



Legal Realism and Transitional Justice from an Historical Perspective

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Legal Realism and Transitional Justice from an Historical Perspective

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A Thesis in the Field of History
for the Degree of Master of Liberal Arts in Extension Studies

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Abstract

Accepted legal doctrine dictates that full disclosure of the crimes committed by an amnesty applicant before South Africa's Truth and Reconciliation Commission was the only factor for the Commission to consider when deciding whether to grant that individual amnesty. In other words, full disclosure was required for the granting of amnesty, but expressions of remorse or apology were not. South African law expressly limited the granting of amnesty to such situations, and international law supported this limitation. However, legal realism provides an alternative perspective, with its notion that decision makers naturally are subject to their own opinions and biases, regardless of what the law might require. An electronically searchable dataset of all amnesty applicants' publicly accessible amnesty hearing transcripts has allowed this project to apply methodological rigor to the analysis of Commission decisions like never before. This thesis explores specifically whether there is a correlation between the frequency of remorse per word of an amnesty applicant's testimony and the granting of amnesty in the South African context. Linear regression analysis of this population did not reveal a statistically significant relationship between frequency of remorse and the granting of amnesty. However, an Analysis of Variance (ANOVA) test showed that amnesty applicants who expressed "more" remorse during their testimony in the amnesty hearings absolutely had a higher chance of receiving amnesty. The results from the ANOVA test are enough of a finding to reject the accepted legal doctrine and to start revising the history of the Commission to emphasize the role of remorse in that narrative. Moreover,

the results set future researchers down a path that emphasizes legal realism and empiricism with this and other transitional justice mechanisms.

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Chapter I.

Introduction

As states transition out of periods of conflict, the victors often are faced with the dilemma of whether to seek revenge against their former foes in the name of justice or to grant them amnesty in the name of peace. Both options will set the state down a particular path. This type of dilemma has led to the almost axiomatic belief that peace and justice are inversely proportional to each other when it comes to post-conflict transitional justice.¹ One tool that has been used to try to strike a balance between justice and peace is the truth and reconciliation commission. In post-apartheid South Africa, the basic idea behind the truth and reconciliation commission was to allow for some form of amnesty in exchange for an admission of the truth by the alleged perpetrator of the political crime in question. The goals of the commission included genuine reconciliation and prevention of open hostilities returning in the future, to create closure for victims and societies through recognition of the hardships they suffered, and to alleviate significant burdens on the domestic court system in trying all of the individuals who otherwise would have been brought before those courts.² Regardless of whether international law required full disclosure of the relevant facts for the granting of amnesty to be deemed legal,³ South Africa placed full disclosure at the heart of its truth and reconciliation

¹ Muhamed Sacirbey, "Securing International Peace: Legality vs. Politics," *Berkeley Journal of International Law* 18, no. 2 (2000): 215; Salvador Maria Lozada, "The Successful Appeal from Ballots to Bullets: The Herculean Hardships of Judicializing Politics in Latin America," *N.Y.U. Journal of International Law and Policy* 25, no. 1 (1992): 132-33; Emiliós A. Christodoulidis, "Truth and Reconciliation as Risks," *Social and Legal Studies* 9, no. 2 (2000): 193.

² Jonathan Allen, "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission," *University of Toronto Law Journal* 49, no. 3 (1999): 315.

³ Gwen K. Young, "Amnesty and Accountability," *U.C. Davis Law Review* 35, no. 2 (2002): 446-53 (arguing in favor of international law requiring full disclosure); Louise Mallinder, "Amnesty and

commission through its Truth and Reconciliation Commission Act. This thesis challenges the centrality, even singularity, of full disclosure by proposing remorse and remorse-related notions, such as contrition and apology, as key determinants of amnesty. While remorse might not fully displace full disclosure and other factors in determining amnesty in a particular case, the insertion of remorse into the calculus helps tell a more sophisticated story of what actually is going on in the mind of the decision maker sitting on a truth and reconciliation commission.

Research Question

The foundational debate at the core of this thesis revolves around the overarching question: What is the role of remorse emotions in decision making of truth and reconciliation commissions? There is a wealth of literature on judicial decision making, mostly in the realm of legal realism and analysis of the individual opinions of U.S. Supreme Court justices,⁴ whereas foreign courts and tribunals typically are seen as monolithic black boxes where the decision makers are devoid of personal opinions and biases. This thesis represents one of the first forays into this exciting area that essentially tries to peek behind the veil at how decisions of truth and reconciliation commissions are reached,⁵ by using a population census and rigorous social science methodology that others before now have lacked. The hypothesis for this thesis is that there will be a

International Law,” in *Oxford Bibliographies*, ed. Anthony Carty et al. (London: Oxford University Press, 2018), accessed Feb. 28, 2022, <https://ssrn.com/abstract=3341316> (arguing that international law does not allow for amnesty for gross human rights violations, regardless of whether full disclosure was provided).

⁴ Keith J. Bybee, “The Limits of Debate or What We Talk About When We Talk about Gender Imbalance on the Bench,” *Michigan State Law Review* 2012, no. 5 (2014): 1481; James L. Gibson and Gregory A. Caldeira, “Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?,” *Law and Society Review* 45, no. 1 (2011): 195.

⁵ Antje du Bois-Pedain, *Transitional Amnesty in South Africa* (Cambridge: Cambridge University Press, 2007), ch. 2-4.

correlation of probabilistic value between remorse on the part of the amnesty applicant and the Commission's granting of amnesty, thereby undermining the perceived importance of full disclosure as the determining factor for amnesty.

The exact research question for this thesis asks: Is there a relationship between the amnesty applicant using remorse words during his testimony and the granting of amnesty by South Africa's Truth and Reconciliation Commission? To be clear, the independent variable is the frequency of remorse per word of testimony, with the dependent variable being the granting of amnesty. The methods adopted in this project when studying the frequency of expressions of remorse and the determination of amnesty are used to determine whether a *correlation* exists between these two. A detailed operational definition of "remorse" is provided later. Suffice it to say here that the plain-language meaning of "remorse" has been used, which involves "deep regret or guilt for doing something morally wrong,"⁶ along with single-word synonyms from a thesaurus and related words. The methods used do not allow for a determination of causation, so it is not possible to talk about the definitive role that expressions of remorse play on a determination of amnesty, only that there is a correlation, which is distinct from causation. Indeed, there may be other factors at play when the Commission granted amnesty, such as the amnesty applicant's race or socio-economic status, which are potential factors that this thesis has not addressed. Nevertheless, answering this research question is important because it challenges legal dogma concerning what is considered when deciding to grant amnesty and it supports an alternative paradigm presented by legal realism. Prior researchers on the Commission have not been able to answer such

⁶ "Remorse," *Oxford English Dictionary* (London: Oxford University Press, 2009).

questions with a sufficient amount of reliability because they appear to have lacked the requisite population census and methodology to base such claims.

The Theoretical Foundation of Legal Realism

The notion of legal realism has suffered a fragmented existence on account of the fact that it has had many rather imprecise definitions over the years.⁷ For example, commentators sometimes see legal realism as a type of methodology that forms an integral part of comparative approaches to the study of law, inasmuch as judges and lawyers alike naturally look outside their own system to see how others tackle similar problems.⁸ Despite the variation in definitions, the red thread throughout all of them is the point that law depends on what judges and lawyers actually think and do, not necessarily what they *should* do, which can be noticeably different at times. In this regard, legal realism can be seen as being similar to the post-positivist positions observed in the more mainstream social sciences.⁹

Emotion features prominently in some definitions of legal realism. Frederick Schauer refers to the involvement of judges' emotions and other extraneous factors that may drive them to a particular decision as a "tamed" version of legal realism when these factors are relied on only when the law is unclear, with the "untamed" version driving them to a particular decision even when the law is clear on its face.¹⁰ Either way,

⁷ Guadalupe T. Luna, "Legal Realism and the Treaty of Guadalupe Hidalgo: A Fractionalized Legal Template," *Wisconsin Law Review* 2005, no. 2 (2005): 519-20.

⁸ Mathias Reimann, "The End of Comparative Law as an Autonomous Subject," *Tulane European and Civil Law Forum* 11, no. 1 (1996): 71; David J. Gerber, "Method, Community & Comparative Law: An Encounter With Complexity Science," *Roger Williams University Law Review* 16, no. 1 (2011): 122.

⁹ Merry-Jo D. Levers, "Philosophical Paradigms, Grounded Theory, and Perspectives on Emergence," 3 *SAGE Open Access*, Dec. 17, 2013.

¹⁰ Frederick Schauer, "Legal Realism Untamed," *Texas Law Review* 91, no. 3 (2013): 779-80; Andrew J. Wistrich et al., "Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?," *Texas Law*

emotions form an important part of one's decision-making processes under this theory. Whereas some might think that emotion represents the antithesis of rational decision making, the reality is that emotion is the main source of humans learning from their mistakes over time,¹¹ with judicial decision makers naturally falling within that set of individuals. Numerous studies within the US-based literature have taken this approach to studying judicial decision making, to the point that it seems possible to say that it represents a dominant way of analyzing domestic court cases. However, this approach has been slow to spread beyond US domestic law, with this thesis representing the most recent effort to expand its applicability.

This thesis identifies a gap in the literature about the role of remorse on the part of the amnesty applicant when South Africa's Truth and Reconciliation Commission was deciding on the application. More importantly, this thesis attempts to fill that gap by demonstrating a statistically significant relationship between the number of remorse words per word of testimony by the amnesty applicant and the granting of amnesty by the Commission. Besides the iconoclasm enabled from the population census and rigorous methodology at the heart of this thesis' research, the analysis contained in this thesis is important because of the way that the Commission has been used as a model for many other transitional justice mechanisms throughout the world. The methodology adopted here and the unique legislation that forms the foundation of the Commission frustrate application of the findings of this thesis to a higher level of abstraction with transitional justice mechanisms in general. Nevertheless, asking and answering this thesis' research

Review 93, no. 3 (2015): 900.

¹¹ Jennifer Nedelsky, "Embodied Diversity and the Challenges of Law," *McGill Law Journal* 42, no. 1 (1997): 101; Neal R. Feigenson, "Emotions, Risk Perceptions and Blaming in 9/11 Cases," *Brooklyn Law Review* 68, no. 4 (2003): 959.

question should lead other researchers to explore whether legal realism plays a role in the decision-making processes of other transitional justice mechanisms. Such data-driven research of historical events offers the possibility of identifying reality when it comes to the decision making of the Truth and Reconciliation Commission concerning how it handled amnesty applications. This quest to understand reality pushes this thesis into the realm of positivism, or the belief that reality can be understood through careful observation.¹² This thesis explores reality through systematic and comprehensive inductive analysis of the amnesty hearing transcripts of the Commission. Without such an analysis of reality, it becomes difficult to make meaningful reforms to legal doctrine and to the functioning of institutions in this area in the future.

Literature Review

While a considerable amount of literature has been written in the context of the Commission on the importance of forgiveness in mending divisions within post-conflict society,¹³ no commentators appear to have focused on remorse or similar emotions as a factor for whether the amnesty applicant receives amnesty. Instead, most commentators assert that the granting of amnesty is not based on expressions of remorse by the amnesty applicant, which has led some victims to reject the entire process.¹⁴ This characterization

¹² Colin Hay, "Political Ontology," in *The Oxford Handbook of Political Science*, ed. R. E. Goodin (Lond: Oxford University Press, 2009), 460; Jonathan Grix, "Introducing Students to the Generic Terminology of Social Research," *Politics* 22, no. 2 (2002): 177, 182; Michael Wells, "Positivism and Antipositivism in Federal Courts Law," *Georgia Law Review* 29, no. 3 (1996): 655.

¹³ du Bois-Pedain, *Transitional Amnesty*, 286; "Ninth Annual Stein Center Symposium: The Role of Forgiveness in The Law," *Fordham Urban Law Journal* 27, no. 5 (2000): 1429 (citing many other authors); Tama Koss, "South Africa's Truth and Reconciliation Commission: A Model for the Future," *Florida Journal of International Law* 14, no. 3 (2002): 526.

¹⁴ Jeanne M. Woods, "Reconciling Reconciliation," *UCLA Journal of International Law and Foreign Affairs* 3, no. 1 (1998): 104; Emily H. McCarthy, "South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation?," *Michigan Journal of Race and Law* 3, no. 1 (1997): 244-45; Jeffrie G. Murphy, *Punishment and the Moral Emotions: Essays in Law, Morality, and Religion* (London: Oxford

of the situation appears to place the burden of emotion – in this case, the suppression of emotion – entirely on the victims’ shoulders, which cannot be a sound basis for a system of restorative justice. Intuition from a general understanding of quasi-judicial decision-making processes, transitional justice, and human nature inevitably leads to a challenge of those basic assertions, which acted as the initial spark for the development of this thesis. A desire to fill that logical gap has provided the sustaining power. The remainder of this section describes and analyzes the six publications that come closest to resembling what this thesis set out to accomplish by focusing on factors other than full disclosure in determining amnesty but fall short when it comes to remorse.

The first publication to be highlighted is Antje du Bois-Pedain’s 2007 book *Transitional Amnesty in South Africa*, which is a methodologically rigorous book that resembles this thesis’ approach. There, du Bois-Pedain used quantitative and qualitative methodology and data to try to determine the reasons why perpetrators were granted amnesty and others were not. Instead of remorse, du Bois-Pedain focused on:

- The amnesty applicant’s affiliation with a political party or the state;
- The severity of the offense;
- The link between the offense and some political purpose;
- The existence of orders and the amnesty applicant’s position; and
- The amnesty applicant’s motivation in committing the offense.¹⁵

University Press, 2014), 7-10; Leslie Haskell, *Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts* (New York: Human Rights Watch, 2011), 121 (asserting that it is imperative that those who have been harmed by gross human rights abuses feel that justice has been served by a transitional justice mechanism).

¹⁵ du Bois-Pedain, *Transitional Amnesty*, 63-65.

Again, du Bois-Pedain used data and quantitative analysis to substantiate her claims, similar to what this thesis achieves. At the same time, she also looked at the following factors for why an amnesty application was rejected:

- Inadequate information from the amnesty applicant;
- The amnesty applicant's motivation in committing the offense;
- Disqualifying factors under the amnesty legislation;
- Inadequate evidence that an offense was committed; and
- Whether the offense was an ordinary criminal act.¹⁶

It is not entirely clear why du Bois-Pedain looked at mostly different variables for determining the granting of amnesty and the denial of amnesty. What is clear, however, is that she did not see remorse or a similar emotion as being a relevant factor in determining an amnesty application.

Nevertheless, du Bois-Pedain dedicated part of Chapter 7 to the importance of expressions of remorse in the truth and reconciliation process. In contrast to this thesis' focus on the impact of amnesty applicants' displays of remorse on the decision-making of the Commission, du Bois-Pedain only treated remorse as a part of the perpetrator-victim relationship. Therefore, she looked at cases where amnesty applicants apologized for their actions and whether they were granted forgiveness by the victims or the victims' relatives.¹⁷ In this part, du Bois-Pedain did not rely on any data, but rather relied on the academic literature theorizing the relationship between apology and forgiveness, thereby leaving a significant gap that this thesis fills.

¹⁶ du Bois-Pedain, 92.

¹⁷ du Bois-Pedain, ch. 7.

Similar to du Bois-Pedain's book, James Gibson's article "The Contributions of Truth to Reconciliation: Lessons from South Africa" was methodologically rigorous. Gibson was ambitious in trying to show a causal link between the Commission's truth-seeking mandate and actual reconciliation in South Africa, as opposed to competing factors such as the granting of amnesty or the rule of law.¹⁸ Gibson's article relied on surveys of the various racial groups in South Africa and employed statistical analysis to show a correlation between these two.¹⁹ He even went so far as to assert a causal connection between them, and he explained that this causal connection was due to the transparency and understandability of the hearings and the findings.²⁰ While Gibson recognized that some amnesty applicants expressed remorse during their hearings,²¹ he did not assert that there was a connection between these expressions of remorse and reconciliation, or the granting of amnesty for that matter. In short, this article did not address remorse and the Commission in a meaningful way.

The next three publications discussed here were less methodologically rigorous than the first two, but they nevertheless addressed remorse to a greater degree. Richard Wilson's 2001 book *The Politics of Truth and Reconciliation in South Africa* made similar observations to the ones identified in this thesis.²² In particular, Wilson observed that nothing relating to the Commission required an amnesty applicant to show a measure of remorse.²³ This especially included the 1995 Promotion of National Unity and

¹⁸ James L. Gibson, "The Contributions of Truth to Reconciliation: Lessons from South Africa," *Journal of Conflict Resolution* 50, no. 3 (2006): 409.

¹⁹ Gibson, table 1.

²⁰ Gibson, 413.

²¹ Gibson, 417.

²² Nothing in Wilson's book influenced the initial formation of this thesis' hypothesis.

²³ Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), 102.

Reconciliation Act, “which had already written reconciliation, remorse and forgiveness out of the practices and decisions of the Amnesty Committee, since the Act did not stipulate that offenders apologize, show remorse, or request forgiveness as requirements for receiving amnesty.”²⁴ However, this essentially is the extent of the similarity between Wilson’s book and this thesis. Instead of focusing on remorse, Wilson’s book focused on at least three other topics, including “truth” or rather the Commission’s failure to define “truth,” which he saw as leading to inconsistent practices between the Commission’s sub-committees.²⁵ Wilson also focused on criticizing the Commission for the different ways that its sub-committees approached “reconciliation,” with the Amnesty Committee taking a legal-procedural approach that satisfied itself by applying the 1995 Act to gross violations of human rights on an individual level,²⁶ whereas the other sub-committees took a “religious-redemptive” approach that allowed for collective forgiveness through a confessional type of testimony by individuals.²⁷ Wilson also focused on the frustrations arising from the Commission’s emphasis on restorative justice, whereas the South African population largely wanted retribution, which ultimately denigrated the legitimacy of the Commission in the eyes of the population.²⁸ He made no meaningful references to remorse besides the citations provided above.

The second publication in this category of less rigorous studies is Eugene Baron’s 2015 article “Remorse and Repentance Stripped of Its Validity: Amnesty Granted by the Truth and Reconciliation Commission of South Africa,” which attempted to show that

²⁴ Wilson, 105.

²⁵ Wilson, 36.

²⁶ Wilson, 104.

²⁷ Wilson, 109.

²⁸ Wilson, 25.

“remorse and repentance were not required in order for perpetrators to get amnesty, [and therefore] left the reconciliation process in a vacuum.”²⁹ Baron essentially assumed that remorse was not appreciated in the amnesty proceedings, although he asserted that it should have been appreciated if the proceedings were to have legitimacy and the reconciliatory effect that the Commission was designed to provide.³⁰ Baron went on to assert, without evidence, that the expression of remorse would have led amnesty applicants to “make things right with their counterparts as part of the reconciliation process.”³¹ Without such expressions of remorse, Baron concluded that the amnesty applicants cannot ever received genuine forgiveness.³² Baron’s line of reasoning ran exactly contrary to this thesis’ hypothesis, and it lacked the methodological rigor that this thesis provides.

The third publication in this category is the 2002 article by Pumla Gobodo-Madikizela entitled “Remorse, Forgiveness, and Rehumanization: Stories from South Africa.”³³ Similar to Baron’s article, this article was entirely normative in nature and devoid of supportive evidence. This article essentially asserted that expressions of remorse by amnesty applicants are, in the abstract, necessary for victims to be able to forgive the amnesty applicants of their misdeeds.³⁴ Gobodo-Madikizela assumed that a showing of remorse was part of the requirement of full disclosure,³⁵ although no evidence was provided to support this, and no such evidence appears available. The strength of the

²⁹ Eugene Baron, “Remorse and Repentance Stripped of Its Validity: Amnesty Granted by the Truth and Reconciliation Commission of South Africa,” *Studia Historiae Ecclesiasticae* 41, no. 1 (2015): 169.

³⁰ Baron, 172.

³¹ Baron.

³² Baron, 174.

³³ Pumla Gobodo-Madikizela, “Remorse, Forgiveness, and Rehumanization: Stories from South Africa,” *Journal of Humanistic Psychology* 42, no. 1 (2002): 7.

³⁴ Gobodo-Madikizela.

³⁵ Gobodo-Madikizela, 13.

article seems to be the development of a theoretical definition of “remorse” and its theoretical connection to humanizing victims.³⁶ Without greater contextualization to the Commission or reliance on evidence generated by the Commission, it is difficult to see this article as being relevant to the historical analysis being undertaken in this thesis.

The last publication mentioned here that resembles what this thesis has set out to accomplish is Juliet Brough Rogers’ 2016 book chapter “Rethinking Remorse: The Problem of the Banality of Full Disclosure in Testimonies from South Africa.”³⁷ Both this thesis and Rogers’ chapter see an important role for remorse with the Commission, but that essentially is where the similarities end. Indeed, they differ in scope, the definition of remorse, the actors who are to show remorse, the methodology for determining remorse, and the hypotheses being scrutinized, among other ways. To begin, this thesis is positivist in demonstrating that an amnesty applicant’s showing of remorse plays a role in the granting of amnesty, whereas Rogers’ chapter was normative in asserting that the showing of remorse and full disclosure of information both should be provided in order to achieve restorative justice, without reference to actual practice.³⁸

Second, Rogers defined remorse in a dramatically different way from this thesis. This thesis sees the concept of remorse as not being foreign to the field of law. For example, remorse is an important factor during the sentencing phase of criminal proceedings, which often is used as a mitigating factor.³⁹ While these definitions are

³⁶ Gobodo-Madikizela, 21-23.

³⁷ Juliet Brough Rogers, “Rethinking Remorse: The Problem of the Banality of Full Disclosure in Testimonies from South Africa,” in *Breaking Intergenerational Cycles of Repetition: A Global Dialogue on Historical Trauma and Memory*, ed. Pumla Gobodo-Madikizela (Opladen: Barbara Budrich Publishers, 2016), 27.

³⁸ Rogers.

³⁹ Stephanos Bibas and Richard A. Bierschbach, “Integrating Remorse and Apology into Criminal Procedure,” *Yale Law Journal* 114, no. 1 (2004): 85.

helpful, they are specific to the criminal law context.⁴⁰ As truth and reconciliation commissions are not criminal proceedings, and not even judicial proceedings in the traditional sense, a broader definition might be more appropriate. As with “legal realism,” remorse has many definitions,⁴¹ which leads one to the plain-language definition provided in the Oxford English Dictionary – “deep regret or guilt for doing something morally wrong.”⁴² Such regret and guilt can take many forms, ranging from discomfort to agonizing horror.⁴³

For the purposes of this thesis, remorse will be seen from an orthodox perspective as any characterization of one’s own actions in a negative light, where a degree of regret is either express or readily implied through verbal statements of the amnesty applicant during the amnesty hearings. Of course, there are genuinely macabre individuals who can see their actions in a negative light and yet be devoid of remorse, just as there are self-deprecating individuals who do not genuinely believe in the negativity that they freely express. Nevertheless, general rules cannot be based on the exceptions, or else the ability to generalize would be severely diminished. If anything, these exceptions can be thought of as proving the rule. Rogers, on the other hand, defined remorse counterintuitively as including “acknowledgment of the enthusiasms and pleasures of the perpetrator in the scene of violence.”⁴⁴ For Rogers, the focus was not on the frequency of remorse-related words or feelings, but rather the perpetrator’s eagerness to share with the victim the emotions he felt while committing the acts in question, which need not be remorseful per

⁴⁰ Richard Birke, “The Role of Trial in Promoting Cooperative Negotiation in Criminal Practice,” *Marquette Law Review* 91, no. 1 (2007): 41-42.

⁴¹ Rocksheng Zhong, “Judging Remorse,” *N.Y.U. Review of Law and Social Change* 39, no. 1 (2015): 134.

⁴² “Remorse,” *Oxford English Dictionary* (London: Oxford University Press, 2009).

⁴³ Zhong, *Judging Remorse*, 134-37.

⁴⁴ Rogers, *Rethinking Remorse*, 46.

se. In Rogers' own words, this untraditional definition of remorse involves behavior that is "less compassionate, less gentle and less desirable than gestures that are traditionally or standardly thought of as remorseful."⁴⁵ Nevertheless, Rogers asserted that such behavior shows remorse because perpetrators are revealing "the ugliness of their actions [which] can be understood to perform a kind of, what we might call[,] selflessness."⁴⁶ Such a definition of remorse runs directly against the mainstream definition, as provided above, and arguably pushes the boundaries of that word's definitional limitations.

Third, this thesis focuses on the decision-making process of Commission members, especially the Amnesty Committee, as explained in Chapter 3 below. On the one hand, this thesis focuses on the degree to which amnesty applicants' expressions of remorse made the Commission more likely to grant the applicant amnesty for the political crimes in question. On the other hand, Rogers looked at the situation from the victims' perspective, believing that the amnesty applicants' "remorse" provided victims with a large measure of closure by documenting the horrors they suffered and by allowing them "to show the reality of their experience as a reality for others,"⁴⁷ which is an unorthodox way of viewing remorse, to say the least.

Fourth, as already specified in the section above entitled "Research Question," this thesis' hypothesis is that there is a correlation of probabilistic value between remorse on the part of the amnesty applicant and the truth commission's granting of amnesty to that particular individual. However, Rogers indicated that expressions of remorse are "unlikely to endear a perpetrator to a judge or jury, indeed, it is very unlikely to secure a

⁴⁵ Rogers, 28.

⁴⁶ Rogers, 29.

⁴⁷ Rogers, 46.

lighter prison sentence and may even contribute to a verdict as ‘guilty.’”⁴⁸ Rogers adopted this untraditional hypothesis because she defined remorse as the “acknowledgment of enjoyment [in the scene of violence]”⁴⁹ by the perpetrator, which would undermine the perpetrator’s chances of being granted amnesty by the Commission. In other words, Rogers’ hypothesis was opposite to the one presented in this thesis, mainly because of her strained definition of remorse.

Finally, this thesis has adopted an inductive approach to analysis with a rigorous social science methodology, whereas Rogers adopted a different approach. For example, Rogers explained that her chapter focused on “psychoanalytic discussion.”⁵⁰ She provided two case studies as support for her arguments – namely, those of Jeffrey Benzien’s and Eric Taylor’s hearings before the Commission – along with reliance on psychoanalytical theory relating to trauma.⁵¹ Her qualitative method is noticeably different from the rigorous methodology adopted here. Indeed, a text-mining methodology as the one adopted here would not be well suited for identifying her brand of remorse, where a perpetrator recognizes his “enthusiasms and pleasures” in causing harm without needing to rely on oral expressions of remorse.⁵²

In conclusion, at first glance, it would appear that Rogers’ chapter fills the gaps in the literature that this thesis identified in the earlier portions of this chapter. However, after further consideration, it becomes clear that Rogers’ chapter left plenty of a gap for this thesis to fill.

⁴⁸ Rogers, 49.

⁴⁹ Rogers.

⁵⁰ Rogers, 27.

⁵¹ Rogers, 33-38.

⁵² Rogers, 46.

Outline

This thesis is divided into six chapters, including this introduction and a brief conclusion, in Chapters 1 and 6, respectively. Chapter 2 provides a thumbnail overview of the Commission's history so that the reader has sufficient knowledge to understand this thesis' arguments concerning the Commission's amnesty determinations. Chapter 3 describes the functioning of the various committees of the Commission, with it being made clear that the Amnesty Committee had responsibility for deciding on amnesty applications, with the other committees and staff fulfilling supporting and implementing roles. Chapter 4 provides the analytical meat of the thesis, by providing a summary of the statistics generated by the research at its core. Chapter 5 elaborates on this thesis' significance, speculating how evidence of the Commission's reliance on remorse to grant amnesty might help convince victims and parts of the South African community that the Commission was more of a worthwhile endeavor than they originally might have thought.

Chapter II.

Brief History Leading up to the Truth and Reconciliation Commission

South Africa's National Party won the 1948 general election, which ultimately would prove to be a watershed moment for South Africa in terms of sending it down a particular path during the remainder of that century. Instead of moving away from racist and discriminatory policies, as was happening throughout the post-war world at that time, the National Party further entrenched the system that gave the white minority dominance over the rest. Fears over *die swart gevaar* – or “the black menace” – that lived in “urban slums and shantytowns” near predominately white areas helped mobilize the white minority to create the apartheid regime.⁵³ Various pieces of legislation, including the 1950 Group Areas Act and the Prevention of Illegal Squatting Act, created “racially homogeneous residential areas” that prohibited the population from moving to areas outside of one's designated area.⁵⁴ The 1950 Population Registration Act required the population to register in accordance with their racial group.⁵⁵ The 1953 Reservation of Separate Amenities Act established “racial separation in all public amenities . . . [and] public transport” and introduced “pass” laws whereby black South Africans needed a pass to live or work in areas designated as “white.”⁵⁶ The 1959 Promotion of Bantu Self-

⁵³ Deborah Posel, “The Apartheid Project, 1948-1970,” in *The Cambridge History of South Africa*, ed. Robert Ross, Anne Kelk Mager and Bill Nasson eds. (Cambridge: Cambridge University Press 2011), 322, 326.

⁵⁴ Posel, 335.

⁵⁵ Other pieces of legislation include the Prohibition of Mixed Marriages Act (1949), the Separate Representation of Voters Act (1956), and the Immorality Amendment Act (1950).

⁵⁶ Posel, *The Apartheid Project*, 356.

Government Act eventually created “separate ethnic territorial authorities” that forced black South Africans out of South Africa into neighboring “homelands.”⁵⁷

All of this legislation and its accompanying implementation understandably led to animosity from the non-white groups of South Africa, which formed opposition groups like the African National Congress (ANC) and the Pan-Africanist Congress. These groups fought the “pass” laws and all other aspects of the apartheid system that promoted racial separation and discrimination, at first using peaceful means but eventually using other means after a 1960 protest at Sharpeville’s police station led to mass casualties among the protesters on account of the live ammunition that police had used.⁵⁸ Tensions continued to rise after Sharpeville, leading the apartheid government to declare a state of emergency and prohibit the ANC and the Pan-Africanist Congress.⁵⁹ With the ANC’s leaders arrested, including Nelson Mandela, and greater repression from the state, the opposition movement had no choice but to move underground.⁶⁰ The ANC formed an armed branch, *Umkhonto we Sizwe* (or “Spear of the Nation” or MK), which trained in neighboring states and sabotaged state targets.⁶¹ In the mid-1970s, following the crushing of a student movement in Soweto, opposition forces grew throughout South Africa on school campuses, with new recruits going to places like Tanzania and Angola to receive military training.⁶² The early 1980s saw numerous sabotage attacks by these groups on oil refineries and nuclear power stations, with the apartheid regime further cracking down as

⁵⁷ Mager Anne Kelk, “Popular Responses to Apartheid: 1948-1975,” in *The Cambridge History of South Africa*, ed. Robert Ross, Anne Kelk Mager and Bill Nasson (Cambridge: Cambridge University Press, 2011), 389.

⁵⁸ “Sharpeville Massacre, 21 March 1960,” accessed Feb. 28, 2022, www.sahistory.org.za/article/sharpeville-massacre-21-march-1960.

⁵⁹ du Bois-Pedain, *Transitional Amnesty*, 4.

⁶⁰ du Bois-Pedain.

⁶¹ du Bois-Pedain.

⁶² Lodge, *Resistance and Reform, 1973-1994*, 409, 428.

a result, under new laws like the 1982 Internal Security Act that allowed for detention (and worse) without trial.⁶³ The South African Defence Forces (SADF) invaded several of South Africa's neighbors in an effort to destroy the ANC's training facilities, and it also used hit squads to eliminate ANC members wherever they could be found.⁶⁴ However, it was the methodical and pervasive abuse of black South Africans during apartheid that was particularly appalling. Such abuse included not only political oppression through such heinous acts as torture and extrajudicial killings but also social oppression through such heinous programs as the Bantu education system and labor control.⁶⁵

While the apartheid regime tried to introduce some superficial reforms in the early 1980s, such as a more inclusive tricameral parliament, racial tensions continued to grow during this period, to the point where South Africa had nearly descended into civil war by the mid-1980s. However, the ANC started to inch towards reconciliation when the SADF made it difficult for the ANC to train its soldiers due to regular attacks on its camps, with Mandela calling for peace talks with the Minister of Justice Kobie Coetsee in 1986.⁶⁶ At roughly the same time, discontent among white South Africans had led to reformist F.W. de Klerk becoming the new prime minister in 1989, which brought new hope for reconciliation.⁶⁷ UN sanctions also had placed considerable pressure on the South African government to reform.⁶⁸ By February 1990, de Klerk had lifted the ban on political

⁶³ Lodge, 409, 428; du Bois-Pedain, *Transitional Amnesty*, 5.

⁶⁴ Max Coleman, "A Crime Against Humanity – Analysing the Repression of the Apartheid State," accessed Feb. 28, 2022, <https://sahistory.org.za/archive/many-faces-apartheid-repression>.

⁶⁵ Nancy L. Clark and William H. Worger, *South Africa: The Rise and Fall of Apartheid* (Milton Park: Routledge Publishing, 2016), chs. 3-4; Albie Sachs, *South Africa: The Violence of Apartheid* (London: Christian Action Publications Ltd. 1969).

⁶⁶ Lodge, *Resistance and Reform*, 464-65.

⁶⁷ Lodge.

⁶⁸ Lodge, 480.

organizations and freed political prisoners, including Mandela, which ultimately led to political settlement in 1994.⁶⁹

The 1995 Promotion of National Unity and Reconciliation Act was the product of negotiation between the new African National Congress (ANC) majority party and the old apartheid regime in South Africa, which had maintained many of the key positions in society and government, including within the court system.⁷⁰ As with most truth and reconciliation commissions, South Africa's Truth and Reconciliation Commission was to address the human rights abuses suffered under the prior regime, to avoid similar incidents from happening in the future by creating a legitimate record of the abuses, and to encourage reconciliation between all of the groups in South Africa.⁷¹ The Commission was not designed to directly get compensation for victims, but rather to make recommendations for compensation that the government was supposed to implement, along with creating a record of abuse and determine amnesty.⁷² As Chapter 4 below explains, this legislation required the Commission to hinge the granting of amnesty on "full disclosure" by the alleged perpetrator. However, as Chapter 5 below shows, the Commission appears to have granted amnesty based on other factors, with this thesis focusing on remorse and remorse-related emotions. Before providing that analysis,

⁶⁹ Lodge, 483.

⁷⁰ Makau wa Mutua, "Hope and Despair for a New South Africa: The Limits of Rights Discourse," *Harvard Human Rights Journal* 10, no. 1 (1997): 78-79; "South African Judiciary is Dragging Its Heels: Blacks Still Minority on High Court Benches," *Cape Argus*, Feb. 28, 1997, 8.

⁷¹ Susanna Braun, "Forgiveness, South Africa's Truth Commission, and Military Trials: America's Options in Dealing with Crimes Against Humanity in Light of the Terrorist Attacks on September 11, 2001," *Hamline Journal of Public Law and Policy* 23, no. 2 (2002): 508-09.

⁷² Braun, 509-10; Kader Asmal, "International Law and Practice: Dealing With the Past in the South African Experience," *American University International Law Review* 15, no. 6 (2000): 1211; Alex Boraine, *A Country Unmasked: South Africa's Truth and Reconciliation Commission* (London: Oxford University Press, 2002).

however, the next chapter discusses the Commission's functioning in order to understand which of its committees made which types of decisions and why.

Chapter III.

Functioning of the Commission

The Truth and Reconciliation Commission was the product of a set of *sui generis* circumstances, and so its structure and functioning were unique to this context. The South African legislature envisioned a sophisticated institution for bringing about reconciliation among diverse groups. This chapter describes that structure and explores how its organs were intended to work together to realize this overarching goal of reconciliation.

The Selection Process for Commissioners

Section 7 of the Promotion of National Unity and Reconciliation Act of 1995 (the TRC Act) granted the South African president the right to appoint commissioners to the Truth and Reconciliation Commission in consultation with the Cabinet of National Unity. In practice, those nominated for the role of commissioner were first interviewed in public sessions by a panel made up of representatives from every South African political party, which then provided President Mandela with a shortlist from which to choose.⁷³ On December 15, 1995, President Mandela appointed the following 17 commissioners: “Archbishop Desmond Tutu (Chairperson of the Commission), Dr. Alex Boraine (Vice-Chairperson), Ms. Mary Burton, Adv. Chris de Jager, the Revd Bongani Finca, Ms. Sisi Khampepe, Mr. Richard Lyster, Mr. Wynand Malan, the Revd Dr. Khoza Mgojo, Ms. Hlengiwe Mkhize, Mr. Dumisa Ntsebeza, Dr. Wendy Orr, Adv. Denzil Potgieter, Dr. Mapule F Ramashala, Dr. Fazel Randera, Ms. Yasmin Sooka and Ms. Glenda

⁷³ Truth and Reconciliation Commission Report, vol. 1, 9.

Wildschut.”⁷⁴ One point that readily stands out is that this group contains a considerable amount of diversity, in terms of gender, race, and occupation.

There is no public record that definitively explains why these individuals were placed on the shortlist or why they ultimately were selected as a commissioner, although presumably they were selected based on their perceived moral reputation and representativeness of the population, in addition to their affiliation with a major political party of South Africa at that time. In defending the impartiality of the Commission, Archbishop Tutu asserted that “all the political parties” were represented on the Commission, although he did not specify which political parties were represented on the panel.⁷⁵ Since the selection of the commissioners unfolded only a few months after the first post-apartheid general election in South Africa in April 1994, it seems safe to assume that Tutu’s reference to “all the political parties” is synonymous with the parties represented in the new parliament.

All 17 commissioners were assigned to one of the three committees established by Section 3(3) of the TRC Act, with the other positions being filled as depicted in the Commission’s structure provided in Appendix 1. The following subsection describes the structure and functioning of each of these three committees in order to understand who was tasked with making which decisions.

⁷⁴ Truth and Reconciliation Commission Report, vol. 1, 44.

⁷⁵ Truth and Reconciliation Commission Report, vol. 1, 9.

The Commission's Three Committees

The TRC Act established three committees, each of which promoted a different aspect of reconciliation through the amnesty-granting process. These committees were the Human Rights Violations Committee, the Reparation and Rehabilitation Committee, and the Amnesty Committee. Understanding the role of these three committees is crucial to fully understanding who was responsible for deciding on amnesty applications and who played a supporting role.

The Human Rights Violations Committee

Section 3(3)(a) of the Truth and Reconciliation Commission Act tasked the Human Rights Violations Committee with dealing with investigating gross human rights violations, which Section 1(1) defined as “the violation of human rights through: (a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a)” within certain time and geographic parameters “by any person acting with a political motive.” The Committee was chaired by Archbishop Tutu and comprised of 19 members, nine of whom were commissioners, with the other ten being referred to as “committee members,” and the Committee operated through four regional offices located in Johannesburg, Cape Town, Durban, and East London, as depicted in Table 1 below. These appointments were not permanent and unchangeable, as shown by the reassignment of two commissioners and two committee members to the Amnesty Committee – Messrs. Malan and Potgieter and Messrs. Lax and Sandi, respectively.

Table 1. Members of the Human Rights Violations Committee.

	COMMISSIONERS	COMMITTEE MEMBERS
JOHANNESBURG	Vice-Chairperson Ms Yasmin Sooka, Vice-Chairperson Mr Wynand Malan (reassigned to the Amnesty Committee in November 1997), Dr Fazel Randera	Dr Russell Ally, Mr Hugh Lewin, Ms Joyce Seroke
CAPE TOWN	Archbishop Desmond Tutu (Chairperson), Dr Alex Boraine, Ms Mary Burton, Mr Dumisa Ntsebeza, Adv Denzil Potgieter (reassigned to the Amnesty Committee in July 1997)	N/A
DURBAN	Mr Richard Lyster	Mr Mdu Dlamini, Ms Virginia Gcabashe, Mr Ilan Lax (reassigned to the Amnesty Committee in early 1998)
EAST LONDON	Reverend Bongani Finca	Ms June Crichton, Ms Motho Mosuhli, Mr Ntsikilelo Sandi (reassigned to the Amnesty Committee in March 1998)

Source: Truth and Reconciliation Commission Report., vol. 1, 277-78.

The Human Rights Violations Committee held monthly meetings in Johannesburg with all its members to discuss policy matters and to issue recommendations to the Commission.⁷⁶ Prior to its monthly meetings, a smaller “Findings Task Force Group,” comprising the Committee’s vice-chairpersons, executive secretary (not a commissioner

⁷⁶ Truth and Reconciliation Commission Report, vol. 1, 278.

or committee member), and one representative from each region would meet to discuss regional findings and issue policy recommendations regarding the process.⁷⁷

Over the course of its mandate, the Human Rights Violations Committee received 21,519 victim statements, approximately 15,000 of which contained at least one gross human rights violation.⁷⁸ In 90 percent of the cases, victims only issued a statement to the Committee and did not appear in a public hearing.⁷⁹ For the remaining cases concerning 1,819 victims,⁸⁰ approximately 100 public “victim hearings” were organized to hear individuals’ testimony of their suffering. It is important to note that these victim hearings are completely separate from the amnesty hearings that are the focus of Chapter 5 below. Nevertheless, the Human Rights Violations Committee was required to issue notices to alleged perpetrators before these public hearings so that the alleged perpetrators had a chance to participate in those hearings if they desired.⁸¹ The Committee also held thematic hearings in order to better understand the “patterns of abuse, motives and perspectives” for topics such as the Soweto 1976 protests and the targeting of women as subjects of human rights violations, for example, as well as institutional hearings to better understand the role of organizations, such as business and the media, during apartheid.⁸²

⁷⁷ Truth and Reconciliation Commission Report, vol. 1, 278.

⁷⁸ Truth and Reconciliation Commission Report, vol. 6, 570.

⁷⁹ Truth and Reconciliation Commission Report, vol. 1, 283.

⁸⁰ Audrey R. Chapman, “Truth Commissions and Intergroup Forgiveness: The Case of the South African Truth and Reconciliation Commission,” *Peace and Conflict: Journal of Peace Psychology* 13, no. 1 (2017): 54.

⁸¹ Truth and Reconciliation Commission Report, vol. 1, 280-82 (providing the details about the specific content and procedure of public “victim hearings,” thematic hearings, and institutional hearings).

⁸² Truth and Reconciliation Commission Report, vol. 1, 280-82.

The Reparation and Rehabilitation Committee

The Reparation and Rehabilitation Committee's main task was to provide recommendations to the government concerning the reparations that victims should receive based on the findings of the Human Rights Violations Committee and the Amnesty Committee. The Reparation and Rehabilitation Committee was chaired by Ms. Hlengiwe Mkhize and was comprised of nine members, including five commissioners, as detailed in the following table.

Table 2. Members of the Reparation and Rehabilitation Committee.

	COMMISSIONERS	COMMITTEE MEMBERS
JOHANNESBURG	Chairperson Ms Hlengiwe Mkhize	Mr Tom Manthata, Professor Piet Meiring
CAPE TOWN	Vice-Chairperson Dr Wendy Orr, Dr Mapule F Ramashala, Ms Glenda Wildschut	N/A
DURBAN	Reverend Dr Khoza Mgojo	Dr S'Mangele Magwaza
EAST LONDON	N/A	Archdeacon Mcebisi Xundu (resigned in January 1998, replaced by Ms Mandisa Olifant)

Source: Truth and Reconciliation Commission Report, vol. 1, 286.

Representatives of the Reparation and Rehabilitation Committee – either commissioners, committee members, or “briefers” – attended hearings held by the Human Rights Violations Committee and the Amnesty Committee in order to be informed of victims' situations, and the Reparation and Rehabilitation Committee started receiving lists of

victims' findings from the Human Rights Violations Committee in September 1998.⁸³

The Committee also relied on the Commission's Research Department for additional information on "the consequences of gross human rights violations on individuals, families and communities, and . . . assessing people's expectations of the [Commission]."⁸⁴ Therefore, it seems clear that the Commission had important support staff to assist these committees in fulfilling their functions.

The Reparation and Rehabilitation Committee provided its recommendations to the South African government concerning the reparations to victims as part of the Commission's Final Report in 1998. The Committee recommended that the government take five sets of measures: (1) urgent interim reparations for those in dire need of support; (2) reparation grants for individuals over the course of six years to up to 22,000 victims; (3) symbolic reparation measures such as the establishment of memorials and a day of remembrance; (4) community rehabilitation programs, notably in health and education services; and (5) institutional reform to prevent the recurrence of gross human rights violations.⁸⁵ Moreover, an Inter-Ministerial Committee on Reparation, chaired by South Africa's Minister of Justice Mr. Abdullah Omar, was established by the government in order to oversee the implementation of these recommendations in coordination with the Reparation and Rehabilitation Committee.⁸⁶ However, unfortunately, no important measures were taken to implement the Reparation and Rehabilitation Committee's recommendations.⁸⁷

⁸³ Truth and Reconciliation Commission Report, vol. 6, 165.

⁸⁴ Truth and Reconciliation Commission Report, vol. 1, 292.

⁸⁵ Truth and Reconciliation Commission Report, vol. 5, 181-94.

⁸⁶ Truth and Reconciliation Commission Report, vol. 5, 181-94.

⁸⁷ Truth and Reconciliation Commission Report, vol. 6, 173.

The Amnesty Committee

Although the Amnesty Committee originally was designed to consist of only five members, this number was increased on two occasions – first on June 27, 1997, and then again on December 10, 1997 – to 19, including four commissioners (Messrs. Potgieter, Malan, and de Jager, and Ms. Sisi Khampepe).⁸⁸ Among these members were judges, advocates, and attorneys, as the following table explains.

Table 3. Members of the Amnesty Committee.

	COMMISSIONERS	COMMITTEE MEMBERS
JUDGES	N/A	Chairperson Hassen Mall, Vice-Chairperson Andrew Wilson, Selwyn Miller, Sandile Ngcobo, Bernhard Ngoepe, Ronnie Pillay
ADVOCATES	Denzil Potgieter SC, Chris de Jager	Francis Bosman, Leah Gcabashe, John Motata, Jonas Sibanyoni, Sibongile Sigodi, Mr Ntsiki Sandi
ATTORNEYS	Ms Sisi Khampepe, Mr Wynand Malan	Mr Jake Moloi, Dr Wycliffe Tsotsi. Mr Ilan Lax

Source: Truth and Reconciliation Commission Report, vol. 1, 267-68.

The Committee ultimately received 7,115 amnesty applications.⁸⁹ The scope of the amnesty hearings covered all crimes committed between March 1, 1960, and May 10, 1994, which was the inauguration date of President Mandela.⁹⁰ Amnesty applications had to be submitted between December 14, 1995, and, after two extensions, September 30,

⁸⁸ Truth and Reconciliation Commission Report, vol. 1, 267-68.

⁸⁹ du Bois-Pedain, *Transitional Amnesty*, 20.

⁹⁰ du Bois-Pedain, 20.

1997.⁹¹ Applications had to be made by named individuals in relation to an act or multiple acts and omissions.⁹² Although co-perpetrators could submit joint applications involving the same incident, political groups and organizations could not submit applications on behalf of unnamed members and leader.⁹³

Most of the applications to the Committee were submitted by “chancers,” or rather applicants already serving prison sentences for clearly non-political crimes and who therefore did not qualify for amnesty under the “political motive” requirement of Section 20(2) of the TRC Act.⁹⁴ Only 1,645 applicants were identified as being affiliated with a “qualifying” political group, such as a state institution, liberation movement or political organization.⁹⁵ The sequence of steps in the Committee’s amnesty process is represented in the flow chart in Appendix 2. First, the completeness of every application was checked by teams of “evidence leaders” and “evidence analysts” who used information from the Commission’s Research Department and Investigation Unit or obtained in interviews with individuals, other applicants, and victims.⁹⁶ Second, applicants’ political motives were evaluated by contacting the organization or group on behalf of which they had claimed to have acted, and by looking at court records, police dockets, and prison records in the case of convicted and imprisoned applicants.⁹⁷ Finally, hearings were either held in chambers – when the application clearly did not meet the stated criteria to qualify for amnesty⁹⁸ – or as publicly “hearable” matters if they did

⁹¹ du Bois-Pedain, 20.

⁹² du Bois-Pedain, 20.

⁹³ du Bois-Pedain, 20.

⁹⁴ du Bois-Pedain, 36.

⁹⁵ du Bois-Pedain, 39.

⁹⁶ Truth and Reconciliation Commission Report, vol. 1, 270.

⁹⁷ du Bois-Pedain, *Transitional Amnesty*, 37.

⁹⁸ Truth and Reconciliation Commission Report, vol. 1, 78-81.

involve gross human rights violations. In total, 5,489 of the 7,115 applications were held in chambers.⁹⁹ There apparently is no public record of the hearings that were held in chambers.

Amnesty hearings began with an applicant's statement of evidence given under oath and subject to cross-examination by a member of the Committee, which could call on any witness to testify.¹⁰⁰ Victims would then present their evidence and testimony, and they could also ask any witness to testify.¹⁰¹ Once applicants and victims had both provided evidence, the Committee could allow implicated persons to rebut allegations that had been made against them, and the Committee could allow interested persons, by themselves or their legal representative, to cross-examine any person that had presented evidence.¹⁰² If applicable, the Committee also could ask witnesses to testify at the request of any interested person in the proceedings, or based on its own initiative.¹⁰³ If the amnesty application was successful, the applicant was released from all future civil liability and both future and existing criminal convictions concerning the act for which amnesty had been granted.¹⁰⁴ However, existing civil judgments in respect to the act in question remained enforceable.¹⁰⁵ If the Committee declined to grant amnesty, the applicant would continue to be subject to claims in criminal and civil proceedings, but potentially compromising statements made during the amnesty proceedings were not admissible in any type of case involving the applicant.¹⁰⁶ Therefore, it is possible to see

⁹⁹ Truth and Reconciliation Commission Report, vol. 6, 36.

¹⁰⁰ Truth and Reconciliation Commission Report, vol. 6, 30.

¹⁰¹ Truth and Reconciliation Commission Report, vol. 6, 30.

¹⁰² Truth and Reconciliation Commission Report, vol. 6, 30.

¹⁰³ Truth and Reconciliation Commission Report, vol. 6, 30.

¹⁰⁴ du Bois-Pedain, *Transitional Amnesty*, 22.

¹⁰⁵ du Bois-Pedain, 22.

¹⁰⁶ du Bois-Pedain, 22.

from this structure that the proceedings before the Amnesty Committee were central to the entire amnesty-granting process of the Truth and Reconciliation Commission.

This chapter has highlighted the composition and functioning of the three committees of the Truth and Reconciliation Commission. The main point to take away from this is that the Amnesty Committee determined whether to grant amnesty applications, with the other organs and staff playing supporting and implementing roles. Even though the membership of the Amnesty Committee was large, with 19 members at its peak, it was an organ of limited membership. Admittedly, the panel membership for each amnesty application presumably varied, without there being a discernable way to determine who served on which panel. Nevertheless, by aggregating the results for all panel decisions, it is possible to talk of the Amnesty Committee acting as a whole. Future research might try to track the decisions of individual panelists to see if any one individual was more prone to granting amnesty on account of expressions of remorse, although new information would need to become available for this to be possible. With this structure and these limitations in mind, the stage is set to understand what the amnesty legislation required of the Amnesty Committee and how the Committee failed to limit itself to that requirement, for better or for worse.

Chapter IV.

The Correlation Between Remorse and Amnesty

The Promotion of National Unity and Reconciliation Act of July 19, 1995, which established the Truth and Reconciliation Commission, specified full disclosure as a requirement for the granting of amnesty, with the political orientation for the crime in question being required for admissibility of the application. As du Bois-Pedain has noted, the vast majority of applications were dismissed for failing this admissibility requirement.¹⁰⁷ Of those applications that survived, the Truth and Reconciliation Commission Act was unclear in Section 2(3)(b) on whether full disclosure was only a necessary condition for the granting of amnesty or whether it was a sufficient condition, where the Commission was to “facilitate[e] the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act[.]” Critics will point to “comply with the requirements of this Act” as indicating that full disclosure was only a necessary condition for the granting of amnesty. However, it is not clear from the letter of the TRC Act exactly which other requirements had to be complied with beyond full disclosure before amnesty could be granted. The South African Constitutional Court in *Azanian Peoples Organization v. President of the Republic of South Africa* seems to imply, when determining the constitutionality of this act, that full disclosure of all of the relevant facts was the sole requirement for the granting of amnesty where a politically motivated crime was involved.¹⁰⁸ Commentators have justified this requirement for full disclosure on

¹⁰⁷ du Bois-Pedain, *Transitional Amnesty*, 63.

¹⁰⁸ *Azanian Peoples Org. v. President of the Republic of S. Afr.*, 1996 SALR 671, 686-87 (CC 1996).

account of the belief that it allows governments to enforce the law in a robust manner if the disclosure is deemed to fall short, thereby satisfying the demands of justice.¹⁰⁹ From a procedural perspective, however, it makes little sense to dramatically limit the bases upon which a truth and reconciliation commission can grant amnesty. In essence, such a limited mandate would artificially require decision makers to ignore all other factors when granting amnesty, and it dares social scientists who care about procedural fairness to look for evidence of the decision makers relying on other factors than the one specified in the legislation. This is exactly what this chapter does, by questioning whether remorse conveyed by the amnesty applicant played a statistically significant role in the applicant ultimately receiving amnesty.

To be clear, this thesis does not assert that the expression of remorse was the sole determining factor when the Amnesty Committee was deciding to grant amnesty. Indeed, there may have been other factors at play – such as race and socio-economic status of the amnesty applicant – that were influencing the Committee members’ decision-making processes, which have not been considered in this thesis’ research. Nevertheless, a correlation between remorse and the granting of amnesty – just as a correlation with any of these other factors and the granting of amnesty – would bring into question whether the Amnesty Committee had based its decision solely on the existence of full disclosure.

Remorse and the Commission

The Commission did not expressly state that full disclosure is the sole requirement for granting amnesty. However, it did express its unwillingness to see

¹⁰⁹ Dan Markel, “The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States,” *University of Toronto Law Journal* 49, no. 2 (1999): 397.

remorse as a relevant factor when deciding whether to grant amnesty. As Amnesty Committee member Selwyn Miller said in the amnesty hearing on October 4, 2000, for members of the Civil Cooperation Bureau, which had acted as a hit squad under the auspices of the South African Defence Force:

Well although the question of reconciliation and regret isn't a criteria [sic] to be taken into account by the Committee in the granting or refusal of amnesty, we, certainly us as a Panel here, believe that it's not out of place for such matters to be raised and aired at hearings of this nature. The question's not going to in any way implicate him in any wrongdoing, the question is therefore allowed, but on the other hand we're not going to force anybody to express their feelings in this matter. So all that I can rule is that the question is fair, but it's up to the witness to answer or refuse. It's up to him if he wants to express his regret or explain why he feels regret. It's up to him, he can tell us.¹¹⁰

This quote shows how at least one Committee member believed that remorse is not a key factor when it comes to the granting of amnesty and that it is up to the amnesty applicant to decide if he wants to share such emotions with the victim and the Committee. At a minimum, this quote suggests that if remorse plays a role with the granting of amnesty, it likely is subconscious for at least some Committee members. This does not mean that all members of the Committee or Commission must share the same views towards remorse, whether consciously or subconsciously. For example, Deputy Chairman of the Commission Alex Boraine lamented how the Commission lacked the ability to force amnesty applicants to show remorse and how he wished the Commission could help the amnesty applicants show remorse by requiring them to render service to the victim's community.¹¹¹ Future researchers might consider analyzing the text of the amnesty

¹¹⁰ Civil Cooperation Bureau. "Hearing in Cape Town, Oct.4 Oct. 2000," pt. 3, accessed Feb. 28, 2022, www.justice.gov.za/trc/amntrans/2000/201004ct.htm.

¹¹¹ du Bois-Pedain, *Transitional Amnesty*, 292; Alex Boraine, "South Africa's Amnesty Revisited," in *Provocations of Amnesty*, ed. Charles Villa-Vicencio and Erik Doxtader (Trenton: African World Press, 2003), 165.

decisions in light of the specific panel members of that hearing to see if a pattern reveals the opinion of individual panelist towards remorse, assuming that the individual panelists can be determined. This thesis focuses on the amnesty hearing transcripts and the words of the amnesty applicants themselves, not on the words of the Commission members, which can be found in a different type of document. The remainder of this chapter focuses on whether the data reveals a correlation between expressions of remorse by the amnesty applicant and the granting of amnesty, which would support the theory of legal realism with this transitional justice mechanism.

Methodology for Quantifying Remorse

The literature on the Commission highlighted in Chapter 1 exhibits an overwhelmingly deductive approach that leaves the critical reader wondering if these commentators have not all fallen prey to the cherry-picking fallacy created by ignoring – either consciously or subconsciously – contradictory examples. When using the word “deductive” with these prior studies, it should not be assumed that they adopted a rigorous methodology. On the contrary, except for du Bois-Pedain’s book and Gibson’s article, there is little evidence of awareness of such issues as methodology in these prior studies, let alone actual efforts to adopt an appropriate and scientific methodology to support their efforts. Regardless, the use of deductive reasoning should be used when you have a set rule or accepted principle, not when trying to establish that rule or principle, which would appear to be the main goal of those prior authors. By inductive argumentation, the research at the heart of this thesis allows the specific details of all publicly accessible amnesty hearing transcripts of the Commission, as provided by the South African Department of Justice and Constitutional Development, to determine the

generalities associated with this decision-making body. Such an inductive approach helps avoid the cherry-picking fallacy or confirmation bias that deductive approaches often exhibit. Confirmation bias occurs when people seek, use or interpret evidence in a way that is partial to their existing beliefs or confirms an already-held hypothesis.¹¹² This type of bias is closely related to “selection bias,” which is a statistical bias that plagues those empirical analyses where researchers select their sample for study on the basis that it fulfills one or more of the criteria being studied.¹¹³ For example, if a study that aims to understand how small businesses successfully survived a recession only samples those small businesses that survived the recession while neglecting those that did not, the researchers are guilty of selection bias – more specifically, they are *selecting on the dependent variable* in their study, survival.¹¹⁴ By using a population census, this thesis is careful to avoid such problems with selection bias.

Upon this general methodological foundation is laid detailed quantitative analyses of all publicly accessible amnesty hearing transcripts using searches of key remorse-related terms. The goal has been to understand whether the showing of remorse through words of the oral testimony of an amnesty applicant correlates with the granting of amnesty in a statistically significant way. In addition to the number of times a remorse-related word appeared in the amnesty applicant’s testimony, this research also kept track of the amnesty applicant’s name and the number of words in his testimony so that remorse-related words per word of testimony could be calculated. In order to determine

¹¹² Raymond S. Nickerson, “Confirmation Bias: A Ubiquitous Phenomenon in Many Guises,” *Review of General Psychology* 2, no. 1 (1998): 175-220.

¹¹³ Barbara Geddes, “How the Cases You Choose Affect the Answers You Get: Selection Bias in Comparative Politics,” *Political Analysis* 2, no. 1 (1990): 131-150.

¹¹⁴ James Fearon and David D. Laitin, “Integrating Qualitative and Quantitative Methods,” in *The Oxford Handbook of Political Science*, ed. R. E. Goodin ed. (London: Oxford University Press, 2001), 1166, 1172-74.

whether such a relationship exists, the testimony of amnesty applicants was isolated in order to determine word count for that testimony, and then that testimony was electronically searched for the following remorse-related root words (occasionally shortened in order to also capture their derivatives): remorse, sorry, forgive, sad, sorrow, regret, repent, pity, apolog, peniten, contrit, sympath, pity, shame, conscience, and rue. These are listed here in order of anticipated frequency in the transcripts. These data points were reviewed, with ones that did not relate to remorse being excluded, such as an amnesty applicant saying sorry because he did not hear the question being asked. The frequency of remorse was normalized by dividing by the number of words of the testimony in order to enable comparison between amnesty applicants. That data was then transformed using log in order to decrease skewness and outliers, inasmuch as the ratios of remorse per word are extremely small (such as 0.0000067) and logs are (or should be) normally distributed. The following section summarizes the results from this research.

Results

The population here is amnesty applicants who testified before the Commission and who received an amnesty decision from the Commission. 848 amnesty applicants are the observational units ($N=848$), with the independent variable being the frequency of remorse words per word of testimony by the amnesty applicant and with the dependent variable being the Commission's granting or refusal to grant amnesty to that amnesty applicant. The following table and figure summarize the frequencies for amnesty among this population in different ways:

Table 4. Table of Frequencies for Amnesty.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	328	38.7	38.7	38.7
	1	520	61.3	61.3	100.0
	Total	848	100.0	100.0	

Amnesty

Amnesty 1 = Yes

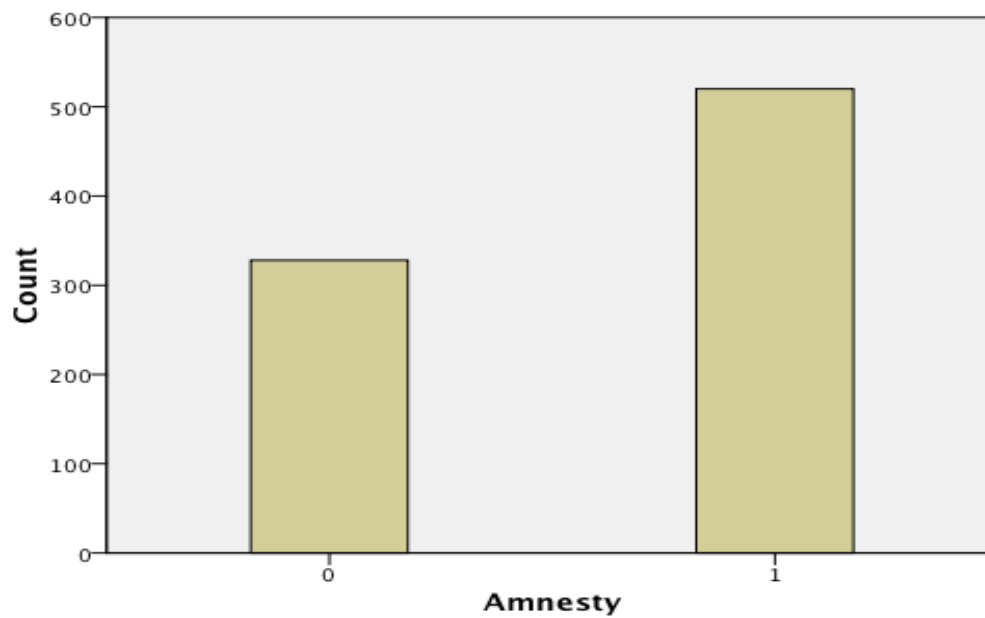


Figure 1. Bar Graph of Frequencies for Amnesty.

These table and figure obviously show that a far greater proportion of amnesty applicants were granted full amnesty than those who were refused amnesty. The more important question for this thesis becomes whether the showing of remorse through words of the oral testimony of an amnesty applicant correlates with whether amnesty is granted.

The following figure summarizes the log-value frequencies of remorse per word, based on grouping together those who were granted full amnesty and those who were not.

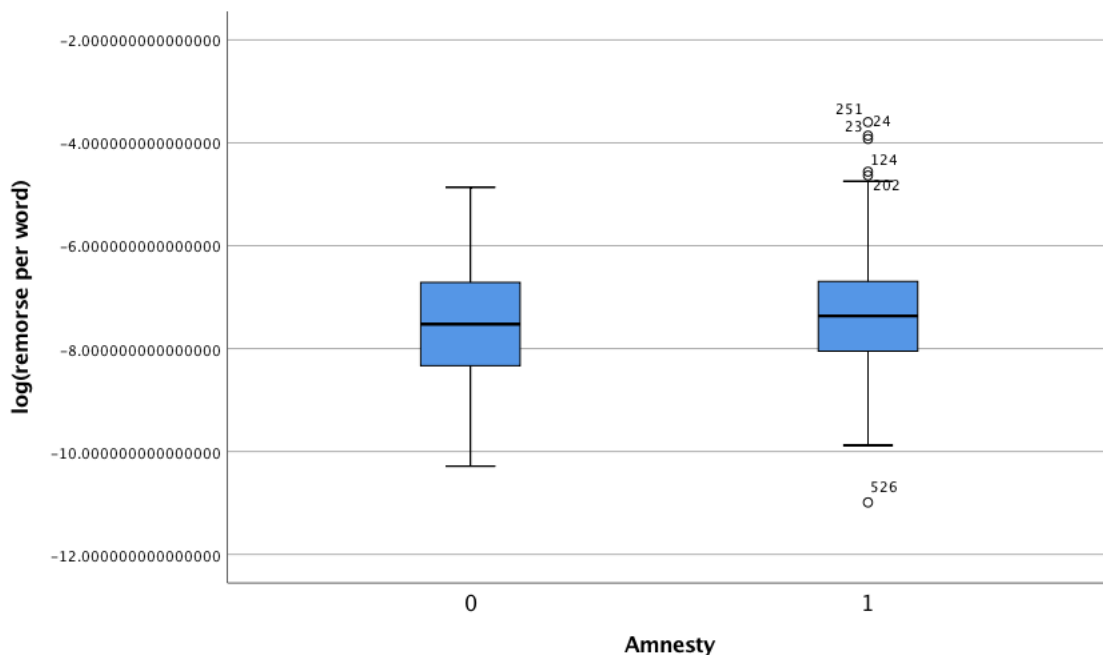
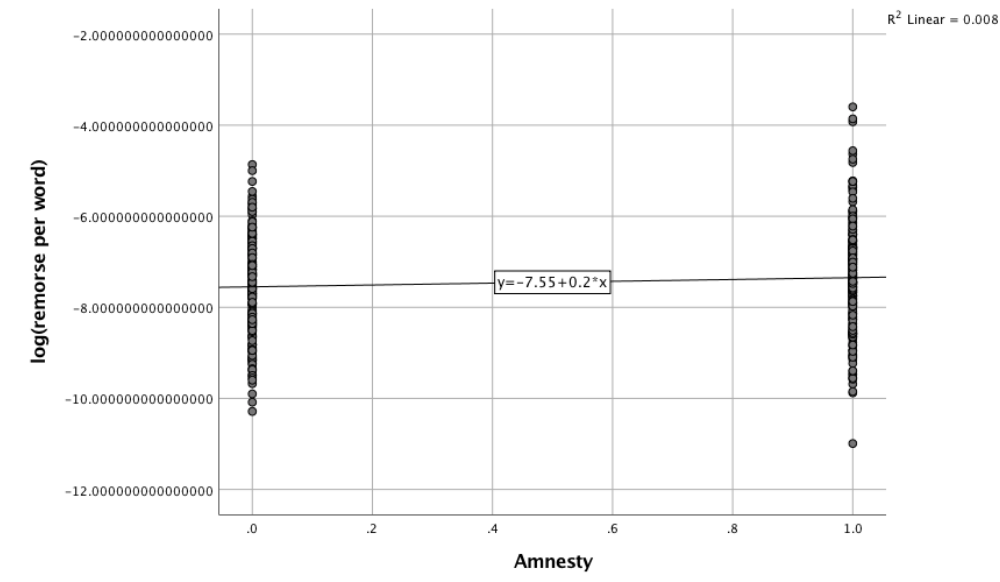


Figure 2. Log-Value Frequencies of Remorse per Word.

Using this dataset, linear regression analysis was conducted in order to explore whether there is a relationship between the log-transformed frequency of remorse per word of

testimony and the granting of amnesty. Linear regression analysis of the dataset using statistical software provided the following chart and R-squared values:



Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.090 ^a	.008	.006	.498

a. Predictors: (Constant), log(remorse per word)

Figure 3. Linear Regression Analysis of the Data.

This figure shows that frequency of remorse per word does not predict the granting of amnesty. The relatively horizontal line and the low R-squared value both show that frequency of remorse per word do not statistically significantly predict the granting of amnesty. In particular, the R-squared value essentially means that a little over 0.08 percent of the variation in the granting of amnesty is due to variation in the frequency of remorse per word of the amnesty applicant's testimony.

However, using an Analysis of Variance (ANOVA) test, it becomes clear that amnesty applicants who expressed “more” remorse absolutely had a higher chance of receiving amnesty.

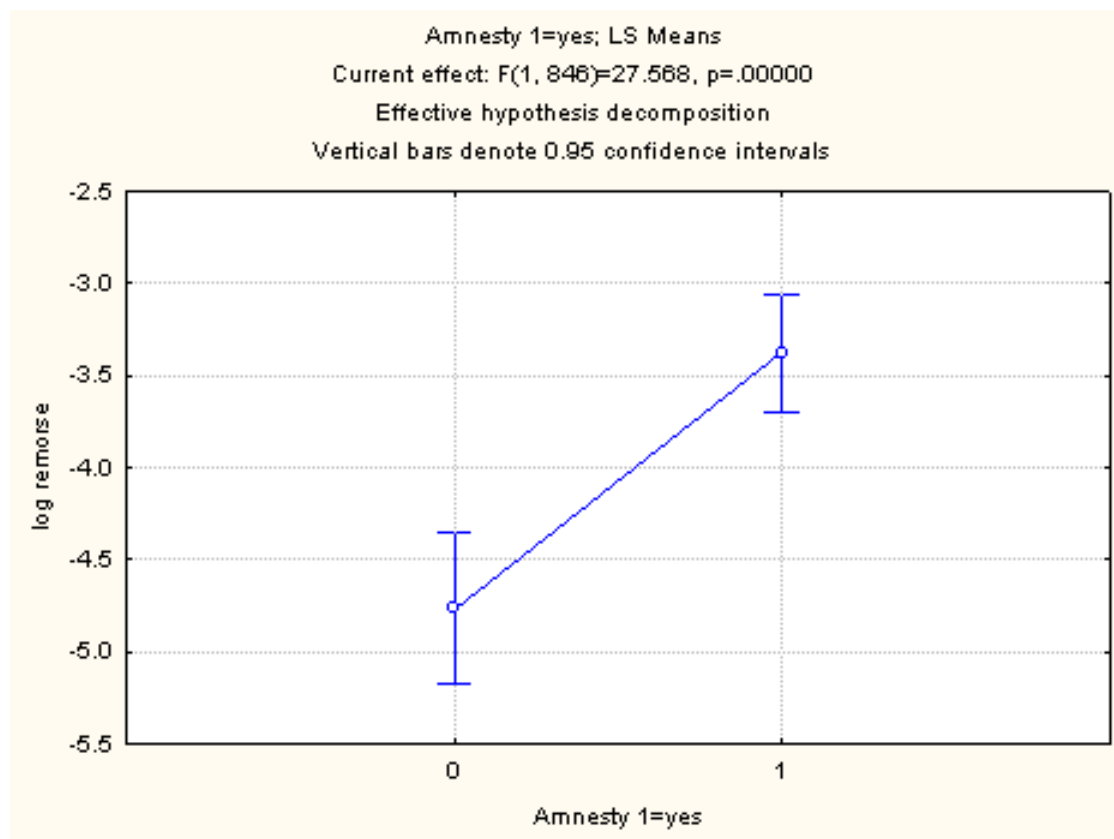


Figure 4. ANOVA Test of the Data.

This figure shows the difference between the average frequencies of remorse-related word usage, as separated by those amnesty applicants who were granted amnesty and those who were not granted amnesty. The lines around each average show where 95 percent of the frequencies lie between. If these sorts of lines do not overlap, it means that they are statistically significantly different. As the lines in this figure do not overlap, it means that frequency of remorse per word does statistically significantly predict the granting of amnesty. While there are more advanced statistical tools for analyzing this data vis-à-vis the relationship between these dependent and independent variables, common sense suggests that the normal regression analysis offered here provides roughly the same results, and therefore it is sufficient for the purposes of this thesis.

Discussion

The linear regression analysis provided above shows that there is no relationship in this data between frequency of remorse per word of testimony of an amnesty applicant and the granting of amnesty. However, it is complicated, because other tools such as ANOVA show a relationship. More statistical work is needed in order to figure out what exactly is going on between these two variables. However, since it is difficult, if not impossible, to determine a *level* of amnesty for each amnesty applicant, it may not be possible to clear up the seemingly contradictory results in the end. Regardless, the results from the ANOVA test are enough of a finding to reject the accepted notion that factors other than full disclosure play no role in the granting of amnesty.

This analysis has several weaknesses. The main weakness, which only was realized towards the end of the research, is that the Department of Justice and Constitutional Development's listing of amnesty hearing transcripts might not include all

transcripts, even though it ostensibly includes all of the transcripts that are publicly accessible. Indeed, 7,112 applications for amnesty apparently were filed with the Commission, with 849 application being decided during the proceedings,¹¹⁵ which is almost identical to the 848 amnesty applicants included in this thesis' population census from the Department of Justice and Constitutional Development list of transcripts. This minor discrepancy might be explained by not all applicants proceeding to the hearing stage or receiving an amnesty decision, or perhaps due to a clerical error.

The secondary weakness of this analysis is operationalizing remorse with regard to the Commission. In particular, not all of the remorse-related words used to generate the frequency numbers are equal, and it is difficult, if not impossible, to scientifically attribute a relative remorse-related value to each word, as context is crucial. For example, one amnesty applicant insisted on numerous occasions and in various ways that he was not at all sorry for the crimes he had committed. Even though that individual used remorse-related words in his testimony, he actually was not using them to show remorse, and that only would become clear if the wider context was considered. A good-faith effort was made to exclude such instances of use of remorse-related words, but there is a possibility that some were missed. Moreover, words are not the only way to express remorse. For example, body language, tears, and tone of voice all can convey a degree of remorse. Such non-verbal communication typically does not appear in the record, and so it is difficult, if not impossible, to include them in the data. If a complete set of video recordings of the amnesty hearings could be found and accessed, it might be possible to

¹¹⁵ Truth & Reconciliation Commission, "Amnesty Hearings and Decisions," accessed Feb. 28, 2022, www.justice.gov.za/trc/amntrans/index.htm; Benjamin N. Schiff, "Do Truth Commissions Promote Accountability or Impunity? The Case of the South African Truth and Reconciliation Commission," in *Post-Conflict Justice*, ed. Cherief M. Bassiouni (Leiden: Brill, 2002), 325, 331.

take into account such forms of non-verbal communication. However, no such trove of video recordings has been discovered in the course of writing this thesis.

Notwithstanding the weaknesses of this analysis, it still suggests an intriguing relationship between the degree of remorse that amnesty applicants showed in their testimony and whether they were granted amnesty – a relationship that has not been demonstrated or even suggested before now. More importantly, such a finding might help the domestic community have greater regard for the Commission's work, which has been significantly lower than that of the international community, as the following chapter explains.

Chapter V.

Significance of this Research

Besides being the first scholarly writing to identify the relationship between expressions of remorse and the granting of amnesty by the Truth and Reconciliation Commission, this thesis has the potential of making a meaningful impact by helping the South African community identify and appreciate the role that remorse actually played with the decision-making process of this transitional justice mechanism, even though more remorse obviously could have been shown by the amnesty applicants.

The Commission has received mixed reviews from many of the South Africans who it was designed to serve. A number of domestic surveys suggest that many South Africans see the Commission as having failed in its efforts to promote reconciliation and forgiveness in South Africa's racially polarized society. Admittedly, forgiveness and remorse for one's actions were not the focus of most victims' and perpetrators' testimony during the Commission's proceedings. Audrey Chapman's analysis of a sample of 429 victim statements from the Human Rights Violations Committee's public "victim hearings" revealed that only 10 percent of victims were willing to forgive perpetrators for their crimes, and only 2 percent were willing to do so unconditionally.¹¹⁶ As the data from the previous chapter showed, only 446 of the 848 amnesty applicants, or 52.6 percent, expressed remorse in a publicly verifiable way during the amnesty hearings. These figures hardly depict perpetrators who were eager to seek forgiveness or victims who were eager to forgive.

¹¹⁶ Chapman, *Truth Commissions and Intergroup Forgiveness*, 56.

A similar lack of genuine reconciliation can be seen in more recent surveys. A 2012 survey noted that 50.6 percent of respondents from the white demographic thought that black South Africans were poor today because of the legacy of apartheid, while 82 percent of black respondents thought so.¹¹⁷ In the same survey, 29.5 percent of respondents in the white demographic between 16 and 24 years of age said that they did not think the government should continue to provide reparations to apartheid victims.¹¹⁸ A poll released in 1998 specifically regarding South Africans' views on the Commission found that two-thirds of the public felt that the Commission's process had "made South Africans angrier and led to a deterioration in relations between races."¹¹⁹ This data paints quite a negative picture of the effectiveness of the Commission in bringing about reconciliation, at least compared to the glowing impression that the international community has had of the Commission.

Several reasons might explain the persistence of interracial hostility in South African society following the conclusion of the Commission's work, beyond endemic interracial hostility. On the one hand, people's perceptions of the Commission's process and findings appear to have been filtered by their own racial background. For example, a multi-scenario survey conducted by James Gibson and Amanda Gouws in 1999, as illustrated in Appendix 3, found that black respondents were more likely to consider MK members (the ANC's military wing known as "Spear of the Nation") applying for amnesty as either "blameless" or "completely blameless" compared to white

¹¹⁷ Jasmina Brankovic, "Accountability and National Reconciliation in South Africa" [original: Responsabilidad y Reconciliación Nacional en Sudáfrica], *Ediciones InfoJus: Derechos Humanos* 2, no. 4 (2013): 14.

¹¹⁸ Brankovic, 13.

¹¹⁹ Christian De Vos, "What Price Truth? South Africa's Truth and Reconciliation Commission in Critical Perspective," *Politikon* 29, no. 2 (2010): 209.

respondents.¹²⁰ The opposite was true when white and black respondents were asked to judge the blameworthiness of applicants from the state's Security Forces.¹²¹ On the other hand, the Commission itself has been seen as having failed to fulfill the expectations of black South Africans and to have taken an ineffective and sometimes counter-productive approach to reconciliation.

One of the problems appears to have been that few South Africans shared the Commission's commitment to restorative rather than retributive justice. Not only was the granting of amnesty considered unfair in itself by many black South Africans, but this sentiment was further amplified by the asymmetry between the immediate benefits of amnesty for perpetrators and the lack of effective action on the government's part to provide reparations to victims based on the recommendations of the Reparation and Rehabilitation Committee. As the Reparation and Rehabilitation Committee noted in Volume 6 of the TRC Report:

[T]he failure of the responsible government bodies to provide the required information, combined with the fact that victims return constantly to the President's Fund and the [Reparation and Rehabilitation Committee] empty-handed, points to a complete breakdown in the agreement forged between government (the Inter-Ministerial Committee on Reparation) and the [Reparation and Rehabilitation Committee].¹²²

Some authors also have claimed that the Commission's amnesty process has contributed to a "climate of impunity for officers in the fight against crime."¹²³ Describing the persistence of high levels of violence in post-apartheid South Africa, Graeme Simpson

¹²⁰ James Gibson and Amanda Gouws, "Truth and Reconciliation in South Africa: Attributions of Blame and the Struggle over Apartheid," *American Political Science Review* 93, no. 3 (1999): 507.

¹²¹ Gouws, 507. The full results of these surveys are provided in Appendix 3 of this thesis.

¹²² Truth and Reconciliation Commission Report, vol. 6, 173.

¹²³ Elizabeth Stanley, "Evaluating the Truth and Reconciliation Commission," *Journal of Modern African Studies* 39, no. 3 (2001): 536; Graeme Simpson, "A Brief Evaluation of South Africa's Truth and Reconciliation Commission: Some Lessons for Societies in Transition" (Paper Presented at the Wits History Workshop, Johannesburg, South Africa, 1999), 29.

states that “the criminalisation of politics and the politicisation of crime are really flip sides of the same coin.”¹²⁴ The misperception that full disclosure was the sole requirement for amnesty also might not have helped black South Africans see the Commission as involving a fair process, one that failed to require remorse on the part of the perpetrators. The data and analysis contained in this thesis should go a long way in reassuring these observers of the Commission’s work.

¹²⁴ Simpson, *A Brief Evaluation*, 29.

Chapter VI.

Conclusion

In what some have heralded as the age of apology, and with a truth and reconciliation commission that has been held up as the model for commissions through the world,¹²⁵ it may be surprising to have learned that only approximately half of the amnesty applicants of South Africa's Truth and Reconciliation Commission have a publicly accessible record in which they expressed remorse during their amnesty hearings. Equally surprising might be the fact that the South African legislature that created the Commission did not require amnesty applicants to express remorse for their actions in order to receive amnesty, instead only requiring full disclosure of their actions. Nevertheless, it has been shown that those applicants who expressed more remorse during the amnesty hearings were statistically significantly more likely to be granted amnesty. This discovery might help those South Africans who wanted the process to focus more on remorse and forgiveness to appreciate more the mechanism as it was implemented. Regardless, using a mixture of historical, doctrinal, and quantitative analysis, this thesis has been the first academic work to highlight these points, which is noteworthy in itself. In doing so, it supports the notion of legal realism that decision makers take into account their own personal opinions and biases when making their

¹²⁵ Rhoda E. Howard-Hassmann and Mark Gibney, "Introduction: Apologies and the West," in *The Age of Apology: Facing Up to the Past*, ed. Mark Gibney et al. (Philadelphia: University of Pennsylvania Press, 2008), 1; Robert I. Rotberg, "Apology, Truth Commissions, and Intrastate Conflict," in *Taking Wrongs Seriously: Apologies and Reconciliation*, ed. Elazar Barkan and Alexander Karn (Stanford: Stanford University Press, 2006), 33, 43-48.

decision, not just those factors enumerated by the legislature, which can help explain the actual functioning of such transitional justice mechanisms.

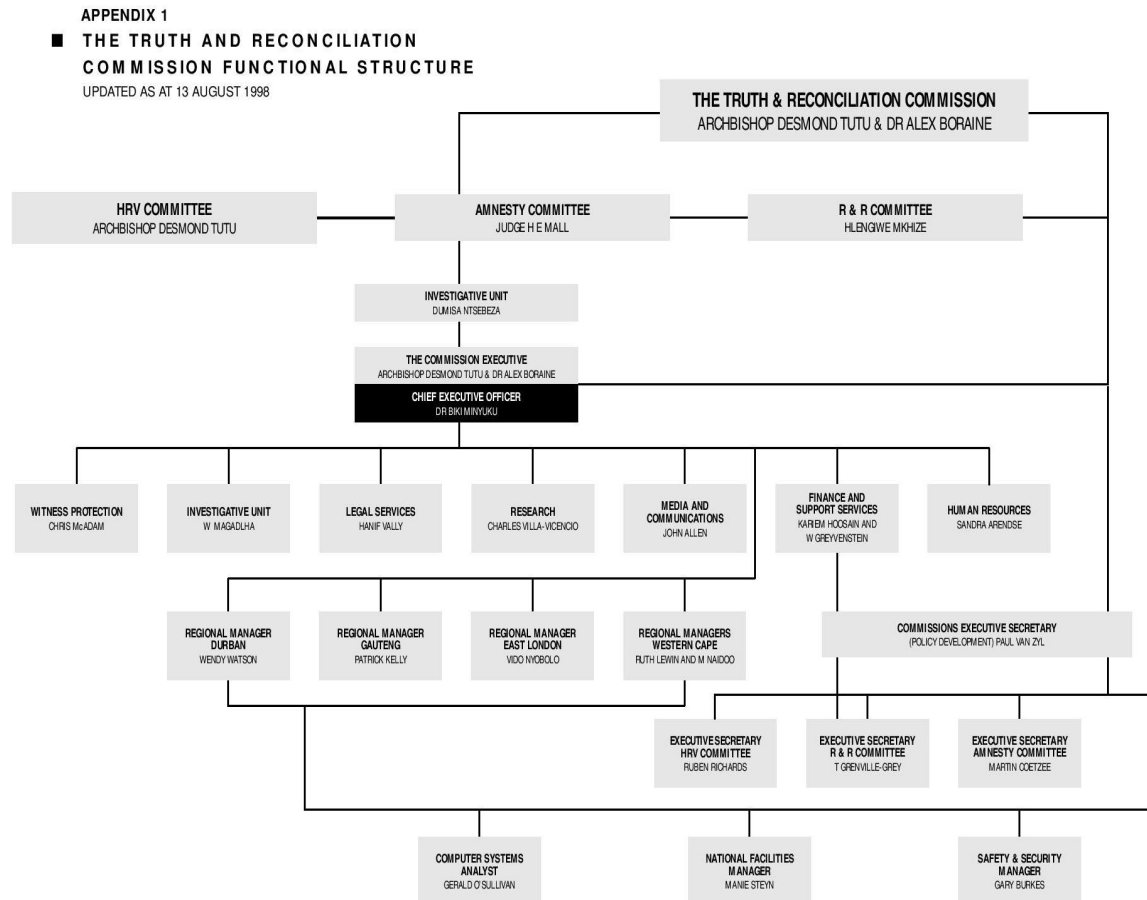
Future researchers who want to continue on where this thesis has left off might want to explore three possible options for further consideration. As noted in Chapter 1 above, this thesis was delimited by only looking at remorse shown by amnesty applicants through their words during their amnesty hearings. However, words are not the only way to express remorse. For example, body language, tears, and tone of voice all can convey a degree of remorse, among other ways of showing human expression. Such non-verbal communication typically does not appear in the record, and so it is difficult, if not impossible, to include them in the data. This means that there might be instances where the amnesty applicant was trying to show remorse but without using the words focused on in this thesis, and so those instances of remorse were not counted. Likewise, there presumably were instances of amnesty applicants using remorse-related words but without pairing them up with non-verbal indications of remorse, which might have had an impact on the Commission's decision on amnesty. If future researchers could access videos of testimony by amnesty applicants, it would be possible to code for non-verbal indications of remorse and test to see whether the new data alters the findings of this thesis. Of course, such coding would take a significant amount of time and would need reliable ways of operationalizing remorse in the non-verbal context, which would be the main challenges for those future researchers. Related to this point is the fact that not all remorse-related words are equal. Therefore, future researchers might want to try to scientifically attribute a relative remorse-related value to each word in order to take into account this type of context.

Finally, as recognized in Chapter 3, a weakness of this thesis has been that the Amnesty Committee that decided on amnesty applications was made up of 19 individuals, and each panel for the amnesty hearing could have been made up of different combinations of Committee members. There appears to be no way to identify the exact panelists for each amnesty hearing. It is conceivable that certain panelists or combinations of panelists were more susceptible to displays of remorse, although there appears to be no way to tell at this point in time. If future researchers could find a way to identify the individual panelists for each amnesty hearing, they potentially could identify those Committee members who were more influenced by expressions of remorse or who gave more weight to expressions of remorse when reaching their decisions. With that level of detail taken into account, these researchers will be better able to peek behind the veil at how decisions of this truth commission were reached. By combining the results of all panels, this thesis created as close an approximation as possible to an objective view of the Amnesty Committee as a whole. In sum, the value of the conclusions of this thesis are probabilistic, as opposed to deterministic,¹²⁶ which must not be forgotten. Nevertheless, this thesis sheds new light on the actual functioning of one of the most important transitional justice mechanisms in history, and in the process has lent considerable weight to the notion of legal realism.

¹²⁶ David A. De Vaus, "What is Research Design?," in *Research Design in Social Research*, ed. David A. De Vaus (Thousand Oaks: Sage Publications, 2001), 1, 4-5; Anna Leander, "Thinking Tools," in *Qualitative Methods in International Relations: A Pluralist Guide*, ed. Audie Klotz and Deepa Prakash (Basingstoke: Palgrave MacMillan, 2009), 11, 23-24.

Appendix 1.

The Truth and Reconciliation Commission Functional Structure



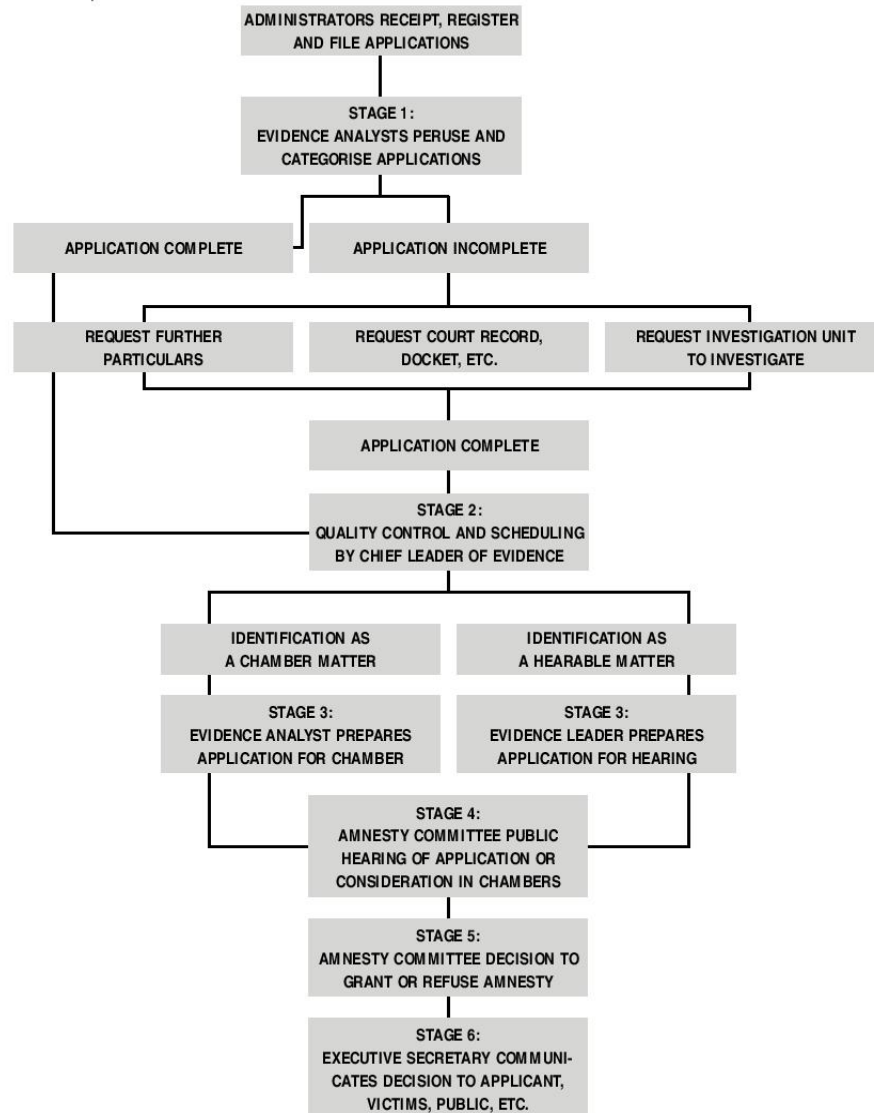
Source: Truth and Reconciliation Commission, vol. 1, 258.

Appendix 2.

Flow Chart of Amnesty Process

■ FLOW CHART OF AMNESTY PROCESS

- 16 The purpose of the flow chart is to give an oversight of the whole amnesty process.



Source: Truth and Reconciliation Commission, vol. 1, 271.

Appendix 3.

Blame Attributions by Actor by Race

	Judgments of Blameworthiness ^a				Mean	Std. Dev.	N	Difference of Means Tests Eta/p-value
	Completely Blameless (0)	Blameless (.1-.5)	Blameworthy (.51-.99)	Completely Blameworthy (1)				
All Vignettes								
All South Africans	15	28	27	29	.58	.38	1,237	.04/NS ^b
African	17	27	24	32	.58	.39	1,005	
Coloured	17	27	29	26	.53	.38	117	
Asian Origin	6	37	34	23	.60	.32	154	
White	6	38	44	13	.59	.29	188	
All South Africans								.27/<.001 ^c
Actor: MK (ANC)	26	36	18	20	.48	.38	636	
Actor: Security Forces	8	17	31	44	.68	.35	601	
African								.37/<.001 ^c
Actor: MK (ANC)	26	36	18	20	.44	.39	519	
Actor: Security Forces	8	17	31	44	.73	.34	486	
Coloured								.04/NS ^c
Actor: MK (ANC)	14	29	24	32	.55	.39	62	
Actor: Security Forces	20	26	34	20	.52	.37	55	
Asian Origin								.06/NS ^c
Actor: MK (ANC)	7	33	32	27	.62	.34	84	
Actor: Security Forces	6	41	36	17	.58	.31	70	
White								.31/<.001 ^c
Actor: MK (ANC)	1	27	53	18	.68	.26	88	.24/<.001 ^d
Actor: Security Forces	10	47	35	8	.50	.30	100	.27/<.001 ^d

Source: James Gibson and Amanda Gouws, "Truth and Reconciliation in South Africa: Attributions of Blame and the Struggle over Apartheid," *American Political Science Review* 93, no. 3 (1999): 507.

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