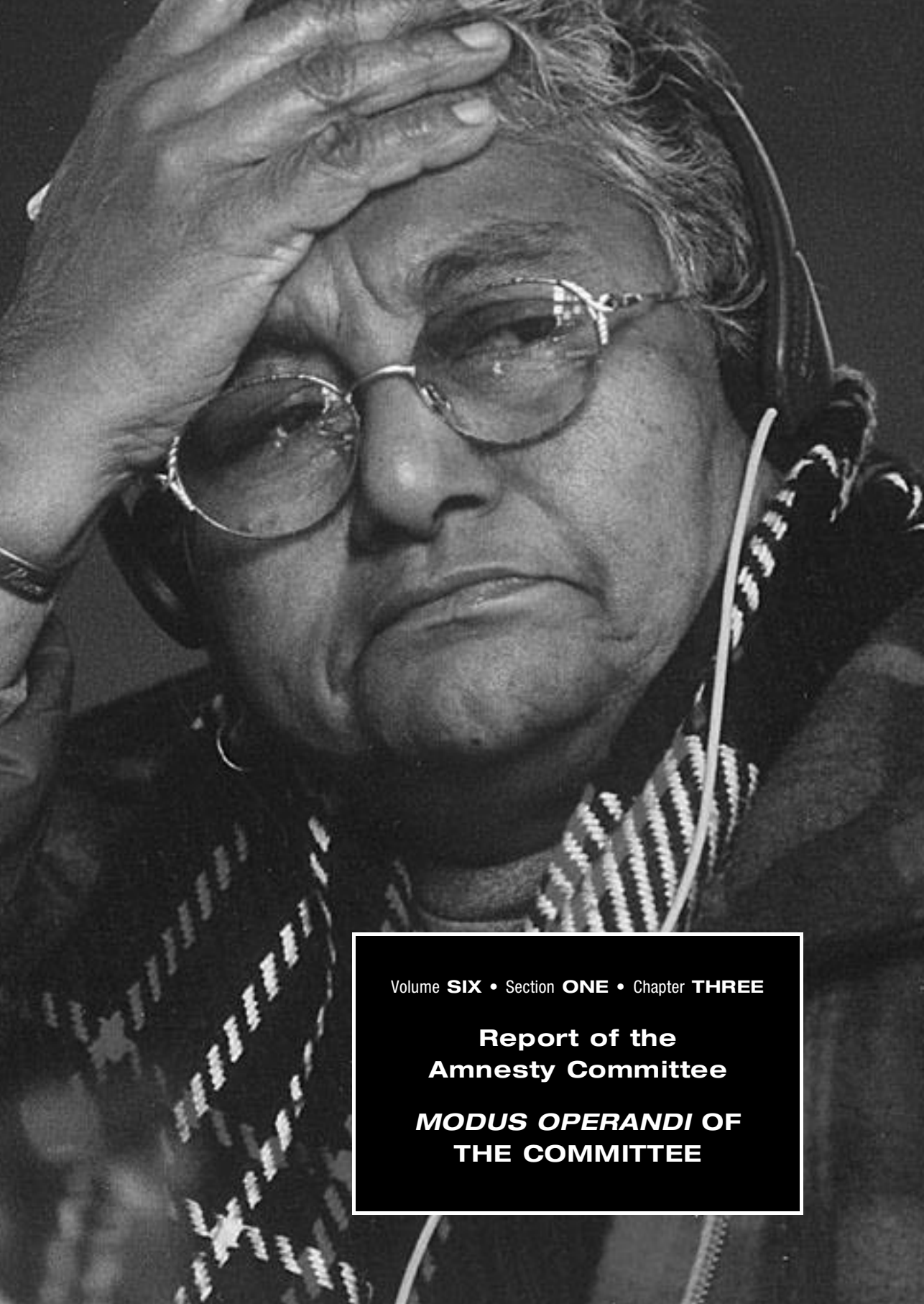

Volume **SIX** • Section **ONE** • Chapter **THREE**

Report of the Amnesty Committee

MODUS OPERANDI OF THE COMMITTEE

Modus Operandi of the Committee

■ CHAMBER MATTERS

1. Section 19(3) of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (the Act) gave the Amnesty Committee (the Committee) the discretion to deal with certain applications in the absence of the applicant and without holding a public hearing – after having investigated the application and having made such enquiries as the Committee considered necessary. These matters were generally referred to as 'chamber matters' and concerned incidents that did not constitute gross violations of human rights as defined in the Act (see further Chapter One).[24]

2. Subsection 19(3)(a) of the Act empowered the Committee to refuse an application in chambers when it was satisfied that the application did not relate to an act associated with a political objective. In appropriate circumstances, the Committee was authorised to give the applicant the opportunity to make a further submission before the matter was finalised. This happened quite frequently where the available information created some doubt as to whether the requirement of a political objective had been satisfied, for example where it was not clear whether the applicant had acted within the scope of a particular order or mandate.

3. In terms of subsection 19(3)(b) of the Act, amnesty could be granted in chambers only if the requirements for amnesty (as set out in section 20(1) of the Act) had been complied with; if there was no need for a hearing, and if the act, omission or offence to which the application related did not constitute a gross violation of human rights.

4. The largest percentage of applications the Committee dealt with were chamber matters. Out of a total of 7115 applications, 5489 were dealt with in chambers.

24 Section 1(ix) defined gross violations of human rights as killings, abductions, torture and severe ill-treatment, including any attempt, conspiracy, incitement,instigation, command or procurement to commit any of these acts.

DIFFICULTIES ENCOUNTERED WHEN DEALING WITH CHAMBER MATTERS

5. One of the difficulties the Committee experienced when dealing with chamber matters arose from the lapse of time between the commission of the act or offence and the consideration of the application for amnesty. Where this spanned a period of years, it was often difficult to trace victims or possible witnesses in order to obtain their comments on an applicant's version. In many such cases, it was difficult if not impossible to obtain police or court records. Even where court records were traced, applicants often averred that they had lied to the trial court to escape punishment. It was also not uncommon to learn from applicants that they had concealed the political motivation for their deeds in their court evidence, as this would, at the time, have been regarded as an aggravating circumstance. This left the Committee with the dilemma of having to decide whether an applicant had disclosed the truth in the amnesty application or whether this new version was also just an expedient stratagem. Obviously, these difficulties also arose in 'hearable' matters.

6. Another difficulty arose from the fact that, in the time gap between the submission of an application by a serving prisoner and its consideration by the Committee, an applicant might have been released from prison without leaving any forwarding address or contact details. In these instances, the Committee took the view that applicants had a duty to keep the Committee informed of their whereabouts. Nevertheless, the Committee took all possible steps to trace applicants. If several attempts and a final ultimatum failed to elicit a response, such matters were dealt with on the basis of unsupplemented information.

7. The use of pseudonyms, and references to co-perpetrators by pseudonyms or *noms de guerre*, hampered the proper linking of files relating to the same incident and consequently made it extremely difficult to corroborate the versions of the various applicants by cross-referencing. This was a particular problem when dealing with applications by members of the liberation movements. The resultant delays made the process of dealing with chamber matters more time-consuming than had originally been anticipated.

8. Other delays resulted from slow responses to enquiries directed to political organisations, government institutions and private individuals. This was not always due to reluctance or unwillingness to assist the Committee on the part

of those concerned, but more often reflected a lack of the necessary capacity to deal with these enquiries expeditiously.

9. The Committee was mindful of the particular difficulties experienced by government departments. In many instances, old files had been destroyed in the normal course of events or as part of a deliberate policy to conceal information.[25] Some considerable changes in staff after the democratic elections in 1994 caused additional difficulties in accessing archival material. In the case of private individuals, communication by mail presented its own problems, particularly in areas that were not easily accessible, such as outlying rural areas and informal settlements.

PROCEDURE FOLLOWED BY THE COMMITTEE IN DEALING WITH CHAMBER MATTERS

10. The procedure followed when dealing with chamber matters was adapted from time to time to take account of the availability of Committee members. This resulted in differing views on the interpretation of the Act. Initially, when the Committee consisted of only five members, all were required to consider the application and only one member was mandated to sign the decision on behalf of the full Committee. After the enlargement of the Committee, two signatures were at first considered sufficient. The Committee, however, eventually settled on a three-member panel (one of whom had to be a judge) to decide chamber matters.

11. Committee members dealt with chamber matters as and when they were available in between hearings and the writing of decisions. At times, this resulted in the involvement of more than just the three Committee members required to sign the final decision. A Committee member would, for example, be assigned to deal with a particular matter in chambers and might, in the process, direct an administrative official to obtain further particulars (such as a police docket or court record) to clarify the application. Once the additional information became available, the same file might be referred to another Committee member who happened to be available at the time, and not necessarily back to the member who had originally dealt with the file. This member would, if satisfied, take a decision and have a draft decision prepared. If s/he did not consider the application to be a straightforward one, s/he might decide to consult with other Committee members before drafting the decision. Once the decision was drafted and the three members concurred, it would be signed and the interested parties would be informed of the outcome of the application.

25 See particularly Volume One, Chapter Eight, 'The Destruction of Records'.

12. Some chamber matters proved to be of such complexity that they required the attention of more than the requisite three Committee members, and even of the full Committee. However, after appropriate consultations among members, the matter would still be finally decided by a three-member panel.

13. In less complicated cases, where an application was refused, no summary of the facts was given but only the ground/s for the refusal. Where amnesty was granted in less complicated cases, a brief summary of the facts was provided, followed by the Committee's decision.

SPECIAL CASES

14. Some cases that were originally earmarked to be dealt with in chambers were eventually referred to a hearing after further consideration and investigation. These special cases fell into three categories. The first concerned a collection of applications involving witchcraft and the burning of people as a result of this phenomenon. These were particularly prevalent in, but not limited to, the Northern Province. The second category concerned a cluster of cases involving the activities of self-defence units (SDUs) in the townships, some of which did not, strictly speaking, require a hearing, but were ultimately heard to ensure that the Committee obtained a complete account of SDU activities. The last category concerned the activities of Azanian People's Liberation Army (APLA) operatives, particularly robberies and related violent acts committed, it was argued, to raise funds for the organisation.

15. At first glance, all of these incidents appeared to be common crimes. The SDU applications, moreover, contained scant information, which aggravated the difficulty of determining the events that had taken place. As the context of these incidents was clarified, however, it became evident that these matters could only be properly decided at public hearings where all the relevant circumstances could be fully canvassed. The Committee accordingly opted for this approach.

Witchcraft

16. Applications relating to offences involving witchcraft were considered to fall into a unique category of human rights violations and were given special attention by the Committee. The question as to whether amnesty could be granted where a victim or victims had been attacked or killed as a result of a belief in witchcraft elicited much debate, and members of the Committee were initially divided on the issue. One view was that such a belief was not sufficient grounds for

granting amnesty and that applications of this nature ought to be refused. Others argued that the concept 'conflicts of the past', as envisaged in the Act, also encompassed the very real conflict between traditional values – essentially supporting the *status quo* – and the emerging democratic values supporting transformation.

17. So contentious was the issue initially that it was referred to a full meeting of the Committee. At this meeting, a subcommittee was mandated to investigate the matter and make recommendations. It was ultimately decided that all witchcraft cases should be dealt with in one cluster and referred to a public hearing.

18. The bulk of the witchcraft cases were heard in two hearing sessions at Thohoyandou in the Northern Province. Professor NV Ralushai, an expert witness and chairperson of the 1995 Commission of Inquiry into Witchcraft Violence and Ritual Murder in the Northern Province, testified at the principal hearing. His evidence, as well as the Interim Report of his Commission – which was made available to the hearings panel – were invaluable in helping the Committee make informed decisions on all witchcraft-related applications.

19. Largely as a consequence of these contributions, the Committee concluded that a belief in witchcraft was still widely prevalent in certain rural areas of South Africa. Moreover, it became clear to the Committee that the issue of witchcraft had – at certain times in some rural areas – been a central factor in some of the recent political conflicts between supporters of the liberation movements and the forces seeking to entrench the *status quo*. The former were of the opinion that traditional practices and beliefs related to witchcraft had been exploited by the latter to advance their positions.

20. The Committee accepted the following finding of the Ralushai Commission of Inquiry:
Apartheid politics turned traditional leaders into politicians representing a system which was not popular with many people, because they were seen as upholders of that system. For this reason, traditional leaders became the target of the now politicised youth.[26]

21. It further accepted the view of the Commission of Inquiry that:
[i]n some cases the youth intimidated traditional leaders in such a way that the latter had little or no option but to sniff out so-called witches.[27]

26 Interim Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murder in the Northern Province, p. 49.

27 Interim Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murder in the Northern Province, p. 144.

22. It was also clear from the evidence heard by the Committee that, in Venda particularly, the liberation forces used cases of witchcraft and ritual killings to politicise communities. This strategy was facilitated by the fact that local communities were dissatisfied with the manner in which the apartheid authorities had handled such cases. For example, the failure of the authorities to act against people who were believed to be witches resulted in a belief that the government was the protector of witches. In Venda, where traditional leaders with relatively poor education were politically empowered and were associated with some of the most heinous abuses, the situation was ripe for political conflict.

23. In some cases, where comrades and other pro-liberation movement activists were perceived as having died as a result of witchcraft, community organisations took steps to eliminate those they believed to have been responsible for these deaths.

24. This exposition represents only some aspects of the hearings on these complex witchcraft-related applications. Although the facts and merits of the various applications were diverse, the incidents occurred largely against the background outlined above, which also informed the decisions of the Committee. Within this framework, each application was decided individually and according to its own merits. The specific circumstances of each case are fully recorded in the amnesty decisions accompanying this report.

25. The Committee shares the widespread concern expressed by civil society about the continued prevalence of practices and violent incidents related to a belief in witchcraft in certain areas. It is the Committee's view that this issue warrants further attention by the appropriate government authorities.[28]

Self-defence units and township violence

26. The Final Report of the Truth and Reconciliation Commission (the Commission) discussed the phenomenon of SDUs and the various acts of violence their members committed in many parts of the country[29]. It will not, therefore, be elaborated on here.

27. Applications by former members of SDUs presented the Committee with formidable problems. Most SDU applications were hurriedly completed and submitted just before the closing date for amnesty applications.[30] These forms contained only basic information with few, if any, details about the incident(s)

28 See Section 4, Chapter 6, 'Findings and Recommendations' in this volume.

29 See Volume Two, pp. 35,36,675ff, 684; Volume Three, pp. 214–15,298–303,515,692.

30 Applicants had been assisted by a community worker who had been closely involved in monitoring community conflicts.

for which amnesty was being sought. Most were identical and simply contained general reference to unspecified SDU activities.

28. These SDU applications caused a number of specific difficulties.

29. First, and not unnaturally, SDU members stated in their applications that they had acted in self-defence. On a strict legal interpretation, such conduct is not unlawful and does not, therefore, amount to an offence. As one of the statutory requirements for amnesty is that the applicant's conduct must constitute an offence associated with a political objective, SDU applicants did not qualify for amnesty (see also Chapter One of this volume).

30. Second, given the form of the violence in the townships and the nature of the operations undertaken by SDUs during the early 1990s, applicants frequently could not identify any specific victim(s) of their actions. Incidents tended to involve violent conflicts between crowds of African National Congress (ANC) and Inkatha Freedom Party (IFP) supporters. Many applicants were unable to say whether or not any person(s) had been injured or killed as a result of their actions in the course of these clashes. They were often not even able to say whether any injuries or deaths had resulted during specified clashes.

31. Third, some applicants (usually convicted prisoners) denied having participated in or even having been associated with the commission of the offence(s) for which they had been convicted and for which they were seeking amnesty. Again, in terms of the Act, they could not be said to have committed an offence with a political objective as required by the Act. Generally the Committee took the view that it was not a court of appeal and that applicants who had been refused amnesty had to seek redress from the courts. The Committee did, however, endeavour to draw the attention of the appropriate government authority to the anomaly of releasing via the amnesty process those guilty of offences, sometimes of a heinous nature, while retaining in prison those innocent of these offences. This is obviously a matter requiring further focussed attention by the appropriate authorities.

32. Fourth, in some SDU cases the Committee found that the applicant(s) concerned had acted against targets without knowing whether or not they were members or supporters of an opposing political organisation or party. Rather, they acted against communities that were perceived to be supporting a rival organisation. This created a potential complication in that the Act required the applicant to have acted against a political opponent.

33. Fifth, the Committee also heard that some SDU applicants had acted during specific incidents without an order from (a) leader(s) of the political organisation or party they represented or of which they claimed to have been a member or supporter at the time of the commission of the offence(s). Again, this complicated even clearly politically motivated action.

34. Sixth, those ANC-aligned SDU members who had committed acts of robbery ostensibly with the aim of buying arms for their activities could not conceivably be said to have acted in accordance with the general policy of the ANC, which disavowed robbery as part of its policy.

35. Finally, due to the lack of legal representation and advice available to them at the time of the completion of the amnesty application forms, many SDU applicants failed to provide the necessary particularity concerning their actions. These applications were, therefore, at risk of being refused for their failure to comply with the requirements of the Act.

36. After intense discussions prior to the finalisation of SDU applications, the Committee decided to deal with them at public hearings where the context of the conflict and the activities of the SDUs could be fully ventilated.

37. The hearings helped clarify the political background and context within which these offences occurred through the evidence of witnesses who were part of the leadership of the organisations involved in the conflict. The Committee also benefited from the reports and testimony of representatives of non-governmental organisations who had been involved in monitoring the political violence and trends in the areas where these activities occurred. In evaluating the merits of the applications, the Committee also considered the submissions of the ANC, and subjected applicants to pertinent and probing questions about the ANC's tactics and policies.

38. However, although these submissions were generally helpful, they did not always enable the Committee to reach an informed decision on every individual case. It was clear, for example, that it had not always been possible for SDU members to receive a specific order before launching an attack or operation. The areas in question were, moreover, gripped by large-scale, ongoing and indiscriminate violence where the maintenance of law and order had all but collapsed. Testimonies at the hearings depicted a grim picture of day-to-day survival as communities came under attack by clandestine forces, often operating

with the tacit approval and even support of the security forces. The East Rand in the early 1990s offered a clear example of this, with young people testifying about their involvement in violent operations in defence of their communities.

39. It was often difficult to draw a distinction between legitimate SDU operations and criminal actions. Local criminal elements exploited the violence and civil strife for their own ends. Some SDUs became a virtual law unto themselves, even acting against fellow SDU members, as was the case in Katlehong in 1992. Other SDU elements launched operations against the express orders of their political leadership.

40. Investigating the involvement of the security forces in the township violence of the early 1990s proved difficult. Lack of investigative capacity on the part of the Committee was one factor; time constraints were another. But the biggest obstacle was the attitude of the security forces themselves. Security force members were reluctant to appear before the Committee to refute allegations about their role in the violence. In many cases, they responded by submitting affidavits or instructing legal representatives to cross-examine those who had implicated them. Rarely did they attend the hearings to present their own version. The result was that, at the end of these hearings, there was little to contradict the strong impression that certain members of the security forces had been involved in acts of violence against communities which had simply sought to defend themselves.

41. It must also be mentioned that, in some of the SDU cases, there was no objective evidence to corroborate the testimonies of the applicants – either because the victims were unknown to the applicant or because they had left the area in which the attack occurred. This did not deter the Committee from making victim findings (in terms of section 22 of the Act) in the hope that the victims, once they reappeared, would be able to access the reparations process. There were also cases where victims took a conscious decision not to attend the hearings and testify for fear of reprisals by other members of an applicant's political organisation or party.

APLA operations

42. Applications from persons claiming to have been members or supporters of APLA – the armed wing of the Pan Africanist Congress (PAC) – presented the Committee with problems peculiar to this particular category of applicants.

43. These problems resulted from certain policies of the organisation, acknowledged by their leaders, which sometimes made it difficult to distinguish between acts associated with a political objective committed by bona fide APLA members and purely criminal acts committed for personal gain, often coupled with severe assault and murder.

44. The first such policy was that expressed in the APLA slogan 'one settler, one bullet'. Given the fact that APLA and the PAC regarded all white people as settlers, this slogan actually translated into 'one white person, one bullet'. Thus individuals became legitimate targets simply because of the colour of their skin, as in the case of the white American exchange student, Ms Amy Biehl[31], the patrons of the Heidelberg Tavern[32], the King William's Town Golf Club, and the Crazy Beat discotheque in Newcastle. These were, of course, analogous to incidents that involved members or supporters of the white right-wing organisation, the Afrikaner Weerstandsbeweging (AWB)[33], where black people were seen as supporters of the ANC and/or communists simply because they were black, and became targets as a result.

45. The second problematic policy position related to the 'repossession' of property. Particular difficulties arose in respect of 'repossessed' goods that, unlike firearms, could not be used directly in the furtherance of the liberation struggle. Many amnesty applications by APLA operatives involved the robbery or theft of a variety of goods and valuables, including cash and vehicles. They often alleged that some of the proceeds of these operations were used as subsistence for the operatives: that is, the proceeds provided their means of survival so that they could continue with their political work. Where goods other than cash were 'repossessed', it was claimed that these were sold to raise funds for the liberation struggle. APLA commanders who testified at hearings were at pains to point out that they viewed these acts of theft and robbery as the legitimate repossession of goods to which the African people of South Africa were rightfully entitled, in line with APLA policy.

46. In dealing with the APLA applications, the first issue the Committee had to resolve was whether these were bona fide operations associated with the liberation struggle. The Committee adopted the approach that amnesty would be refused if the applicants were unable to satisfy the Committee that the property involved had either been handed over to APLA or used in accordance with APLA policy in furtherance of the liberation struggle.

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31 Volume One, p. 11; Volume Three, p. 510.

32 Volume Three, p. 508.

33 Volume One, p. 120; Volume Two, pp. 643,645–8, 665; Volume Five, pp. 209,237.

47. Given the open-ended nature of this 'repossession' policy, it was not surprising that a large number of prison inmates attempted to obtain amnesty ostensibly under the flag of the PAC or APLA. The Committee initially inclined to the view that all these doubtful matters could be dealt with in chambers. However, it later adopted a more cautious approach, with the result that many alleged APLA cases were later revisited and referred to a public hearing.

48. A further difficulty that bedevilled the Committee in assessing the APLA applications was the somewhat loose structure of the APLA units that operated inside the country and, in particular, the 'task force' or 'township trainees' recruited by trained APLA commanders to assist in operations. According to the general submission of the PAC to the Commission, as well as the evidence of APLA commanders at hearings, these task force members were often recruited from the ranks of known criminals both in and outside prison. This was done, it was suggested in evidence, specifically because people with criminal records were best suited to the task of 'repossession' by means of theft and robbery.

49. The use of code names, the unavailability of APLA records and the impossibility at times of ascertaining the true identity of individual amnesty applicants further compounded the problems experienced by the Committee. According to the testimony of APLA commanders, the records of the organisation had been confiscated by the police and never returned. A further difficulty arose from the fact that the PAC and APLA maintained independent organisational structures. This duality is illustrated by the fact that, in the early 1990s, the PAC leadership – which represented the political wing of the organisation – suspended the armed struggle, while APLA, the military wing, continued with the armed struggle in apparent conflict with the PAC position. The resultant confusion presented a further difficulty for the Committee when it came to apply the amnesty-qualifying criteria of the Act – such as the provision that the act under consideration had to be 'associated with a political objective'.

50. The Committee sought the assistance of the PAC and APLA leadership in an attempt to ascertain the truth or relevant information to shed more light on particular aspects of various applications. Unfortunately this assistance was very seldom forthcoming. In those cases where assistance was given, it took an inordinately long time before a query was responded to.

51. Bold allegations of APLA membership or APLA involvement, uncorroborated by any objective proof, were obviously insufficient to comply with the requirements

of the Act. Unfortunately, in many instances, APLA commanders failed to attend hearings or to come to the assistance of applicants. This left the Committee in the position of having to test alleged APLA membership or involvement in incidents as best as it could, for example by evaluating an applicant's knowledge of the history, policies and structures of the organisation.

HEARABLES

52. In line with the provisions of the Act, the Committee was obliged to deal with any application concerning a gross violation of human rights at a public hearing.[34] This part of the Committee's mandate encompassed its most visible activities and was its public face. Although the Act provided for hearings to be held behind closed doors under exceptional circumstances, all the hearings conducted by the Committee were accessible to members of the public as well as to all sectors of the media, including television. The media covered most of the hearings and gave particularly extensive coverage to the cases considered to be high-profile amnesty applications, although this coverage and interest waned towards the end of the process.

Constitution of panels

53. The Act empowered the chairperson of the Committee to constitute subcommittees or hearings panels, which had to be presided over by a High Court judge. Normally a hearings panel would consist of three members who constituted a quorum, though at times, and in more complex matters, panels of up to five members were established.[35] An effort was always made to ensure that panels were representative of the racial and gender composition of the Committee itself, taking into account the exigencies of the particular case. Other relevant factors such as language were also taken into account. In applications involving official languages other than English, an effort was made to ensure that at least some members of the panel were proficient in the language in question, although a simultaneous interpretation service was provided at every hearing. This approach significantly facilitated the work and deliberations of the hearings panel outside of the formal hearing itself.

34 Subsections 19(3)(b)(iii) & (4).

35 There is no statutory quorum requirement set out in the Act. The quorum stipulation was established by decision of the Committee. The Act initially provided for a single committee of five members to consider applications. This soon proved impractical in view of the tremendous workload of the Committee. The Act was consequently amended to expand the membership of the Committee and to provide for multiple hearings panels in order to expedite finalisation of the work of the Committee within the general time constraints that applied to the Commission's process as a whole. It was, therefore, only on rare occasions that panels of more than three members were constituted later on in the process.

54. There is no doubt that the general representivity of the hearings panels greatly benefited the hearings process and helped the panels to deal with and appreciate the nuances of particular cases, enhancing the ultimate quality of decision-making within the Committee.

Hearings procedure

55. Although the Act gave the Committee the latitude to prescribe a formal set of rules to govern hearings, the Committee decided, after some consideration, that it would be in the best interests of the unique process created by the Act not to opt for a set of rules in advance.[36] It settled instead on the more flexible approach of determining the hearings procedure as the amnesty process unfolded, taking into account the practical demands of the process itself. This enabled the Committee to ensure procedural fairness in all cases, even where this required deviations from the procedures followed in the majority of cases. In the end, the procedure followed in most cases did not differ substantially from that which applies in a court of law.

56. It must be noted that there were those who criticised what they described as the 'judicialisation' of the amnesty process, arguing that the Committee was under no statutory obligation to adopt the process it followed: one which, even in the setting and formalities of hearings, very closely resembled the court approach.

57. A further and related criticism concerned the membership of the hearings panels. Although the Act required only that the Committee and the hearings panels be chaired by judges, the membership of the Committee consisted exclusively of lawyers. Critics argued that the exclusion of persons skilled in other disciplines – for example the social sciences – from Committee membership, impoverished the process. It was their view that multi-disciplinary panels would have diluted the legalistic process adopted by the Committee and introduced, instead, a rich variety of perspectives.

58. This criticism is reproduced here without analysis or comment, save to offer the Committee's view that, in a process requiring adjudication, lawyers will inevitably play a significant if not leading role and that the process will tend, therefore, to be judicial in nature. While it must be accepted that any system designed by humans will always leave room for improvement, it is the Committee's view that the adopted process did not result in prejudice to any party.

36 There was a view within the Committee that procedures should have been agreed upon and publicised at the outset.

59. In general, the Act provided for a process with clear inquisitorial elements. The Committee was expressly required to conduct investigations in respect of amnesty applications[37] and to ensure that the fullest possible picture emerged of the particular incident forming the subject matter of the application. This process had, moreover, to be undertaken within the context of the new constitutional system, which requires that administrative bodies such as the Committee should engage in fair administrative action.[38]

60. Within the broad parameters set by the legislation, the Committee endeavoured to steer a middle course between a purely inquisitorial and an adversarial procedure[39] in its hearings. The guiding principle followed was to allow every interested party the fullest possible opportunity to participate in the proceedings and to present a case to the panel. Every party that participated in the hearings had the right to legal representation, and even those who were indigent were always afforded some form of legal representation.[40] This enabled the hearings panels to adopt a less inquisitorial approach during the course of the hearings, which eventually became predominantly adversarial in nature. In some exceptional cases, and where it was demanded by the interests of justice, hearings panels acted proactively by postponing hearings (even when they had already been partly heard) to allow a party the opportunity to investigate or deal with material issues that arose in the course of the hearing. This meant that parties were allowed the fullest possible opportunity either to present or oppose an amnesty application. While endeavouring to make the process as fair as possible, the Committee was cognisant of and guarded against the possible abuse of the flexibility of the adopted procedure to the detriment of one of the parties or the process as a whole.

61. Throughout the process, the Committee was faced with the challenge of having to balance the need to allow applications to be fully canvassed with the need to conclude the process within the shortest possible time and with ever-dwindling resources. To this end, the Committee was authorised by the provisions of the Act to place reasonable limitations on cross-examination and the presentation

37 Section 19(2) provides that the 'Committee shall investigate the application and make such enquiries as it may deem necessary …'.

38 Section 33 of the Constitution (Act 108 of 1996) provides that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair'.

39 An inquisitorial procedure is one in which the court or committee takes the leading role in questioning witnesses and examining evidence. In an adversarial procedure the court or committee plays a neutral role and allows the parties to present their cases and question each other. South African courts are traditionally adversarial, and commissions of inquiry traditionally inquisitorial.

40 Section 34 of the Act entrenches the right to legal representation while at the same time providing for a legal assistance scheme for indigent parties to amnesty proceedings. In practice this scheme was chiefly applied to assist victims, since the government introduced a state-sponsored scheme to assist applicants who were former or present state employees or members or supporters of liberation movements. The perceptions of the victims with regard to the quality of legal representation provided for in the respective schemes are dealt with elsewhere in this report.

of argument at hearings.[41] Hearings panels were, therefore, in a position to direct cross-examination and argument towards only those elements of a case that were relevant to assessing the factors to be considered in deciding the amnesty application. In many instances, the incidents in question had already been fully canvassed at court hearings – particularly in criminal trials – which had already established the objective facts surrounding an incident (such as the date, time, place and nature of the incident, the identity of the victims and the like).

62. There was, however, a significant limitation to the degree of assistance that could be obtained from the records of many criminal trials in cases where an amnesty applicant had appeared as the accused. The striking difference between an amnesty application and a criminal trial lies in the fact that, in a criminal trial, the accused invariably try to exonerate themselves, while at an amnesty hearing they incriminate themselves. This latter factor is, of course, one of the legal requirements for qualifying for amnesty. The Committee was often struck by the extent to which both defence and prosecution had perverted the normal course of justice in earlier criminal trials. Not only did amnesty applicants who had earlier been accused admit to having presented perjured evidence to the trial court, but similar admissions were often made by amnesty applicants who had appeared as prosecution witnesses at criminal trials or who had investigated cases as members of the former South African Police. A similar situation pertained to official commissions of inquiry, such as the Commission of Inquiry into Certain Alleged Murders convened in 1990 and chaired by Mr Justice LTC Harms.

63. With a few notable exceptions, the Committee generally received the co-operation of legal representatives in confining cross-examination or argument to strictly relevant issues. As the amnesty process progressed, oral argument at the conclusion of hearings became the norm. It was only in particularly complex cases, or where extensive evidence and other material were presented to the hearings panel, that the parties were called to give written argument. In some exceptional cases, hearings panels had to reconvene to receive oral submissions on the written argument that was presented to the panel.

Decision-making

64. Only in the most exceptional cases did the Committee deliver its decision immediately on conclusion of the proceedings. These few *ex tempore* (immediate)

41 Section 34(2) deals with this issue as follows: '(2) The Commission may, in order to expedite proceedings, place reasonable limitations with regard to the time allowed in respect of cross-examination of witnesses or any address to the Commission.'

decisions were handed down in clear-cut cases where all parties agreed that amnesty ought to be granted and that any further delay would occasion irreparable prejudice to the applicant, who was in many cases serving a prison sentence for the offence for which amnesty was being sought.

65. However, in the normal course of events, the Committee would reserve its decision at the end of the hearing to allow members of the panel to consider the case. In the majority of cases, panels reached consensus. There were, however, instances where dissenting decisions were handed down. For the most part, the dissenting opinion related to the overall outcome of the application. In some cases, however, it applied only to a particular issue, or to only one of a number of incidents forming the subject matter of the application, or to some of the applicants only.

66. In all cases, the hearings panel handed down reasoned, written decisions.[42] The decision was then made available to all parties that had participated in the application, and was simultaneously made public.

67. Insofar as the specific process of decision-making was concerned, it was the responsibility of the presiding judge to allocate the writing of the particular decision to a member of the hearings panel. In most cases, the panel was able to come to a decision soon after the finalisation of the hearing. In more complex cases, or where there was no immediate consensus, the panel took time to consider the entire case and review the transcript and any preliminary views expressed by members of the panel. Sometimes, one or more meetings had to be convened to canvass the matter.

68. In order to decide a case, the panel had to make a decision based on the relevant facts. These findings were then tested against the requirements laid down in the Act in order to determine whether the particular applicant qualified for amnesty. One of the difficulties that confronted the Committee was that hearings panels were sometimes presented with only a single version, namely that of the amnesty applicant. This was the case where the applicant was the only witness to the incident in question, or where other potential witnesses were untraceable or deceased. Needless to say, this was not a particularly satisfactory way of determining applications, especially those concerning grave incidents. The reality was, however, that panels had to make a decision on each and every application and were left with the task of assessing the single version as best they could,

42 A full text electronic version of all decisions handed down in hearable matters accompanies this report in the form of a compact disc.

taking into consideration the established objective facts as well as the probabilities. Unfortunately, there was always the possibility of suspicion or doubt around cases of this nature. There was, however, no foolproof method of eliminating the possibility of abuse of the process in cases of this nature.

69. Usually, however, hearings panels were faced with the task of deciding cases in the face of conflicting versions of fact. These could and did take a variety of forms and related to both peripheral and material issues. There was often a conflict between the version of the applicant and the version of those opposing the application. Frequently this conflict did not relate directly to the merits of the incident in question but to other relevant issues, such as the political motivation for the incident, or the alleged political activities of a deceased victim. In other instances, the factual dispute related to conflicting versions amongst multiple applicants.

70. Equally frequently, there was a conflict between versions tendered at the amnesty application and those that had been given at earlier criminal trials, inquests, commissions of inquiry and the like. In many instances, there was a conflict between the written application for amnesty and the testimony of the applicant at the amnesty hearing.

71. In situations where amnesty applicants and other parties who appeared at amnesty hearings readily admitted to having given false testimony in earlier judicial proceedings, the Committee could obtain very little assistance from the decisions of those tribunals. The same caveat applied with respect to the potential value of prior police investigations. The shocking injustices that had been perpetrated as a result of police investigations in some of the incidents that came before the Committee often meant that the results of these investigations had to be treated with caution when deciding amnesty applications. One of the more prominent examples of this was the so-called 'Eikenhof incident', where the wrong people were convicted and sentenced on the strength of false confessions obtained in the course of the police investigation.[43]

72. In these rather challenging circumstances, the Committee tried as best it could, by means of its own investigative capacity and a very careful weighing of all the relevant facts and circumstances, to reach just and fair conclusions. Aggrieved parties had the option of taking decisions of the Committee on review to the High Court. To date, eight of the Committee's decisions have been challenged

43 Phila Dola [AM3485/96].

and taken on review. Though the Committee was required by the High Court to review one of its decisions, that process resulted in the Committee reaffirming its original refusal of amnesty. The most prominent of these cases was that involving the assassins of the senior ANC/South African Communist Party official, Mr Chris Hani – namely Messrs Clive Derby-Lewis and Janusz Walus – where the Committee's rejection of their amnesty applications was upheld.[44]

73. Finally, it is also pertinent to note that the Act did not expressly introduce an onus of proof on applicants. It simply required that the Committee should be satisfied that the applicant had met the requirements for the granting of amnesty. This requirement is less onerous on applicants and introduced greater flexibility when deciding amnesty applications. (...p54)

44 See this section, Chapter Four, 'Legal Challenges'.