and exposing the truth about the past. In particular, unlike other amnesties which served to cover up the truth, an amnesty based on full disclosure would do the opposite.

A related issue raised by some HROs was that of the publication of the names of perpetrators receiving amnesties. Evidently this should have been an implication of the “truth-for-amnesty” compromise and of full disclosure as a condition for granting amnesty to applicants. Section 16 (3) of the draft Bill stated that the Committee shall publish in the Government Gazette the full names of any person to whom amnesty is granted as well as “sufficient information to identify the act or omission in respect of which amnesty has been granted”. A few submissions, including those from the CSVr, the LHR, and the KZN NGO Forum took exception to this, arguing that the interpretation of “sufficient information” was too vague.<sup>290</sup> It was suggested by the CSVr that the following additional information be published by the Amnesty Committee: the names of other people who assisted in committing the crime and who had full knowledge of the crime including its planning; the full details of the planning of the crime; the motive of the crime; the chain of command and how it was executed; the place where the crime occurred or was intended to occur, the names of the victims and/or intended victims and also the name of the organisation, security force or any other relevant structure to which the individual belonged or by which the individual was employed.<sup>291</sup>

Also related to the “truth” objective of the amnesty process was clause 16(8) in the draft Bill which said that if persons who prior to the Commission had been convicted of human rights violations were granted amnesty by the Commission for the said violation(s) then they would have their criminal records “expunged from all official documents or records and the

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acknowledgement of the historical suffering of victims of human rights abuses under apartheid. Although the Bill [proposed by the CSVr] seeks to be sensitive to political restraints ... its objectives clearly subject this to the primary concern for the victims of these historical abuses.” Simpson 1994, p.15.

<sup>290</sup> CSVr 1995, pp.5-6; LHR 1995, Section 8.5

<sup>291</sup> CSVr 1995, p.6

conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed to have not taken place.” The KZN NGO Forum and the LHR opposed the proposed eradication of the criminal records of persons granted amnesty.<sup>292</sup> They argued that this would run contradictory to the purposes of the truth commission to record and remember the truth of human rights violations for posterity and prevent such offences from occurring again.<sup>293</sup>

We may conclude from these submissions that at this time the human rights community was not exclusively, or even primarily, concerned with the claims of retributive justice in relation to the perpetrators of gross human rights violations but much more with a victim-oriented process of “truth”. This may go some way in accounting for their willingness to go along with the amnesty compromise which included full-disclosure as a condition. Their preoccupation was with the objectives of a truth process, namely of providing closure to victims, of affording them acknowledgement and dignity as well as providing for the possibility of “healing”, “forgiveness” and “reconciliation”, rather than with those of retributive justice in relation to perpetrators.

### *5.2.3 The issue of ‘closed door’ versus public amnesty hearings*

Perhaps the single most controversial aspect of the draft TRC Bill was the issue whether the amnesty hearings would be open to the public or held behind closed doors. This was by far the most contested issue in the submissions by the human rights sector, certainly more so than the amnesty itself. The stated objective of the proposed Commission was to establish the ‘truth’ about past political atrocities and ‘full disclosure’ was to be a condition of granting amnesty to applicants. Yet section 15(2)(b) of the draft Bill stated that all procedures with regard to the hearing and granting of amnesty would be held behind closed doors. This meant that the general public would not be able to attend the hearings and would effectively be denied any direct access to the proceedings of the amnesty hearings. It followed that the public would only come to know of the disclosures by perpetrators via statements relayed by officials and/or via the final TRC report.<sup>294</sup>

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<sup>292</sup> KZN NGO Forum 1995, p. 68; LHR 1995, Section 8.6

<sup>293</sup> KZN NGO Forum 1995, p. 68

<sup>294</sup> Justice in Transition. 1995. *Promotion of National Unity and Reconciliation Bill*. Recording of Workshop held by Justice in Transition, Somerset West, South Africa, January 16-17, p.3

The submissions from the human rights community rejected the provisions that the amnesty hearings be held *in camera*. It was argued that such a secrecy clause would significantly compromise the truth commission's objective to uncover the truth and would negate the spirit and values of reconciliation which the truth commission purported to promote.<sup>295</sup> The Black Sash wrote that open amnesty hearings would help to uncover the truth to the fullest possible extent and that this was "essential for the according of respect and dignity to the victims of human rights abuses and for seeking means of reparation."<sup>296</sup> The LRC also stated that "the truth commission is meant to play a cleansing and healing role, and for this to happen effectively, transparency is needed."<sup>297</sup> In its 1995 Submission the CSVr wrote that if hearings were to be held in secret it would "...inhibit reconciliation because for many victims and their dependents the past will remain unresolved. It is difficult to achieve genuine forgiveness in the absence of knowledge. Society in general and victims in particular will be unable to properly come to terms with the past until they are presented with an accurate and complete picture of it."<sup>298</sup>

So strongly did the human rights community feel about this issue that it was prepared to make it into a condition for its own support of, and participation in, the TRC process. The human rights community along with other representatives of civil society held that unless the clause providing for secret amnesty hearings was scrapped their future participation in the TRC would be jeopardised.<sup>299</sup> Significantly it was stated that the human rights community had already compromised on amnesty but that it could not also compromise on the amnesty hearings being in secret.<sup>300</sup> Given that most organisations motivated their support for the amnesty process because of its potential to provide victims and the nation the truth about the past and to provide official acknowledgement of this truth, it is not surprising that the notion of closed-door hearings prompted such an outcry from organisations. Organisations did

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<sup>295</sup> Daniels, Glenda. 1995. Call to scrap truth commission's secrecy. *The Star*, February 2, p. 10. Also Black Sash 1995, p. 1; In its 1995 Submission the CSVr wrote that if hearings were to be held in secret it would "...inhibit reconciliation because for many victims and their dependents the past will remain unresolved. It is difficult to achieve genuine forgiveness in the absence of knowledge. Society in general and victims in particular will be unable to properly come to terms with the past until they are presented with an accurate and complete picture of it." CSVr 1995, p.7

<sup>296</sup> Black Sash 1995, p.1

<sup>297</sup> Statement by Shehnaz Meer, LRC Deputy Director in Daniels 1995

<sup>298</sup> CSVr 1995, p.7

<sup>299</sup> Justice in Transition 1995a, p4; Black Sash 1995, pp.1-2; Justice in Transition, p.5; KZN NGO Forum 1995, p. 72 LHR 1995, Section 3, 8.4; CSVr 1995

<sup>300</sup> Justice in Transition 1995, p4; Black Sash 1995

indeed actively campaign against these proposals and gained considerable media coverage for their opposition to the proposed secret amnesty hearings.<sup>301</sup>

Justice in Transition and CSVr also opposed the proposals for closed-door amnesty hearings because these disregarded the TRC's (as well as the new government's) commitment to transparency, openness and accountability.<sup>302</sup> The underlying concern was that this would render the granting of amnesties amenable to backdoor deals and political horse trading and in this way undermine the legitimacy of the truth commission and the new government.<sup>303</sup>

The human rights community's insistence that the hearings be in public represents an important stand taken by the human rights community to make the amnesty more compliant with a human rights perspective. Although there would be amnesty, a public amnesty process as compared to one held in secret would contradict the objective of truth recovery, the primary concern of the human rights community as evidenced in their submissions.

#### *5.2.4 The Amnesty Committee's status and role within the TRC process*

The Amnesty Committee, as the mechanism to deal with amnesty, served to give effect to the requirements of the Interim Constitution and the Postamble. Despite the fusion of the amnesty process and the truth commission initiative the Amnesty Committee retained a distinct identity, separate status and different procedures. The other committees of the TRC, the Human Rights Violations Committee and the Reparations and Rehabilitation Committee, were specifically victim-oriented. It was the Amnesty Committee that would deal specifically with the perpetrators of gross violations of human rights. So, it was the composition and

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<sup>301</sup> Amhurst, Mark. 1995. Non-governmental bodies lash out at secrecy clauses. *Business Day*, February 2; Mohamed, Zohra. 1995. NGOs reject secret truth commission hearings. *New Nation* 39, February 3-9, p.3; Daniels, Glenda. 1995. Call to scrap truth commission's secrecy. *The Star*, February 2, p. 10; Madland, Adrian. 1995. Lawyers body want truth commission Bill amended. *Business Day*, February 15, p.4;

<sup>302</sup> Justice in Transition 1995, p.5; CSVr 1995, p.2, KZN NGO Forum 1995, p.72, LHR 1995, Section 3.1. The transparency and accountability of the overall TRC was also taken up as an issue by other organisations. LHR and CSVr submitted that meetings of the Commission, subcommittees and committees should also be open to the public. Clause 24 of the draft Bill stipulated that all the meetings of the Commission, any committee and any sub-committee shall be open to the public, except those of the Committee on Amnesty, but that allowance would be made for certain proceedings to be held behind closed doors if the Commission deemed that it would be "in the interests of the security of the State or of good public order or public morals to do so." Some organisations argued that the criteria of "interests of the security of the State" and "good public order" was too broad and therefore open to political manipulation. See CSVr 1995; LHR 1995 Submission: Justice in Transformation Submission, Section 14, 15

<sup>303</sup> CSVr 1995, p. 3

location of the Amnesty Committee within the TRC that be of particular concern to the human rights community.

Two major features of the provisions for the Amnesty Committees in the draft Bill were i) the requirement that they not only included judges but that the Amnesty Committee be chaired by a judge (who need not be Commissioners) appointed by the State President (and not by the Commission)<sup>304</sup> and ii) that they did not report to the Commission but directly to the State President. The significance of these particular features was that i) in contrast to the victims hearings of the HVR Committee the amnesty hearings would take on a quasi-judicial form involving legal representation and elements of due process while ii) the Amnesty Committee would function semi-autonomously, effectively by-passing the Commission itself. The Amnesty Committee was to be neither subject to direction from or intervention by the Commission nor accountable to the Commission. Both i) and ii) had to be of concern to the human rights community in relation to the amnesty issue, though in different ways. The central role of judges on the Amnesty Committee, making it a quasi-judicial process, could from a human rights perspective diminish principled objections to amnesty. But such a quasi-judicial amnesty process could also be more effective in protecting the rights of perpetrators while marginalising victims' access and rights as well as being less conducive to bringing about any kind of victim-perpetrator reconciliation. Similarly ii), the semi-autonomous functioning of the Amnesty Committee, could be conceived either as insulating the amnesty process from external or political interference or as conversely making it more susceptible to that.

Significantly the human rights submissions on the draft Bill did not comment on these aspects of the draft Bill. Only the LHR questioned the special appointment procedure of the Amnesty Committee, arguing that too much power was vested in the President and the Minister of Justice thereby calling into question the political independence of the Amnesty Committee. But rather than pursuing this point they argued that:

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<sup>304</sup> Section 13, draft Bill. The draft Bill stipulated that the Chairperson and Vice Chairperson of the Amnesty Committee should be appointed by the President and the other three members were to be appointed in consultation with the Minister of Justice whereas members of the Human Rights Violations Committee and the Reparations and Rehabilitation Committee were appointed by the Commission. Furthermore, the draft Bill stipulated that an Amnesty Committee should include at least two members of the Commission and at least one person who was not a member of the Commission. Furthermore, in the event the Commission did not include any judges as members. In practice this meant that both the key membership and the chairs of the Amnesty Committees had to come from outside the Commission

The special appointments procedure of the amnesty committee places the emphasis in the Bill on Amnesty rather than on investigation and recording of human rights violations and compensating victims of human rights violations.<sup>305</sup>

This may be taken as an indication that the human rights community had not yet taken on board the perpetrator-oriented focus of the amnesty process and was still mainly concerned with the notion of a victim-oriented truth and reconciliation process.

From their submissions it is clear that the human rights organisations were aware that the Amnesty Committee would be quasi-judicial in nature. But it is not entirely clear how the human rights community conceived of the nature of the amnesty process in general, and of the composition and location of the amnesty committee in particular, in relation to the overall TRC process. Presumably they still assumed that the amnesty process could somehow serve the same objectives of victim-oriented 'truth' and 'reconciliation'. It was only much later, in the course of the parliamentary debates on the Bill, and at the insistence mainly of the National Party, that a clause more explicitly entrenching the Amnesty Committee's distinctive status and role from that of the TRC was inserted:

No decision, or the process of arriving at such a decision, of the Committee on Amnesty regarding any application for amnesty shall be reviewed by the Commission.<sup>306</sup>

Further entrenching the Amnesty Committee's distinctive role within the TRC process was Mandela's appointment of Judge Hassen E. Mall -- who was not a commissioner of the TRC -- as chairperson of the Amnesty Committee in December 1995. Boraine records that he and a few others stressed the need for the chairperson of the Amnesty Committee to be a TRC commissioner and also for any amnesty decisions to be reviewed by the full commission, but these proposals were turned down.<sup>307</sup> There is little in the submissions to confirm that Boraine or others took issue with these provisions at this time, however it is true that the implications of these provisions became more pronounced only subsequent to the draft published in November 1994.

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<sup>305</sup> LHR 1995, section 8.1

<sup>306</sup> Section 5(e), PNUR Act

<sup>307</sup> Boraine 2001, p.116-117

### *5.2.5 Scope of the Amnesty Committee: definition of gross human rights violations and “acts associated with a political objective”*

The definition of gross human rights violations would determine the scope of the amnesty applications to be dealt with by the Amnesty Committee. The draft Bill defined gross violations of human rights to include “killing, attempted killing, abduction, severe ill-treatment or torture of any person during the period 1 March 1960 to 5 December 1993.”<sup>308</sup> Arguably this consequential definition of gross human rights violations should have been problematic for the human rights community. Certainly, the majority of human rights violation in apartheid South Africa was not of this kind of direct gross violations such as killing, attempted killing, abduction, torture, etc. While gross human rights violations (murder, torture, kidnapping etc) were committed against political dissidents and activists (as in Latin America), the majority of crimes that characterised apartheid were those which systematically denied non-white citizens their political, social and economic rights on a daily basis. Apartheid itself had been declared ‘a crime against humanity’ by the United Nations; it constituted a system of racial injustice and inequality that penetrated all levels of society. Accordingly, the focus of the human rights community’s activities during the years of apartheid was to remedy and limit the human right violations suffered by black people in this regard. But the greater part of these systemic and collective violations of human rights was not covered by the definition of “gross human rights violations” in the draft Bill.

Significantly, though, the human rights organisations generally did not object to the draft Bill’s definition of gross human rights violations. Instead many submissions noted that the limitation of the truth commission to the serious human rights violations was necessary in order for the process to be manageable within a limited time frame.<sup>309</sup> Mostly these organisations acknowledged that the definitions did not deal with the “broad crimes against humanity inherent in the Apartheid system” because almost the entire population had been subjected to these crimes and that in practice it would not be possible for the commission to deal with all these crimes.<sup>310</sup> The human rights community was thus more concerned with pragmatic considerations rather than the larger implications of these definitions. However, the definitions of gross human rights violations actually had important implications and

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<sup>308</sup> Draft PNUR Bill, section 1(vii)

<sup>309</sup> LHR 1994, section 3; HRC 1994, p.2; Kahanovitz 1994, section 4, p.3; Simpson 1994, pp.12, 15-16

<sup>310</sup> Simpson 1994, pp.15-16



consequences for both victims and perpetrators. In terms of the *victims* a broader definition of gross human rights violations, namely one that included some of the more systemic violations suffered under apartheid, would have had major implications i) for relevant participants in, and the focus of, the victims hearings and ii) for those qualifying for reparations. In relation to *perpetrators* a broader definition of gross human rights violations would similarly have extended the scope of those who needed to apply for amnesty. But the submissions were not particularly concerned with the complicity of 'bystanders' and 'beneficiaries', nor more generally with the systemic and social injustice of the apartheid system.

Another key feature of the amnesty that may have raised objections from the human rights community had to do with the definition of acts committed with a "political objective" as a justification for amnesty for human rights violations. The draft Bill said that amnesty could be granted for acts committed by:

- a) members and supporters of a publicly known political organisation or liberation movement who committed acts in furtherance of a related political objective in the course of the political turmoil
- b) any member of the security forces who "in the course and scope of his or her duties and within the scope of his or her express or implied authority directed against a publicly known political organisation or liberation movement engaged in political struggle against the state or a former state by civil war/ insurrection or political turmoil... with the objective of countering or otherwise resisting the said struggle."<sup>311</sup>

From a human rights perspective this could have been of special concern in so far as it went directly against the Nuremberg principle that "superior orders" could not be invoked in justification of human rights abuses. This raises the question of why violations committed with a *political objective* could be considered for amnesty but not other crimes. Is the implication that human rights violations with a *political objective* are less problematic than those with a non-political objective? On the question of "superior orders" the first submission by CSVN raised the point that it could imply a dangerous principle in government that

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<sup>311</sup> Draft PNUR Bill, Section 1(1)(a)(b). Draft 1(1)(c) stated that the acts did not include any act or omission committed for personal gain, out of personal malice or in furtherance of acts where there was no reasonable correlation between the act committed and the objective pursued.

“officials may use criminal means in the execution of State objectives because ... government will be protected by virtue of the fact that they acted as officials under orders.”<sup>312</sup> Aside from this point made by CSVR, no other submissions considered the issue. Again this stands in stark contrast to the Argentine human rights community who rejected Alfonsín’s attempts to narrow down prosecutions by prosecuting only those who were responsible for giving out orders while “excusing” lower ranked officers on the grounds that they were acting under orders.

#### 5.2.6 *The Implications of Amnesty for Victims’ Rights to Claim Civil Liability*

The draft Bill made provision for indemnity against criminal *and* civil liability for human rights violations.<sup>313</sup> In terms of criminal liability, granting perpetrators amnesty effectively precluded state prosecution of perpetrators of human rights violations. Regarding civil liability, the proposed amnesty furthermore prevented victims from instituting *civil* proceedings against their alleged perpetrators and would effectively annul the rights of victims’ to claim civil remedies from their alleged perpetrators. While the submissions from human rights organisations indicated a general willingness to go along with the indemnity for the criminal liability of perpetrators of gross human rights violations, the indemnity for their civil liability elicited some criticisms and objections. The context of this was the involvement of some organisations, particularly LHR and LRC, in civil claims instituted against the Minister of Law and Order especially in the aftermath of the Harms and Goldstone Commissions as discussed in Chapter Three.

The KZN NGO Forum argued that in general the right not to institute criminal proceedings is vested in the state and so therefore it is the prerogative of the state to grant amnesty against prosecution. *However* this should not restrict the rights of an individual to institute private prosecutions. They argued that amnesty from civil liability would infringe on the individual’s right to claim compensation/remedy in respect of losses/damages by instituting civil proceedings.<sup>314</sup> Some human rights organisations maintained in their submissions that amnesty should not prevent victims from bringing civil claims against their perpetrators as this would violate the rights of victims to claim compensation for losses and damages

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<sup>312</sup> Simpson 1994, p.23

<sup>313</sup> Draft PNUR Bill, section 16(5)(a)

<sup>314</sup> KZN NGO Forum 1995; LHR 1995, section 2.2

incurred.<sup>315</sup> However, few of the submissions discussed or explained how amnesty for criminal liability but not for civil liability could possibly have been practically feasible. The Black Sash simply said that it would be acceptable for the new government to be immune from civil claims, but that alleged perpetrators who may be living off the proceeds of services rendered in furtherance of apartheid should not be immune from civil claims.<sup>316</sup>

In general, the human rights community reasoned that perpetrators should be civilly liable because it was the right of the victim to be adequately compensated for damages suffered. Many organisations conceded that should the state make provisions for reparations to be paid to victims then this may stand in lieu of civil claims against individual perpetrators.<sup>317</sup> This is again demonstrative of the human rights community's primary concern for the needs of victims as the focus of the truth commission as opposed to claims for (retributive) justice. Nonetheless the suggestions of the human rights community amount to an attempt to make the conditional amnesty more compatible with the needs of victims.<sup>318</sup>

#### *5.2.7 Extra-judicial Sanctions: Lustration and Naming*

Almost all the submissions by human rights organisations were critical of the fact that the Bill made no provision for extra-judicial sanctions such as 'lustration' (i.e. disqualifying perpetrators of gross human rights violations from holding official or public positions) in conjunction with amnesty. Most in the human rights community were of the view that amnesty recipients should not be eligible for, nor continue to hold, public office.<sup>319</sup> It was suggested that the Amnesty Committee should be empowered to bar amnesty recipients from holding public office or positions of authority. Furthermore, those who received amnesty for

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<sup>315</sup> Independent Board of Inquiry. 1995. *Submission on Truth Commission Bill*. January 12. (Board members of IBI include Alex Boraine, Frank Chikane, Brian Currin, John Dugard, Sheeha Duncan.) Black Sash 1995, p2; KZN NGO Forum 1995; LHR 1995 Section 2.2

<sup>316</sup> Black Sash 1995, p2

<sup>317</sup> KZN NGO Forum; LHR 1995, pp.6-7

<sup>318</sup> Interestingly, these submissions anticipated the Constitutional Court's judgement in the AZAPO court case which overruled an application to have the amnesty part of the PNUR legislation declared unconstitutional. In AZAPO the denial of victims' rights to civil action was justified by the provision of an alternative reparations mechanism (the Rehabilitation and Reparations Committee).

<sup>319</sup> CSVR 1995, p.8-10; LHR 1995, section 2.3, KZN NGO Forum 1995, Black Sash 1995, pp.2-3; IBI 1995, p1. Religious organisations concurred on this point; the SACC and the World Conference on Religion and Peace made submissions to this effect.

human rights abuses should be prohibited from serving in the police force, defence forces or security forces generally.<sup>320</sup>

The CSVR's rationale for lustration of those granted amnesty was partly 'forward-looking' saying that unless these perpetrators were removed from public office transformation of these institutions would be difficult.<sup>321</sup> CSVR and the LHR did however also conceive of lustration as a punitive measure and as an additional way of holding perpetrators accountable.<sup>322</sup> CSVR held that the absence from the draft TRC Bill of a "lesser sanction, short of criminal prosecution or civil liability" was unacceptable as it allowed "people who have murdered, abducted and tortured to have done so with complete impunity."<sup>323</sup> It conceded that publication of the names of those granted amnesty would constitute a form of sanction against perpetrators (a measure of public shaming) but maintained that it was not enough and that amnesty recipients should also be removed from public office. The LHR similarly submitted that "those who committed human rights violations must be held accountable and the Commission should be able to recommend other measures which may be taken against perpetrators who have received amnesty."<sup>324</sup>

The suggestion to include lustration as an extra punitive measure for perpetrators receiving amnesty is evidence again of an attempt by the human rights community to make amnesty more compatible with concerns of retributive justice. However, apart from the suggestion that perpetrators be removed from public office, the submissions did not make suggestions for how civil society institutions themselves could become involved in lustration. It is conceivable that civil society and professional associations could have played a role in lustration by disbarring medical professionals who had been involved or complicit in torture for example.

#### *5.2.8 Amnesty and 'Even-handed' Justice*

It was well-established that both the apartheid state and the liberation movements had engaged in political violence during past conflicts. The ANC had been committed to the

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<sup>320</sup> KZN NGO Forum 1995, p.66; LHR 1995, section 2.3

<sup>321</sup> CSVR 1995, p.8

<sup>322</sup> CSVR 1995, p.8; LHR 1995, section 2.3. Of the submissions that made suggestions to this effect, only the CSVR and the LHR actually gave written reasons for their suggestions.

<sup>323</sup> CSVR 1995, p.8

<sup>324</sup> LHR 1995, section 2.3

“armed struggle” which included sabotage, bombings, armed assaults etc. in some cases involving civilian targets. Whether these constituted human rights violations depended on one’s interpretation of just war principles. On the “just cause” interpretation political violence used in defence of the unjust apartheid regime constituted human rights violations but not the political violence used in the armed struggle against apartheid rule. So on this interpretation amnesty was needed for agents defending apartheid but not for combatants who had been involved in the armed liberation struggle. On the alternate “justice in war” interpretation, human rights violations are possible on both sides regardless of “just cause”. The issue of exactly who need apply for amnesty or else face possible prosecution for human rights violations thus arose.<sup>325</sup> It was stated in the draft Bill that gross violation of human rights included those by “a) an agent, member or supporter of the State, any former state or political organisation or movement; or b) any other person active with a political motive”<sup>326</sup> This suggested a “justice in war” rather than a “just cause” interpretation, and implied that not only state agents but also members of the liberation movement would need to apply for amnesty for gross human rights violations.

The Human Rights Commission, in its first submission, argued that the Commission should take an ‘even-handed’ approach to human rights abuses.<sup>327</sup> In its first submission in mid-1994, CSVR also held that abuses of ‘all sides’ of the political conflict in SA should be subject to investigation.<sup>328</sup> Human rights organisations were concerned mainly with abuses committed by the apartheid government and forces but they were also concerned with human rights abuses committed in the course of the armed struggle. This view was compatible with a principled human rights response which treats all human rights violations equally regardless of who they are committed by and for what reason.

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<sup>325</sup> Not surprisingly the right-wing dealt with the issue extensively in their submissions. Members of the right wing feared that the TRC would turn into an ‘Afrikaner witch hunt’.<sup>325</sup> The right-wing was therefore keen to stress the fact that serious human rights violations had also been committed by anti-apartheid operatives. Presumably this was an effort by right-wing Afrikaners to assuage or deflect from their culpability for human rights violations. See Political Rights Organisation. 30 January 1995; Support Police Action Group. *Submission on Draft PNUR Bill*, Cover Letter to Minister of Justice Dullah Omar. Re: Truth Commission, 28 June 1994; Van der Merwe, Johann. 1994. *Further Proposals by the South African Police on the Truth and Reconciliation Commission*, September 14, p.7. Of course the NP also raised this matter in its submission on the PNUR Bill.

<sup>326</sup> Draft Bill, section 1(vii)(a)(b)

<sup>327</sup> HRC 1994, section 2

<sup>328</sup> Simpson 1994, pp.11,17

### 5.2.9 Complementary and Follow-up Prosecutions

What was significant about (and unique to) the proposed amnesty was that perpetrators of gross human rights violations who did not apply for amnesty, or who were denied amnesty by the Amnesty Committee, were to be liable to prosecution in the new dispensation. It was mentioned earlier that the very fact that individuals had to apply for amnesty meant that it was not an automatic or a blanket amnesty such as the amnesties in Chile and Argentina. What distinguished this amnesty was therefore that *only* individuals granted amnesty were immune from prosecution. Implicit in this compromise then was an understanding that perpetrators who were refused amnesty, or did not apply for amnesty, could and would face prosecution. Without the counter-part of prosecutions, those who did not apply for amnesty, which was the majority of perpetrators of human rights violations, would have effective impunity comparable to those covered by a formal amnesty.<sup>329</sup> Certainly, the human rights community could be supportive of the amnesty in so far as it was *not* an automatic blanket amnesty encouraging impunity but rather involved an individual and conditional application process providing not only a means to the truth but also some measure of accountability. Logically then, the complementary and follow-up prosecutions should have been a priority for these organisations.

However, the draft Bill made no arrangements for, nor did it make explicit reference to, any such complementary or follow-up prosecutions. This momentous omission was noted only by the Black Sash which submitted its concern that the draft Bill made no provision for the handing over to the Attorney-General of cases where amnesty had been refused to be considered for prosecution.<sup>330</sup> It also remarked on the fact that the Commission was not given any powers to direct the Attorney-General to prosecute. No other organisations took the issue up in any sustained way.

Instead, in their submissions most human rights organisations drew attention to the proposed Commission's lack of a comprehensive strategy for an effective investigations unit and

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<sup>329</sup> In the event only 1167 people received amnesty. Considering the high levels of political violence especially in the years leading up to the 1994 transition, this was a small portion of perpetrators

<sup>330</sup> Black Sash 1995, p.2

‘strategy’.<sup>331</sup> The lack of planning for an effective investigations unit was seen as a major defect in the draft Bill with some arguing that the success of the Commission was largely dependent on an effective investigations unit. Concern was also raised by historians and archivists that the TRC would have to rely on evidence from official records, much of which had been destroyed. The TRC would therefore need to make a special effort to recover these official documents and thus it was suggested that provision be made for this in the Bill.<sup>332</sup>

The strong emphasis on the need for a competent investigation unit and also for the need to prevent documents from being destroyed in anticipation of investigations by the TRC demonstrates the human rights community’s priority for the truth to be made known. On the other hand, the fact that the human rights community did not pursue the ‘flipside’ of the amnesty deal, namely the complementary and follow-up prosecutions demonstrate that they were not so much concerned with claims of retributive justice in relation to the perpetrators of gross human rights violations but more with the victim-oriented aspects of the truth process.

### **5.3 Impact of the human rights community’s proposals**

After the Portfolio Committee received the written and oral submissions on the draft Bill, the Bill was extensively debated in parliament and among political parties. There was a protracted parliamentary process involving numerous rounds of debates on, and amendments to, the final legislation. This involved a complex set of interactions between officials in the Justice Department and members of the Select Committee on Justice who proposed repeated amendments. These developments are not the subject of this thesis and cannot be dealt with in any depth.

However, a number of suggestions by the human rights community in their submissions on the draft TRC Bill were incorporated into the final TRC Act. The most significant of these and the one which was to have the greatest impact on the amnesty process was the final decision to hold public amnesty hearings. This suggestion was initially rejected by the government, mainly because of the pressure from the NP and right-wing groups to hold the amnesty hearings in private. The NP was so insistent that it was only after civil society and

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<sup>331</sup> IBI 1995; LHR 1995, section 7.1-7.4, KZN NGO Forum 1995

<sup>332</sup> South African Society of Archivists 1995, Freedom of Expression Institute 1995

the human rights community campaigned in favour of public amnesty hearings that the Bill was amended to allow for public hearings.<sup>333</sup> This meant that the amnesty hearings would be open to the public and also to the media who could learn first hand of public disclosures made to the amnesty committee.

The majority of suggestions made by the human rights community and discussed above were however ignored. Certainly the LHR's suggestion that amnesty only be granted to already convicted perpetrators was not incorporated into the Act. The suggestions of the human rights community for the amnesty to cover criminal liability only and not civil liability were rejected as were suggestions that the amnesty be accompanied by the lustration of perpetrators. The Black Sash's suggestion that the Act make provision for a prosecutions strategy was also not taken up, the significance of which will be taken up in the concluding chapter.

#### **5.4 Conclusion**

The submissions from the human rights community amounted to *constructive* input on the amnesty process with notably little principled opposition to the provision for amnesty. Although most of the human rights community's suggestions were not incorporated into the TRC Act, finalised after further debate and drafting at the level of parliament and the Justice Portfolio Committee, it was only the issue of in-camera hearings that the human rights community rejected outright and followed up on with sustained protest action. This opportunity was afforded to the human rights community by virtue of the SA truth commission being created by parliamentary decree and with the input of civil society, unlike in the Argentine truth commission which was created by presidential decree and with limited or no public consultation. The parliamentary process for creating the truth commission made a remarkable difference to the eventual SA TRC process compared to truth commissions in both Chile and Argentina which were held in private and made known to the public only through a final report. While the Argentine government was fearful to conduct the truth commission as a parliamentary commission for fear that it might be too amenable to the "extreme" demands of the human rights movement, it would appear that Dullah Omar and the

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<sup>333</sup> For media reports on this see footnote 50



new government did not have similar reservations regarding the anticipated response from civil society and the human rights movement.

Regarding the human rights community's response to the mechanism of amnesty tied into the truth commission, one would imagine a significantly different response from the Argentine human rights community. Whereas the SA TRC incorporated a mechanism for amnesty, the Argentine truth commission was eventually handed over to the judiciary for the purpose of assisting prosecutions against perpetrators of human rights atrocities. Furthermore, unlike the SA human rights community, many of whom reasoned that the amnesty was acceptable partly because it played a necessary function in the transition, the Argentine movement was insistent on the principle of retributive justice for the perpetrators of all human rights atrocities regardless of the implications for peace and political stability. According to their submissions, the majority of the human rights community's views were consonant with the spirit of the Postamble that postulated "in order to advance reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past."<sup>334</sup> The general discourse of the human rights community in the conferences and indeed in their submissions on the general aspects of the TRC confirms that, unlike the Argentine human rights movement, it was mostly sympathetic to these arguments.

The implication of the submissions by the human rights organisations was that justice need not necessarily be achieved through through prosecutions and punishment of perpetrators of past political atrocities but that an individual and conditional amnesty tied into a truth commission with a focus on the victims was a satisfactory compromise. The submissions from the human rights community suggest that it was because of the special individual and conditional features of the amnesty that would promote truth recovery and that were granted within a context of a victim-centred mechanism for dealing with the past that the amnesty was an acceptable compromise. The submissions imply that a blanket amnesty would *not* have been acceptable in the same way as an individual amnesty conditional on full *public* disclosure was. Nonetheless, the prospect of amnesty for human rights atrocities, albeit individual and conditional, remains highly problematic from a human rights perspective.

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<sup>334</sup> Ibid.

## **CHAPTER 6: CONCLUSION**

Before concluding on the bases of the analysis thus far, the first part of this chapter gives a brief overview of the amnesty process and its aftermath with particular emphasis on the implications for further prosecutions, including the role of the human rights community in this regard. What role did the human rights community play in the amnesty committee and the implied complementary and follow-up prosecutions that were to take place in conjunction with the Amnesty Committee?

### **6.1 The Amnesty Process and its aftermath: AZAPO, Prosecutions Policy, Presidential Pardons**

The TRC Act was signed into law on the 19<sup>th</sup> July 1995 and came into effect with the appointment of the Commissioners on 15 December 1995. The selection of TRC Commissioners involved an extensive public nomination process driven largely by civil society. In the event some key members from the human rights community who had been involved in the TRC legislative process actually became TRC Commissioners while many others became involved in the commission in other ways.<sup>335</sup> Boraine was elected Vice Chairperson of the Commission while other members of the human rights community were elected as commissioners including Mary Burton and Yasmin Sooka. This public nomination process did not extend to the selection of members for the Amnesty Committee who were instead appointed by the President with no public input.

Soon after the signing in of the Act, the Amnesty Committee of the TRC was subjected to a legal challenge brought before the Constitutional Court on 1 July 1996 by the Azanian Peoples Organisation, a black consciousness movement, and relatives of five slain apartheid victims, namely Steve Biko, Victoria and Griffiths Mxenge, and Fabian and Frances Ribeiro.<sup>336</sup> The claimants submitted to the court that the amnesty denied victims of human rights violations the opportunity to claim civil remedy which was in conflict with the Constitution. It was furthermore argued that the amnesty legislation was a breach of the

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<sup>335</sup> The selection of TRC Commissioners involved an extensive public nomination process largely driven by civil society.

<sup>336</sup> *Azanian Peoples Organization (AZAPO) v the President of the Republic of South Africa* CCT 17/96, [1996].

state's obligation under international law to investigate and prosecute gross human rights violations.

The judgement delivered on 25 July 1996 by Mohammed DP rejected the application to have the amnesty declared unconstitutional and controversially declared that the South African amnesty was *not* in contravention of international law.<sup>337</sup> The court case was not publicly supported by the human rights community – instead it was the initiative of this small group of family members of the victims and AZAPO. Considering the submissions from human rights organisations that the amnesty should not cover *civil* liability and that this was one of the key arguments made by the claimants in the AZAPO case, it is surprising that more members of the human rights community did not join the case.

There was however some further criticism of the amnesty, not from the human rights community as such but from Khulumani Victim Support Group, a victim-based NGO formed in 1995 as a subsidiary of the CSVR. When it formed in 1995, Khulumani protested that the TRC had not adequately informed victims about the implications of amnesty for the victims before the hearings began.<sup>338</sup> The victim organisation demonstrated their discontent by organising a picket outside the Johannesburg TRC office. To what extent the human rights community was sympathetic to Khulumani's protests would require further research. However, on the surface of it appears that the human rights community did not generally back Khulumani's protests. The protest and the court challenge by the relatives of the victims appeared to be the first genuine voices of protest against the amnesty. In the end however, these late challenges to the amnesty did not have any significant impact.

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<sup>337</sup> On this subject see Dugard, John. 1997. 'Is the Truth and Reconciliation Process Compatible with International Law? An unanswered Question', *South African Journal on Human Rights* 13: 268-268. On the question of whether the amnesty was permitted to cover criminal acts, the Court argued i) for the necessity of the amnesty for the sake of a (peaceful) transition, and ii) that victims of apartheid were foremost in need of the truth and that the granting of amnesty through the truth commission, as opposed to prosecuting perpetrators, was the best way of providing victims with the truth of human rights abuses. *AZAPO v the President*, par 17; Also see Klaaren & Varney. In *The Provocations of Amnesty*, p 274 On the question of civil liability, the Court upheld that the amnesty would include immunity against civil liability arguing: i) the one was that perpetrators would be less likely to come forth with the truth if there was a threat of civil claims being brought against them and, ii) the TRC Act made provision for reparations to victims and thus the victims' right to seek compensation for damages was not contravened by the Act. See also Sarkin, Jeremy. 1996. Trials and Tribulations of South Africa's Truth and Reconciliation Commission. *South African Journal on Human Rights* 12, pp. 617-640

<sup>338</sup> *Ibid.* at p. 66

Volumes Six and Seven of the TRC Report, covering the work of the Amnesty Committee were presented to the President only on 21 March 2003.<sup>339</sup> In total, the Amnesty Committee registered 7115 applications.<sup>340</sup> Of these applications, 5489 were dealt with in chambers, and the majority were rejected as they did not comply with the criteria of political motivation and were largely from opportunistic ordinary criminals.<sup>341</sup> Thus, the actual number of applications is closer to 2500<sup>342</sup> of these only 1167 people received amnesty and 145 received partial amnesty.<sup>343</sup> This is deemed to be a significantly low number and there is little doubt that the number of perpetrators who received amnesty covered a small fraction of the gross human rights violations that were committed between 1960 and 1994.<sup>344</sup> As Sarkin points out, this is an especially low number when one considers that in the four year period in the lead up to the negotiations there were more than 16 000 deaths as a result of the political struggle.<sup>345</sup> It also suggests that by the end of the amnesty process, there was still a large number of individuals who, according to the terms of the amnesty in the TRC were liable for prosecution.

The TRC Report recommended that prosecutions should go ahead for those who had not applied for, or who had been denied amnesty:

Where amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation. In this regard, the Commission will make available to the appropriate authorities information in its possession concerning serious allegations against individuals (excluding privileged information such as that contained in amnesty applications). Consideration must be given to imposing a time limit on such prosecutions. Attorneys-general must pay rigorous attention the prosecution of members of the South African Police Service who are found to have assaulted tortured and/or killed persons in their care.<sup>346</sup>

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<sup>339</sup> The amnesty process was significantly delayed and only held its first public hearing in May 1996, a few months after the rest of the TRC began its work. The TRC only completed its work at the end of 2002, which was four years after the TRC had disbanded.

<sup>340</sup> TRC Report, Vol. 6, Section 1, Chapter 3, paragraph 4

<sup>341</sup> Sarkin 2004, p. 111

<sup>342</sup> Sarkin 2004, 113,

<sup>343</sup> Sarkin. 2004. .107, 113

<sup>344</sup> Sarkin, 2004 p. 113-115; Pigou, Piers. 2003. Degrees of Truth: Amnesty and Limitations of the Truth Recovery Project. In *The Provocations of Amnesty: Memory, Justice and Impunity*. Eds. Charles Villa-Vicencio & Erik Doxtader. Claremont, South Africa : David Philip Publishers, p. 219

<sup>345</sup> Sarkin. 2004. P115

<sup>346</sup> TRC Report. 1998. Vol.5, Chapter 8, para 14

From a principled human rights perspective the government had a duty to investigate and prosecute cases beyond the work of the Amnesty Committee.<sup>347</sup> At the time however, there was “no dedicated body in the criminal justice system tasked with investigating and prosecuting political crimes of the past.”<sup>348</sup> As pointed out in the previous chapter, the TRC legislation did not make any provision for (or even *mention of*) a strategy for prosecutions for perpetrators who would be denied or not apply for amnesty. Significantly, there was no attempt on behalf of the human rights community to have this momentous omission rectified. The human rights community made virtually no comment on the need for follow-up prosecutions.

In this light, it is perhaps not surprising that 15 years on from the TRC and 8 years on from the closing of the Amnesty Committee, there is still much ‘unfinished business’ regarding the lack of follow-up prosecutions and that there has furthermore, until recently, been little action from the human rights community to deal with the problem.<sup>349</sup> Despite the legitimate expectation that those who did not receive amnesty would be prosecuted through the criminal justice system, only a few trials relating to apartheid human rights atrocities have been conducted. These were generally poorly investigated and tried and resulted in just a few convictions.<sup>350</sup> For various reasons, prosecutions were mostly put on hold until the Amnesty Committee had concluded its work. However, even after the Amnesty Committee finished in 2003, there have been almost no follow-up prosecutions. The South African National Directorate of Public Prosecutions (NDPP) was restructured in March 2003 to include a Priority Crimes Litigation Unit with a mandate to investigate “matters emanating from the

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<sup>347</sup> The TRC did have the power to request that criminal proceedings against amnesty applicants be suspended pending the outcome of their applications.

<sup>348</sup> Klaaren, Jonathan & Howard Varney. 2000. A Second Bite at the Amnesty Cherry-Constitutional and Policy Issues around Legislation for a Second Amnesty. *South African Law Journal* 117, p. 572, 575. Two small inquiries were set up, one in the Transvaal and one in KwaZulu Natal. Neither of these inquiries had prosecutions as their primary objectives. The inquiry set up in the Transvaal was primarily to cleanse the death squads in the Transvaal, and Vlakplaas in particular. The KwaZulu Natal inquiry was ultimately to investigate the ongoing political violence in the province with the hope of intervening and resolving in the bloody conflict. See Klaaren & Varney 2000, p.575

<sup>349</sup> Another contentious issue in terms of the “unfinished business” of the TRC has to do with reparations. While the TRC only made recommendations for reparations to be made by government to victims, the government has lagged behind with paying out individual financial reparations to apartheid victims and survivors and when reparations were paid out it was done so without consulting important stakeholders and representatives of victims groups. This despite civil society’s considerable lobbying around the issue of reparations which appeared to be ranked very low on the government’s list of priorities. See the article by Makhalemele, Oupa. 2004. Still not talking: Government's exclusive reparations policy and the impact of the 30 000 financial reparations on survivors. *Centre for the Study of Violence and Reconciliation*, p. 4

<sup>350</sup> Sarkin 2004. pp. 373-379

TRC Process”, with an emphasis on prosecutions and missing persons.<sup>351</sup> However, the Unit was weak and has virtually no investigative capacity and the few cases that were initiated after 2003 were, according to the CSVR, met with “procedural obstacles and institutional lethargy.”<sup>352</sup>

Policy amendments to the prosecution policy allowed “for the non-prosecution of those who met the TRC requirements for amnesty” and “provided additional open-ended criteria under which the NDPP could decline to prosecute, even where there was enough evidence to secure a conviction.”<sup>353</sup> It made no provision for victims to have access to the truth disclosed by perpetrators and was a completely exclusionary process. The prosecution guidelines relating to the prosecution of “matters relating to the past” were furthermore, unlike the TRC legislation, drawn up without any consultation from the public and victims.<sup>354</sup> The Legal Resources Centre, on behalf of relatives of victims and three human rights organisations – Khulumani, the South Africa office of the International Centre for Transitional Justice (ICTJ) and CSVR – argued in the Constitutional Court that the guidelines were unconstitutional and amounted to a “copy or duplication of” the TRC amnesty process.

Another related issue is the more recent proposals of a framework policy for ‘presidential pardons’. In November 2007, President Mbeki announced that there would be a special pardons process for alleged political offenders who had committed crimes in the past and up until 16 June 1999. Despite Mbeki’s statement that the process would “uphold and be guided by the principles, criteria and spirit of the TRC” the special dispensation for political pardons was shrouded in secrecy and didn’t allow for victims to make representations regarding decisions about who would get presidential pardon. An application to interdict the President from granting pardons under this pardons process was therefore brought by a coalition of human rights organisations – CSVR, Khulumani, Human Rights Media Centre, Freedom of Expression Institute, Institute for Justice and Reconciliation, ICTJ (South Africa) – on the grounds that the special dispensation to grant pardons to political prisoners was

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<sup>351</sup> See Priority Crimes Litigation Unit. Guidelines. Available online at:

<http://www.npa.gov.za/UploadedFiles/About%20PCLU%20signedoff.pdf> [accessed 15 January 2010]

<sup>352</sup> Ernest, Carnita. 2004. Reconciliatory Justice: Amnesties, Indemnities and Prosecutions in South Africa’s Transition. Centre for the Study of Violence and Reconciliation, p.13

<sup>353</sup> Centre for the Study of Violence and Reconciliation. 2008. *Press Release: NPA Prosecutions Policy for Apartheid Crimes Struck Down*, Available online at:

[http://www.justiceforum.co.za/NPA\\_Prosecution\\_Policy.pdf](http://www.justiceforum.co.za/NPA_Prosecution_Policy.pdf) [Accessed 20 January 2010]

<sup>354</sup> Ibid.

unconstitutional and violated the rights of victims and interested parties to make representation.

Up until this time these human rights organisations do not appear to have received strong support from the wider human rights community for their objections to the lack of follow-up prosecutions. Civil society in South Africa has been relatively quiet and inactive with regard to the hiatus in prosecutions and legal proceedings in post-apartheid South Africa.<sup>355</sup> Civil societies' engagement with post-TRC issues has also been relatively ad-hoc and piecemeal and has been limited to a 'reactive' role by way of litigation.

## 6.2 Conclusion

The historical accounts of the Argentine and South African human rights communities' debates around the emerging problem of accountability for human rights atrocities has shown that the ways in which the issue of amnesty emerged as a human rights issue, both in terms of timing and in terms of content, differed significantly.

In Argentina, early attempts by the military to entrench a self-amnesty at the beginning of 1983 were met with fierce opposition from the human rights movements. However, unlike in SA, amnesty was not posed as a precondition for the transition. At the time that the Argentine junta proposed a general self-amnesty, the junta did not appear to have the power to insist on a general amnesty. This contrasts to the case in South Africa where the Government of National Unity ostensibly relied on the cooperation of the prior regime to secure a smooth and peaceful transition while the security forces insisted on amnesty. Another important factor that sets the Argentine transition apart from the South African transition was the extreme violence that characterised the lead up to the political transition in SA. As shown in Chapter Three, the extent of the increasing political violence was a major concern for human rights organisations at the time. A negotiated settlement offered a solution to the violence; and a negotiated settlement (ostensibly) rested on the provision of amnesty for apartheid human rights atrocities. Thus, it is conceivable, that an amnesty with the prospect of bringing about peace and an end to the violence became acceptable to the human rights community at the time.

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<sup>355</sup> Wannenburg, Gail. 2003. *Post TRC Legal and Truth Seeking Activities in South Africa: an Evaluation of the Way Forward*. Centre for the Study of Violence and Reconciliation.

In the case of Argentina it was only two years after the official transition that the military became more of a threat to the new Alfonsín administration. It was only at this point that, responding to fears of a military backlash, Alfonsín attempted to limit the scope of the prosecutions for human rights atrocities. This was then met with fierce opposition from the human rights movement and particularly the victims and family organisations within the movement. This however was at a time when the human rights movement's demands for retributive justice had gained considerable momentum and popular support. Importantly, the issue of amnesty in the case of Argentina was never framed as part and parcel of a negotiated transition in the same way as the South African amnesty was part of the negotiated settlement reached at CODESA II. So, whereas in South Africa, the amnesty issue was framed first and foremost as a transitional justice issue and as a requirement for a peaceful transition, this was not the case in Argentina where the issue was approached, at least initially, solely from the perspective of a human rights movement with an agenda for truth and (retributive) justice.

It is significant that in the case of South Africa there was no central *human rights movement* focused on issues of truth and justice comparable to the Argentine human rights movement. In Argentina, victims and relatives groups, set up in the early days of the repression, articulated their demands for transitional justice, in terms of "truth" and "justice" at a very early stage of the transition. Indeed, by the time of the transition a forceful human rights *movement* with victims and family organisations and human rights organisations at its core had developed. In the lead up to the transition, the movement rallied around their central demands for truth about the disappeared and prosecutions for human rights atrocities. The human rights movement had influenced the public discourse around transitional justice to such an extent that political parties used it as part of their election campaigns to gain votes in the 1983 elections. The candidate that demonstrated more of a commitment to a principled human rights approach to transitional justice than any other was Alfonsín who won the elections over the traditionally more popular Peronist party.

In comparison, the human rights community in South Africa could firstly not be characterised as a *movement*. While there were significant social and political anti-apartheid movements in South Africa in the lead up to and during the transition these can not be classified as human rights *movements* as such. Indeed, while the SA human rights community was a part of the anti-apartheid 'struggle' they did not figure in any major way. Civil society and the human



rights community in South Africa did not have a base that was independent of political movements as in Argentine. Instead, the human rights community was part of the anti-apartheid struggle in a minor and more secondary capacity.

The SA human rights community's general response to the transition had been focused on socio-economic injustices that were the result and legacy of apartheid. As shown in Chapter Three, from early on the human rights community signalled its intention to take forward socio-economic issues of development, health, and education etc as matters of priority in the 'new' South Africa. Significantly, among their priorities was *not* the issue of amnesty/prosecutions/accountability for apartheid human rights atrocities, certainly not in way comparable to the Argentine human rights movement. In comparison to the Argentine human rights movement there was generally no *single* and coordinated agenda among members of the human rights community in terms of their approach to amnesty and transitional justice, with the exception of the human rights community's later mobilisation for public amnesty hearings.

The SA human rights community's response to the issue of socio-economic injustices as its central concern in the context of the transition can possibly be understood using Tina Rosenberg's distinction between different "legacies of injustice". Certainly a response to the "legacies of injustice" must be shaped by the content and context of human rights violations to be dealt. In this sense Rosenberg's distinction between Latin America's "regimes of criminals" and the Communist dictatorships "criminal regimes" is a crucial one. In the case of the former, victims need the truth and also justice for human rights atrocities. In the case of the latter, victims need to know the truth about what happened but "more than anything else...these victims need a new society that works better than the old."<sup>356</sup>

While direct human rights violations (murder, torture, kidnapping etc) were committed against mainly outspoken political dissidents and activists (as in Latin America), the majority of human rights abuses under apartheid were a direct consequence of the apartheid *system* of institutionalised racism, a system that was itself a 'crime against humanity.' Unlike in Latin America and Eastern Europe, the apartheid system was also based on and perpetuated by intense racial divisions between whites and non-whites.

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<sup>356</sup> Rosenberg 1999, p. 342

In South Africa there was therefore a need for truth and justice but also for affirmative action and a new social and economic “system”. As a response to the intense racial divisions, there was also a need for societal reconstruction and reconciliation at both the individual and political level. Apartheid left a legacy of injustice that “truth” and retributive justice through the courts alone could arguably not address. Importantly, in the South African transition, the nature and extent of violations required a range of responses to a range of problems. It is arguable that prosecutions would not have impacted on this in any significant way. Rather, a strong and enforceable Bill of Rights in the Constitution, with an effective and functional democratic state, to implement and ensure these rights would be a more appropriate ‘remedy’ and as such, given the focus of the human rights community on such socio-economic issues would likely have been of more concern to the human rights community at the time than prosecutions and retributive justice.

Given the human rights community’s relative lack of concern for retributive justice at the early stages of the transition, it is not surprising that the lack of follow-up prosecutions has not occasioned more of an outcry from the human rights community. While in the case of Argentina, human rights organisations and victims groups have sustained their call for prosecutions for human rights atrocities this has not been the case at all in South Africa. This may appear especially surprising considering that the legitimacy of the conditional South African amnesty arguably rested on the complementary and follow-up prosecutions. Instead of foreclosing the option of prosecutions, the South African amnesty actually implied prosecutions as a necessary counterpart to the individual and conditional amnesty agreement. However, as discussed in Chapter 5 there was no strategy or plan set up for how complementary and/or follow-up prosecutions would be dealt with. This was indeed a momentous omission – one that the human rights community failed to problematise and address at the time.

As discussed in the previous subsection there has been some organised action by a few human rights organisations around the issue of outstanding prosecutions. This is yet to develop into sustained action and activism comparable to that in Argentina. There is room for further research regarding the extent to which the human rights community has followed through on their demands for the amnesty process.

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