Introduction

South Africa's transition to democracy is often heralded as a 'miracle', and it is not difficult to see why this should be so.[1] By the early 1990s South Africa was disintegrating politically and deteriorating economically. Its government was not only morally bankrupt but also increasingly inefficient at curbing the ever-rising levels of political violence.[2] The overall death toll from political incidents rose sharply between 1980 and 1990, and even more so after the release from prison of Nelson Mandela and the unbanning of the African National Congress (ANC) and other previously proscribed organisations in February 1990.[3] Moreover, an increasing proportion of killings were directly attributable to non-state agents[4] (though suspicions persist that many of these were due to vigilante groups whose activities were tolerated if not supported by the police and that there existed a 'third force' resulting from a security force strategy to act in non-traceable ways through third parties).[5]

[1] See esp Friedman and Atkinson 1994; Sparks 1995; Waldmeir 1997; Guelke 1999. For a recent stock-taking of post-apartheid South Africa, see Sparks 2003.

[2] For good general historical overviews, see Davenport and Saunders 2000 and the illustrative but less detailed Morris *et al.* 2004. The immediate pre-negotiations and negotiations period receive excellent in-depth coverage in Friedman 1993; Adam and Moodley 1993; Davenport 1998. For useful and concise explanations of the history and roles of the main political players in the negotiations process, see Eades 1999.

[3] For pertinent statistics, see Coleman 1998 esp table 4 and figures 13, 14, 16, 18 and 19, as well as his analysis at 157–223. See also Marks 1992; Wardrop 1992.

[4] This is suggested by the statistics cited in note 3 above. See also Guelke 1999: 46 and 49. For an interpretation that lays responsibility for the violence mainly at the door of the liberation movements, see Kane-Berman 1993. For a contrasting view that sees the state as the real culprit, see Amnesty International 1992. The South African TRC took a more complex view; see esp *TRC Report* vol 2: 577ff.

[5] See esp Minnaar *et al.* 1994 and the works cited in notes 3 and 4 above. The TRC is sceptical of the 'third force' theory, finding that '[w]hile there is little evidence of a centrally directed, coherent or formally constituted "third force", a network of security and ex-security operatives … were involved in actions that could be construed as fomenting violence'. See *TRC Report* vol 2: 709.

Most of the victims were black, but whites were also increasingly touched by the violence.[6] In the townships and other large predominantly black settlements, the successes of the ungovernability campaign launched by the ANC in the mid-1980s combined with the growing conflict between, on the one hand, conservative-minded and often state-funded 'traditional' power-holders in the black communities and their supporters, and, on the other hand, the newly openly visible political competition from the reform-minded ANC to create a volatile mix which erupted in street-fights and assassinations.[7] Residents organised themselves in 'self defence units' (SDUs) which, armed with the assistance of members of the not-yet-disbanded military wing of the ANC, Umkhonto we Sizwe (MK), became embroiled in a vicious circle of attacks and counter-attacks with Zulu-speaking hostel dwellers who supported the Inkatha Freedom Party (IFP).[8] White South Africans were targeted and killed in 'repossession operations' in which the revived Pan-Africanist Congress (PAC) engaged through its military wing, the Azanian People's Liberation Army (APLA).[9] Militant whites were organising themselves in groups to the right of the National Party (NP) government with the avowed aims of fighting the 'black danger' and of creating an all-white 'volkstaat'.[10] Aware that it could not control the violence and commanded no respect from the black majority, terrified to

[6] Figures are given in Coleman 1998: 163.

[7] On the causes of the violence in the pre-election period, see *TRC Report* vol 2: 577ff. See also Kane-Berman 1993 and Marks 1992. An informative and balanced account is offered by Murray 1994: 93ff.

[8] On these conflicts, see esp *TRC Report* vol 2: 625–41 and 668–89. On the massive training of IFP supporters in the use of weaponry to form 'Self Defence Units' in the 1990s, see *TRC Report* vol 6: 339 and 361ff. Inkatha was founded in 1975 by Mangosuthu Buthelezi, a Zulu leader and erstwhile 'chief minister' of the KwaZulu 'homeland'. It was presented as a cultural movement but from its inception possessed strong political undertones. In its early years, Inkatha 'played up the idea that it represented a reincarnation of the banned [ANC]' (Guelke 1999: 93): the 'true' opposition to white dominance. But its ambiguity on the issue of ethnicity prevented it from gaining the full backing of the ANC in exile. Inkatha reconstituted itself as a political party after restrictions on political activity were lifted in early 1990, and quickly became the ANC's main competitor for political support among the Zulu-speaking black population.

[9] On the activities of the PAC, see esp *TRC Report* vol 6: 375ff.

[10] On these political developments, see the essays collected in Moss and Obery 1992. The white right-wing organisations with the largest political support base amongst white South Africans were: (1) the Conservative Party (CP), formed in 1982 and headed by Andries Treurnicht; (2) the Afrikaner Weerstandsbeweging (AWB) under Eugene Terreblanche; and (3) the Freedom Front, a conglomerate of right-wing parties headed by General Viljoen which emerged during the negotiations period.

lose its grip over its own security apparatus and its influence over the increasingly paranoid and militant fringes of the white electorate, the government was unnerved by the revelations of security force agents who spoke publicly about clandestine killings of political opponents throughout the 1980s by members of the security police.[11]

This state of affairs was the culmination of centuries of racial segregation and discrimination against the descendants of indigenous blacks and imported slaves – since 1948 elevated into a comprehensive policy of 'separate development' or 'apartheid' – as well as decades of increasingly desperate and violent organised resistance against the system.[12] The NP government, voted into power in 1948 by an almost exclusively white electorate and confirmed in its rule through ever-stronger electoral victories, secured its ascendancy over the black majority through a combination of violent repression of those openly opposed to apartheid and co-optation of compliant black leaders. These leaders were trying to cement their own communal standing through the limited self-rule and bogus 'independence' held out by the apartheid planners' 'grand strategy' of creating a numerical majority of whites in South Africa by assigning black South Africans citizenship in allegedly independent black 'homelands' on what was previously South African territory.[13] Popular protest and resistance against the policy of apartheid and its manifestation in pass laws, racial zoning of settlements, inferior education and generally severely limited economic opportunities for blacks grew from the mid-1950s onwards.[14] In 1960, when a wave of protest marches swept the country, police opened fire at demonstrators in Sharpeville, killing and injuring numerous unarmed people. The subsequent eruptions of unrest all over the country were curbed through the imposition of a state of emergency and the outlawing of most opposition groups and of previously

[11] See Pauw 1991 for a detailed account of the disclosures made by Dirk Coetzee, the unit's erstwhile commander. This followed revelations by a prisoner on death row who used to work for the security police, Butana Almond Nofomela, in October 1989. The allegations made by Coetzee and others were the subject of an official inquiry by the Harms Commission in 1990.

[12] See the historical overviews cited in note 2 and Posel 1997. On apartheid policy and more generally Africaner political thought, see Adam and Giliomee 1979. See also Du Toit and Giliomee 1983.

[13] On the homeland strategy, see esp Meredith 1988: 149ff. Dugard 2000 provides a useful appendix on the 'homelands'.

[14] Generally on the history of resistance against apartheid, see Lodge 1983; Lodge and Nasson 1992. An exhaustive documentary history of African politics is provided by Karis *et al.* 1972–1997.

lawful forms of civil disobedience, thus blocking off traditional avenues for non-violent political resistance.[15]

This draconian response by the state drove into exile the two most prominent opposition movements – the ANC, created in 1912 by educated black South Africans in order to strive for equality and to defend the civil and political rights of the disadvantaged, and the PAC, a more distinctly Africanist grouping which broke away from the ANC in 1959 under the leadership of Robert Sobukwe.[16] It also triggered the formation of an armed wing of the ANC, called Umkhonto we Sizwe or MK.[17] Its initial mission was sabotage. Loss of life was to be – and largely was in fact – avoided. But the efficiency of this type of resistance was limited. MK never managed to put any significant military pressure on the apartheid state, even after it relaxed its rule in 1985 against the loss of civilian life through its operations. The force of the ANC as an opposition in exile lay in the moral strength of its cause, for which it won supporters even as it was effectively driven out of the country and its physical bases were confined to camps and offices scattered over some of South Africa's neighbouring states and the occasional bureau in Europe.[18] It also gained influence internally in the early and mid-1980s through its links with civic organisations drawn together under the banner of the United Democratic Front (UDF)[19] – a development which, because the UDF was the greatest threat to Mangosuthu Buthelezi's power base in rural KwaZulu-Natal, also sowed the seeds of the violent confrontations between Buthelezi's IFP and ANC supporters in the early 1990s.

Meanwhile, the South African government pursued a multitude of strategies to suppress resistance against apartheid. First and foremost, it relied on its security establishment to identify its political opponents and to remove them from society – initially, through banning orders, other restrictions on free movement and free speech and long periods of

[15] See generally Meredith 1988: 78. The date of the Sharpeville massacre later provided the starting point for the investigations of the TRC.

[16] See generally Dubow 2000 chapter 7 and Ellis and Sechaba 1992. On the PAC, see esp Pogrund 1990.

[17] On the history of MK, see Barrell 1990. See also the personal reminiscences of a high-profile MK leader, Ronnie Kasrils (Kasrils 1993).

[18] For a history of the ANC see Dubow 2000.

[19] The UDF was formed in 1983 as a loose coalition of nearly 700 organisations, including civil rights organisations, trade unions, student groups, youth groups, women's organisations, religious groups and the like, in order to help co-ordinate resistance campaigns against apartheid. See Karis 1986. For the connections between the ANC in exile and the UDF, see Dubow 2000 esp chapters 8 and 9.

detention without trial, and generally with the help of the criminal process,[20] and later, when trials collapsed or were turned into platforms for political opposition, by clandestinely apprehending and killing activists and hiding the evidence of these deeds.[21] Those arrested and held in police detention were subjected to brutal torture to get them to reveal information about opposition structures and planned operations. Some were 'turned' and forced to work for the police as so-called 'askaris'.[22] Others, like the black-consciousness leader Steve Bantu Biko, died from their injuries. When public protests erupted, as in Soweto in 1976, police shot indiscriminately and caused many deaths. During the frequent states of emergency, which lasted, with few and brief interruptions, from 1985 to 1989, the security forces were effectively given carte blanche to do what they thought necessary to suppress the protests.[23] A special police unit, the notorious C1 section based at Vlakplaas, was created in the early 1980s to assist security police around the country to deal with organised resistance against the state. It specialised in ambushes, assassinations and cover-ups.[24] The South African Defence Force (SADF) made incursions into neighbouring countries.[25] It also provided military training to a group of young Zulus supposedly needed as bodyguards for Buthelezi and other Inkatha officials in the KwaZulu 'homeland' – men who later became implicated in many of the political killings taking place in that region.[26] From the late 1980s onwards, however, it was clear that the security forces were losing the battle. After P.W. Botha stepped down as state president in late 1989, the NP government tried to save what could be saved with serious negotiations,

[20] See Mathews 1971 and Dugard 1978.

[21] For developments in the apartheid state's 'counter-revolutionary strategy', see Murray 1994: 73–92. See also *TRC Report* vol 2: 165ff. For perpetrator accounts, see Pauw 1991 and De Kock and Gordin 1998.

[22] The word 'askari' has Arabic and Swahili roots and was frequently used to describe indigenous troops in East Africa and the Middle East serving colonial powers. In the South African context it came to be applied to former members of the liberation movements who worked for the security forces, mainly by providing information and by tracing former comrades. See *TRC Report* vol 6: 217.

[23] The relevant legislation introduced immunities from prosecution and presumptions of good faith. See Chapter 1, notes 47–51 and accompanying text for details.

[24] See *TRC Report* vol 6: 217ff.

[25] Through raids on liberation-movement strongholds outside South Africa and other military activity in Southern Africa the South African state caused greater loss of life outside than within its borders. See *TRC Report* vol 2: 42–160.

[26] On the Caprivi trainees and their activities, see *TRC Report* vol 2: 464–9. See also Chapter 3, notes 20–23 and accompanying text.

and through political reform, all against the backdrop of an ever-rising tide of violence.[27]

The 'miracle' of South Africa's transformation into a reasonably stable democracy was made possible by a political peace deal. A promise of amnesty for 'all acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past' was an integral part of the deal.[28] This was not in itself unusual or innovative. Amnesties for politically motivated crimes, whether at the end of international or of internal armed conflicts, have a long (albeit somewhat contentious) history.[29] What caught the attention of the world was not the amnesty promise as such: it was its innovative transformation into an element of a truth and reconciliation process.[30]

Legislation passed in 1995 provided for a Truth and Reconciliation Commission (TRC) which, through its Amnesty Committee, was empowered to operate a disclosure-based amnesty scheme that required individual applications from perpetrators.[31] The granting of amnesty was made subject to certain procedural and material conditions. It promised protection from criminal prosecution and from civil claims, but only in exchange for a full disclosure by the perpetrator of all relevant facts of his offence – in stark contrast to the amnesty laws passed in several Latin American countries which shielded the perpetrators from official scrutiny of their deeds as well.[32] Moreover, both the servants and supporters of the previous regime and the members and supporters of the erstwhile opposition had to apply for amnesty. More problematically, it also extinguished any liability of the organisation behind the perpetrator – be it the state or a political organisation with legal personality – for the amnestied deeds.[33]

[27] See especially Waldmeir 1997: 108ff and Harvey 2001: 179–244. See also the autobiographies of Nelson Mandela (Mandela 1994) and F.W. de Klerk (De Klerk 1998).
[28] Act 200 of 1993: epilogue.
[29] See esp Elster 2004; Hesse and Post 1999. For more recent developments, see Bell 2000. For the legal implications of such amnesties, see O'Shea 2002; Roht-Arriaza and Gibson 1998, and Chapter 8.
[30] Minow (1998: 57) writes: 'It turns the promise of amnesty, wrested from political necessity, into a mechanism for advancing the truth-finding process.' On the innovative character of the amnesty scheme, see also Werle 1996, Werle 1999 and Werle 2001.
[31] Promotion of National Unity and Reconciliation Act 34 of 1995 (hereafter referred to as TRC Act).
[32] See Ocampo 1999; Popkin and Bhuta 1999; Bakker 2005; Lafontaine 2005.
[33] TRC Act, ss 19, 20, 21.

South Africa thus came up with an amnesty scheme that had few predecessors in the field of amnesty laws dealing with politically motivated violence,[34] and no predecessors insofar as it required from applicants from the former state security forces to make a full disclosure of all relevant facts.[35] In contrast with amnesties in Latin America that had come to be criticised by those who were concerned with the after-effects of impunity for state crimes, South Africa claimed that its amnesty law was a mechanism that actually ensured accountability for gross human rights violations.[36] Moreover, by embedding the amnesty process in the wider truth-finding efforts of the South African TRC, amnesty was said to contribute to, and in fact to be crucial for, the moral and political reconstruction of society.[37]

This suggests that the South African amnesty scheme might be capable of serving as a model, in the sense of a blueprint adjustable to other situations, to future societies in transition confronted with a legacy of systematic human rights violations and widespread political violence.[38] This book addresses the question whether the South African amnesty scheme for politically motivated offenders provides such a 'model'.

The validity of the claim that South Africa's transitional amnesty arrangements constitute a practically workable and ethically defensible

[34] A 1987 Bolivian amnesty law offers amnesty to rebels who lay down their arms, and a 2002 Colombian amnesty law combines with 2005 legislation to enable members of certain listed groups to benefit from amnesty for some minor offences as well as from a fast-tracked summary trial with limited penalties for even very grave offences in return for the willingness of the accused to make a full confession. For further information on the Bolivian amnesty law see Ambos 1997.

[35] These individuals are often shielded by self-amnesties.

[36] See Promotion of National Unity and Reconciliation Bill B-30 of 1995: Explanatory Memorandum.

[37] This position is forcefully put forward by Archbishop Desmond Tutu, who presided over the TRC, in his foreword to its *Report* (vol 1: 1–23). It is also endorsed by the South African Constitutional Court in the *AZAPO* case, which upheld the constitutionality of the amnesty arrangements.

[38] One vociferous defender of the view that the South African model, suitably adapted to different sets of circumstances, can serve the needs of other societies in transition better than possible alternatives is Alex Boraine, the TRC's erstwhile Deputy Chairperson (see esp Boraine 2000: 379ff). John Dugard, who in 1998 still thought it 'premature to hail the South African experiment as a model for future societies emerging from the darkness of repression' (Dugard 1998: 310), after the publication of the *TRC Report* advocated the international recognition of the validity of conditional amnesty laws drafted along South African lines (Dugard 1999: 1015).

way of dealing with the past can be evaluated only through a combination of mutually reinforcing empirical and normative enquiries.

On the empirical level, the first question one needs to address is: did it work? More specifically, did the scheme receive a significant response from its intended constituency? And did it thereby contribute to the stabilisation of the new democratic political community? Connected to this first set of questions – in fact, implied by it – is a second question, aimed at understanding: how did it work? In particular, what were the reasons that induced the addressees of the Commission's work – ordinary South African citizens, and those who as victims or as perpetrators of human rights violations formed the specific constituency of active participants in the Commission's procedures – to engage with this new institution of 'transitional justice'? On the normative level, the question that matters is whether the South African amnesty scheme is ethically defensible. This question is not only of interest to those who are more concerned with abstract justice than with practical efficiency. People's moral instincts are often sound enough to identify ethically indefensible responses, and their perception that the transitional regime's response to the past is unjust is therefore likely to undermine their trust in, and support of, the new political dispensation. Given the interconnectedness between moral responses and practical efficiency, asking the direct normative question makes sense even for someone who is ultimately more interested it 'what will work' than in 'what is just'.

In any case, meaningful normative analysis depends on knowing the answers to the empirical questions posed in the preceding paragraph. Empirical findings on the practical effects of the amnesty law have direct repercussions for normative justifications that are underpinned by consequentialist arguments. But even non-consequentialist justifications – such as the claim that justice requires the 'restoration' of victims and offenders to society – are sensitive to empirical discoveries regarding the extent to which the practices of the Amnesty Committee, flanked by the broader efforts of the TRC, indeed match up to the requirements for the resolution of social conflicts according to the principles of justice. Empirical knowledge must be the launching pad for any normative question – whether it concerns the legality or the morality of the amnesty arrangement – that may be asked about this scheme.

This book investigates the practical implementation and possible legal and ethical justifications of South Africa's transitional amnesty scheme for politically motivated crimes. The first chapter describes the background and content of the amnesty legislation, as well as the operations of

the Amnesty Committee and the challenges that its work faced. The second chapter presents the methodology and results of an empirical analysis of the Committee's amnesty decisions. It shows that the success rates of *bona fide* amnesty applications are exceptionally high, and hardly drop even when ever-graver deeds are involved. The next two chapters take up the main requirements for amnesty laid down in the Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act). Chapter 3 explores the Committee's notion of an 'act associated with a political objective' in the light of the empirical findings. It suggests that the marginalisation in the Committee's practice of ethical-normative criteria for evaluating amnesty applications, such as proportionality, can be explained by the Committee's desire to treat every act and incident that was an upshot of the political conflicts of the time as eligible for amnesty. It also highlights that this has important repercussions for any ethical defence of the amnesty scheme. Since there is no principled restriction in the Committee's practice on the kinds of deeds for which perpetrators can receive amnesty, the moral justification of the amnesty arrangement rests crucially on whether full disclosure renders an applicant morally deserving of amnesty. The fourth chapter is accordingly concerned with the Committee's understanding of the full-disclosure requirement. This chapter concentrates in particular on the principles which govern the fact-finding efforts of the Committee (presentation and evaluation of evidence) and on its interpretation of the applicant's obligation to make a full disclosure of his deed.

Chapters 5, 6 and 7 then measure the Committee's work against its avowed objectives: truth discovery and documentation (Chapter 5), victim-centeredness and victim participation (Chapter 6) and perpetrator accountability (Chapter 7). They argue that while the amnesty arrangements made significant achievements possible in each of these respects, there were inherent limitations. Both in light of these limitations and on a more theoretical level, these features of the process, however valuable, cannot provide a full defence of the amnesty practice as morally just.

Chapter 8 turns to legal analysis, investigating the transitional amnesty arrangement from an international law perspective. The concluding chapter links this to the preceding empirical and normative analyses, and addresses the question whether and under which conditions a transitional amnesty along South African lines constitutes a legally permissible, morally defensible and practically feasible alternative to a prosecution-based reaction to politically motivated serious violations of human rights.

The theoretical backdrop for this book is provided by concerns of and with transitional justice.[39] Many studies of transitions to democracy in Central and South America and elsewhere have highlighted the value of concerted official truth-finding efforts and analysed the capabilities of various truth commissions in this regard.[40] Frequently such studies claim that establishing the truth about past violations is more important for a society in transition and the victims of injustice themselves than doing justice according to law through criminal trials and the vindication of civil claims in the courts.[41] There are, however, also commentators who deplore the fact that truth commissions often in practice come to function as 'substitutes', rather than complementary mechanisms, for criminal justice, believing that the truth-finding efforts of truth commissions are devalued without the substantive justice that can be delivered by the courts.[42] Adherents of the latter view oppose amnesty laws that shield the perpetrators of gross human rights violations from criminal prosecution, while adherents of the former view are largely indifferent towards such legal arrangements since in their view the important tenets of responding to victims' needs and consolidating the transition can in any case still be achieved. Both positions, however, are challenged by an amnesty law which is, as the South African law claims to be, *instrumental* in pursuing the fundamental objectives of truth, justice and social healing that any given set of transitional policies seeks to achieve. Amnesty can no longer be ignored as insignificant by holders of the former view. On the latter view, it can perhaps no longer be rejected as undermining justice.

Furthermore, whatever one's views might be on the comparative importance of justice, peace, reconciliation, truth and other 'transitional goals', *laying claim to justice* is something that any transitional policy must do in some way or form.[43] Transitional mechanisms cannot

[39] On transitional justice see generally Teitel 2000.

[40] See esp Hayner 2001; Steiner 1997; Arnson 1999; Phelps 2004. A framework for the empirical study of transitional processes was formulated by Elster 1998; a normative framework has been proposed by Crocker 1999. For case studies of the German and South African transitions, see the Berlin-based research project on 'Strafjustiz und DDR-Vergangenheit', led by Professors Klaus Marxen and Gerhard Werle (www.rewi.hu-berlin.de/jura/proj/psv).

[41] For proponents of this view, see Graybill 2002 and the essays collected in Biggar 2001.

[42] This view is most often taken by human rights activists and non-government organisations. See Brody 2001 and Mariner 2003, as well as the websites of Amnesty International and Human Rights Watch. For the views of an academic, see Ambos 1997. See further Harper 1996; De Brito 1997; Roninger and Sznajder 1999.

[43] A similar point is made by Allen 1999: 347.