OPINION

TO:

LUKHANYO CALATA & THE CRADOCK FOUR FAMILIES

MATTER:

CRADOCK FOUR

RE:

ADMISSIBILITY OF AMNESTY EVIDENCE IN CRIMINAL PROCEEDINGS

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INTRODUCTION

1 Our opinion is sought in respect of whether statements made by perpetrators of apartheid-era crimes disclosed in amnesty applications and proceedings held in terms of Chapter 4 of the Promotion of National Unity and Reconciliation Act, 34 of 1995 ("the TRC Act") are admissible or not in subsequent criminal proceedings.

2 If evidence heard by the Amnesty Committee ("AC") of the Truth and Reconciliation Commission ("TRC" or "the Commission") is inadmissible before subsequent criminal proceedings it will have considerable negative impact on cases such as Cradock Four, as it will remove critical evidence from the purview of prosecutors and trial courts.

3 There is a widely held view that no evidence led during the TRC's amnesty proceedings may be admissible in subsequent legal proceedings, including criminal trials. This is a view that is shared not only by some prosecutors but even by the TRC itself. The view is based on a fundamental misreading of certain sections in the TRC Act, namely sections 21 and 31, which we will elaborate on below. We are of the view that there is no basis to exclude statements voluntarily made to the TRC. The text of the TRC Act does not remotely support such a conclusion.

4 Suspects who appeared in amnesty proceedings, aside from attempting to rely on the aforesaid sections, are likely to claim that any evidence from such proceedings amounting to admissions or confessions were improperly induced by the mere operation of law, alternatively because of bad legal advice they received. They are

likely to also argue that the admission of their amnesty statements into evidence in subsequent trials would violate their right to a fair trial, not because they were unlawfully extracted by officials, but because they were improperly induced into making them by the operation of the TRC Act, alternatively by poor legal advice. In our view such claims have no basis in law.

5 In this opinion we will consider all these aspects as well as various policy considerations. We will explore the circumstances in which evidence from amnesty proceedings may be properly adduced in subsequent criminal trials.

6 We have structured this opinion as follows:

6.1 First, we consider the impact of sections 21 and 31 of the TRC Act to demonstrate how they have been misconstrued.

6.2 Second, we deal with policy considerations behind the approach of the TRC Act in confining the protection to the very narrow circumstances of s 31.

6.3 Third, we turn to the legal means and procedures available to admit evidence from amnesty proceedings into criminal trials.

6.4 Fourth, we consider the impact of the law on admissions and confessions on the question of the admissibility of amnesty evidence before criminal courts, and whether the operation of the TRC Act served to improperly induce amnesty applicants into making certain statements.

6.5 Fifth, we explore whether the right to a fair trial in terms of s 35(5) of the Constitution is implicated by the admission of amnesty evidence into criminal proceedings.

6.6 Sixth, we consider the application of the Hollington Rule to the underlying evidence in amnesty proceedings, namely the contents of amnesty applications and hearing transcripts. In an annex to this opinion, we consider the application of the rule to opinion evidence, such as the findings of the Amnesty Committees.

6.7 Seventh, we consider the journal article of Mervyn Bennum on the question of the admissibility of amnesty evidence.

6.8 Eighth, we consider whether it is open to amnesty applicants to claim that ignorance or mistake of law improperly induced them to make statements before the AC, or that they were subject to undue influence or pressure because of wrong legal advice.

6.9 Finally, we offer our conclusions in summary form.

SECTION 21 OF THE TRC ACT

7 Section 21 of the TRC Act sets out the effect of a refusal of amnesty:

> CHAPTER 4
> AMNESTY MECHANISMS AND PROCEDURES (ss 16-22)
>
> 21 **Refusal of amnesty and effect thereof**
> (1) If the Committee has refused any application for amnesty, it shall as soon as practicable notify-
> (a) the person who applied for amnesty;

> (b) any person who is in relation to the act, omission or offence concerned, a victim; and
> (c) the Commission, in writing of its decision and the reasons for its refusal.
>
> (2) (a) If any criminal or civil proceedings were suspended pending a decision on an application for amnesty, and such application is refused, the court concerned shall be notified accordingly.
>
> (b) No adverse inference shall be drawn by the court concerned from the fact that the proceedings which were suspended pending a decision on an application for amnesty, are subsequently resumed.

8 In the case of a refusal of amnesty, s 21 imposes an obligation on the Amnesty Committee to notify the applicant, any associated victim and the Commission of its decision and reasons for refusal. Any criminal or civil court which was previously seized with the case must also be notified.

9 Subsection 21(2)(b) prevents a court from drawing an adverse inference from the suspension of the proceedings due to the amnesty process. This is presumably to deal with any issues arising from delays occasioned by the suspension of the proceedings. Section 21, in no form or manner, prohibits disclosures and statements made in the amnesty process from being used in subsequent criminal or civil proceedings.

10 Notwithstanding the clear wording of the section, the TRC misread it and concluded in Volume 6 of its final report that it not only prohibited amnesty records from being used in subsequent criminal proceedings but that a court is precluded from relying on facts disclosed in amnesty applications:

> REFUSAL OF AMNESTY AND THE EFFECT THEREOF (SECTION 21)
>
> 42. When the Committee refused an application for amnesty, it notified the applicant and victims concerned of its decision and the reasons for its refusal. If criminal or civil proceedings had been suspended pending the outcome of the amnesty application, the court concerned was notified of this.

> 43. Where amnesty was refused, the law would take its course against the applicant. Any legal proceeding that might have been suspended pending finalisation of the amnesty application was free to continue. **The applicant would, however, be protected against the disclosure or use of the record of the amnesty application in any subsequent criminal proceedings. The prosecution would, moreover, be precluded from relying on the facts disclosed in the amnesty application, or facts that had been discovered as a result of information disclosed in the amnesty application. The Act specifically provides that any evidence obtained during the amnesty process, as well as any evidence derived from such evidence, may not be used against the person concerned in any criminal proceedings**.[1] (Bold added)

11 It is possible that the authors of this section of the report believed that section 31 in chapter 6 of the TRC Act (dealing with the investigative powers of the Commission) was of application, since that section prohibited certain evidence from being admitted against the person giving it in subsequent criminal and other legal proceedings. However, the protection afforded by s 31 is confined to compelled self-incriminating evidence. No evidence provided by amnesty applicants was compelled under subpoena or other measure. The amnesty process was entirely voluntary, and nobody was compelled to apply for amnesty. All evidence and testimony provided by amnesty applicants was voluntary. In this regard see the following exchange from an amnesty hearing:

> CHAIRPERSON: Mr Berger, in testifying here, let's assume Mr Coetser was a willing witness and he was willing because he was afforded the protection as afforded by Section 31(3) and he was prosecuted in South Africa because he wasn't granted amnesty, he could call - he could invoke Section 31(3) in a South African Court. Could he do so in Lesotho?
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> MR BERGER: No, he can't invoke it in Lesotho, but Chairperson, look at it from a different perspective. The Act says
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> "People who are subpoenaed shall be compelled to testify."[2]

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1 Paras 42 – 43, Page 14, Vol 6, Section 1, Ch 1, Subsection 6, TRC Final Report

2 It should be noted that s 31(1) did not only apply to persons subpoenaed to give evidence but could be invoked against any witness questioned by the Commission, whether subpoenaed or not, subject to the

Who is that referring to? **Well, it's not referring to applicants because applicants, if they want amnesty, they have to make full disclosure, they have to come and testify, so it can't be intended for applicants.**[3]
(Bold added).

SECTION 31 OF THE TRC ACT

12 Section 31 of the TRC Act provides that:

CHAPTER 6
INVESTIGATIONS AND HEARINGS BY COMMISSION (ss 28-35)

31 Compellability of witnesses and inadmissibility of incriminating evidence given before Commission

"(1) Any person who is questioned by the Commission in the exercise of its powers in terms of this Act, or who has been subpoenaed to give evidence or to produce any article at a hearing of the Commission shall, subject to the provisions of subsections (2), (3) and (5), be compelled to produce any article or to answer any question put to him or her with regard to the subject-matter of the hearing notwithstanding the fact that the article or his or her answer may incriminate him or her.

(2) A person referred to in subsection (1) shall only be compelled to answer a question or to produce an article which may incriminate him or her if the Commission has issued an order to that effect, after the Commission—

(a) has consulted with the attorney-general who has jurisdiction;

(b) has satisfied itself that to require such information from such a person is reasonable, necessary and justifiable in an open and democratic society based on freedom and equality; and

(c) has satisfied itself that such a person has refused or is likely to refuse to answer a question or produce an article on the grounds that such an answer or article might incriminate him or her.

(3) Any incriminating answer or information obtained or incriminating evidence directly or indirectly derived from a questioning in terms of subsection (1) shall not be admissible as evidence against the person concerned in criminal proceedings in a court of law or before anybody or institution established by or under any law: Provided that incriminating evidence arising from such questioning shall be

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requirements in s31(2) being met. In addition, it should be noted s 31(1) was not invoked against all persons subpoenaed. The invoking of s 31 was entirely within the discretion of the Commission.

3 Amnesty Hearing, (Eugene Alexander de Kock), 7 June 2000, Pretoria, Day 21.

admissible in criminal proceedings where the person is arraigned on a charge of perjury or a charge contemplated in section 39 (d) (ii)[4] of this Act or in section 319(3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).[5]

(4) Subject to the provisions of this section, the law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a court of law shall apply in relation to the questioning of a person in terms of subsection (1).

(5) Any person appearing before the Commission by virtue of the provisions of subsection (1) shall be entitled to peruse any article referred to in that subsection, which was produced by him or her, as may be reasonably necessary to refresh his or her memory."

13 Section 31 forms part of Chapter 6 of the TRC Act, which is entitled "*Investigations and Hearings by Commission*". Significantly, it was not placed under Chapter 4: "*Amnesty Mechanisms and Procedures (Ss 16-22.)*" The section was a special investigative tool aimed at assisting the Commission in obtaining certain information in specific circumstances. Generally, witnesses appearing before the TRC had the right to refuse to answer incriminating questions. The only exception was when the Commission specifically invoked section 31, sometimes referred to as the "*use immunity*" clause.[6]

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4 S 39(d)(ii) reads: "Any person who— wilfully furnishes the Commission, any such commissioner or member with any information which is false or misleading" shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment".

5 S 319(3) of Act 56 of 1955 (which was not repealed by Act 51 of 1977) reads: **319. Charges for giving false evidence.**—(1) and (2) . . . . . .(3) If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such first mentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true.

6 Use immunity is generally understood as a type of immunity guaranteeing that the testimony of the witness will not be used as evidence against him or her in court.

14 When section 31 was specifically invoked by the Commission, a witness was compelled to give testimony that was incriminating, but such evidence could not be used against him or her in subsequent legal proceedings.

15 Section 31(2) provides that a witness is only required to answer a question or produce an article which may incriminate him if ordered to do so by the Commission after it has consulted with the responsible attorney-general and satisfied itself that such an order is necessary and justifiable. It is significant to note that every provision of s 31 is made contingent upon s 31(1) which in turn is contingent on s 31(2), which provided that:

15.1 "*a person referred to in subsection (1) shall only be compelled to answer a question or to produce an article which may incriminate him or her if the Commission has issued an order to that effect*…";

15.2 The Commission must first consult with the relevant Attorney General, and be satisfied that compelling the testimony was "*reasonable, necessary and justifiable in an open and democratic society based on freedom and equality*"; and

15.3 be satisfied that the witness was likely to refuse to answer a question or produce the article sought on the grounds that such answer or article might incriminate him.

16 Only thereafter could the testimony be compelled and the 'use immunity' afforded in terms of s 31(3).[7]

17 Section 31(3) only rendered inadmissible evidence obtained or derived from a proceeding described in s 31(1) and when the requirements in s31(2) were completed. Accordingly, it did not render inadmissible any evidence obtained or derived in any other way. For example, it could not benefit amnesty applicants since their disclosures were not made in terms of s 31.

18 Section 31 did not apply to testimony that was voluntarily provided to the Commission, even if that testimony was self-incriminating, as was the case in amnesty proceedings, since amnesty applicants had to admit to their crimes to qualify for an amnesty in terms of section 20 of the TRC Act.

19 It also follows that s 31(3) renders evidence inadmissible only in the criminal prosecution of the witness from whom the evidence was obtained, but the evidence can be used against any other person. It follows that the evidence given by a witness, and any evidence derived from that evidence may be used in the prosecution of anybody other than the witness concerned.

19.1 In this regard, where an amnesty applicant is still alive, he could be subpoenaed in the trial of a third-party co-perpetrator and then be

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[7] See the exchange in an amnesty hearing between the Chairperson and counsel for the amnesty applicant, Mr Visser. (Amnesty Hearing of Salmon Johannes Gerhardus Du Preez in the matter of *Ndwandwe, Nxiweni and the Kwamashu Three*, 17 November 1998, Durban, Day 7). The Amnesty Committee wished to use s 31 to compel a witness to disclose the identities of certain informers. Mr Visser asserted that the s 31 was reserved for use in investigations and the hearings of the Human Rights Violations Committee; and was of no application in amnesty proceedings; and that in any event, it could only be invoked if the s 31(2) requirements had been met.

confronted with his statement in the amnesty application. If he provides a different version, he will face the real threat of a conviction for perjury if he sought to retreat from his original statement.

19.2 In cases where an amnesty applicant has died, there would be a strong case for having the relevant statements treated as admissible hearsay under the Law of Evidence Amendment Act 45 of 1988. Adducing such evidence will depend on "*the credibility of any person other than the person giving such evidence*".[8] Section 3(1)(c) of Act 45 of 1988 sets out the various grounds when hearsay evidence may be admitted when the "*person upon whose credibility the probative value of such evidence*" does not testify.[9]

19.3 In respect of the testimony of an amnesty applicant who has died, the prosecution may rely on the various grounds set out in s 3(1)(c) of Act 45 of 1988, in particular s s 3(1)(c)(vii), namely that it is in the interests of justice that such evidence be admitted. S 3(1)(c)(v) requires a court to take into account '*the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends*'. Death would be a compelling explanation.[10]

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8 Hearsay evidence is defined in section 3(4) of Act 45 of 1988 as follows: "*hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'.*

9 These include: (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

10 DT Zeffertt, A Paizes, and JS Grant, *Essential Evidence*, 2nd ed, 2020, page 150.

20 The s 31 power was an exclusive prerogative of the Commission, and it could only be invoked in the very narrow circumstances described in the section. It was a highly exceptional mechanism and was rarely used.

21 Section 31 was invoked by the Commission against subpoenaed witnesses, Dr Philip Mijburgh and Dr Wouter Basson, in the Chemical and Biological Warfare hearing held by the Human Rights Violation Committee between June and July 1998. The provisions of s 31(2) were complied with. Dr Basson, who had been charged with murder and fraud, complained that being compelled testify in terms of s 31 would violate his right to silence. He brought an application to the Cape High Court seeking a stay of the hearing until after his criminal trial. His application was dismissed, and he was ordered to appear before the Commission on 29 July 1998 and to answer all questions lawfully put to him.[11]

22 While s 31(3) did come with the caveat that the protection did not cover the crime of perjury arising from a questioning in terms of s 31(1), we are not aware of a single prosecution in this regard. The caveat has proved to be toothless. This is probably because there is little prospect of demonstrating perjury when the evidence in question is usually within the peculiar knowledge of the amnesty applicant himself, and few others. The 'few others' within the security services were typically part of "*a conspiracy of silence*."[12] In addition the possible sanction

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11 Chemical and Biological Warfare Hearings, 8 June 1998, Cape Town, Day 2, Testimony of Wouter Basson. See also TRC Final Report: pages 198 – 199, paras 117 to 133, Vol 1, Ch 7, Subsections 14 – 15.

12 See para 13 of the affidavit of George Bizos SC in the Reopened Inquest into the Death of Neil Hudson Aggett, Exhibit G01, Case no: 2019/445, Gauteng Local Division: "*Almost without exception Security Branch members committed themselves to a conspiracy of silence*."

in terms of s 39(d)(ii) [13] namely a fine and/ or imprisonment not exceeding two years. Such penalty was quite light compared to potential penalties for the underlying crimes, which were typically serious crimes such as murder and kidnapping.

Alternate interpretation

23 It may be argued that since s 31(1) may be invoked not only against those subpoenaed to give evidence, but also "*[a]ny person who is questioned by the Commission in the exercise of its powers in terms of this Act*", amnesty applicants are protected in terms of s 31(3) to the extent that any self-incriminating answers they provide under questioning by the Commission, goes beyond the self-incriminating statements made in their amnesty applications. Under this interpretation,

23.1 Self-incriminatory statements made by an amnesty applicant in his application would be admissible against him in subsequent proceedings, as would any self-incriminatory testimony that is consistent with what was disclosed in his application.

23.2 Moreover, since the "questioning" only applies to questioning by the Commission, the protection in s 31(3) would not be afforded to answers provided in response to questions posed by an amnesty applicant's own legal representative. The bulk of questions put to amnesty applicants in amnesty hearings were posed by counsel representing the applicants. The

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13 S 39(d)(ii) reads: "Any person who— wilfully furnishes the Commission, any such commissioner or member with any information which is false or misleading" shall be guilty of an offence…".

protection would also not be afforded to answers to questions posed to amnesty applicants by legal representatives of the victims.

23.3 However, in terms of the interpretation posited above, where under questioning by the Commission itself, the applicant provided self-incriminatory testimony that departed from his amnesty application, or which was substantively different, he would then be entitled to the protection of s 31(3).

24 In our view, the alternate interpretation cannot be correct because it ignores the scheme of section 31. That scheme was:

24.1 to protect the ordinary law of privilege applicable to testimony of witnesses in judicial proceedings (including the privilege against self-incrimination), but

24.2 to create a narrow exception providing for the compulsion of self-incriminatory evidence,

24.2.1 subject to strict conditions, and

24.2.2 subject also to a direct and derivative use immunity over the self-incriminatory evidence should the witness ever be charged with a crime in relation to the subject matter of his/herself incriminatory evidence.

25 In respect of amnesty applicants, the alternate interpretation cannot be aligned with the scheme and purpose of s 31, and in particular, the requirements of s 31(2).

25.1 Firstly, it should be noted that s 31(2) applies as soon as s 31(1) is invoked against a witness under questioning by the Commission, regardless of whether such witness was subpoenaed or not to give evidence.

25.2 As mentioned above, amnesty applicants were never compelled to answer questions, given that the entire process was premised on voluntary participation.[14]

25.3 S31 was an investigative tool for the Commission designed to secure information necessary to meet its mandate. The AC was not an investigative arm of the TRC. Its mandate was confined to determining whether amnesty should be granted or not, based largely on the disclosures made by an amnesty applicant. Where amnesty applicants failed to disclose in full, they were not compelled to disclose in full, they were simply denied amnesty.[15]

25.4 Accordingly, given that amnesty applicants had to make voluntary disclosure in order to qualify for amnesty, s 31 could not lawfully be invoked against them, at least not in the context of the amnesty process.

25.5 In addition, we note it would have made no sense to consult the attorney general, as required in s 31(2)(a), in respect of an amnesty applicant, since the then attorneys general had no role to play in the amnesty process. Their

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[14] We are only aware of consideration being given to invoke the section against other witnesses (not the applicant) who appeared in an amnesty hearing. See fn 7 above.

[15] One of the most common reasons for the refusal of amnesty was the failure to disclose in full. In relation to amnesty applications which were referred to public hearings this was the most common reason for a refusal. See Jeremy Sarkin-Hughes, *Carrots and Sticks: The TRC and the South African Amnesty Process*, Antwerp Intersentia, 2004 at 141 - 144

only interest was in the outcome of process, namely whether an amnesty was granted or not.[16]

26 In our view the only viable interpretation of s 31(3) is one which confines the use immunity conferred by that subsection to the self-incriminatory evidence which was compelled from a witness under subsection (1) read with (2) of s 31. Any other self-incriminatory evidence given by a witness would be given voluntarily and there would be no reason for limiting its admissibility in subsequent criminal trials.

POLICY CONSIDERATIONS

27 Legislators opted to confine protection to the narrow circumstances described in section 31. The legislature chose not to offer such protection to those who voluntarily provided evidence to the TRC, such as those who applied for amnesty.

28 It should be noted that evidence secured by the TRC outside the ambit of s 31, that is, evidence which is not rendered inadmissible by the section, is still subject to the ordinary rules of evidence and the guarantee of a fair trial in section 35(3) of the Constitution, which may impact on its admissibility. These questions are dealt with below.

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16 This is in contrast to their clear interest in relation to a potential criminal accused being granted "use immunity" in relation to key evidence.

29 The limiting of the protection to the narrow circumstances of s 31, implies *ex contrariis* that other evidence led before the TRC is not so protected.[17] That choice by the legislature must have been deliberate, and in our view was based on sound policy considerations.

30 Section 31 was an investigative tool aimed at securing important evidence for the Commission, while protecting witnesses required to give self-incriminating evidence. The legislature chose not to similarly protect amnesty applicants who were denied amnesty.

31 Amnesty applicants who were truthful and complied with the requirements set out in s 20 of the Act were rewarded with full immunity against criminal and civil liability in respect of the crimes amnestied. However, the 'chancers' who attempted to dress up their crimes as "political" and those who engaged in deception and misled the Commission were meant to face the full force of the law. Their statements were not so protected and could be used against them, so long as the ordinary rules of evidence were complied with.

32 A contrary position would have encouraged such 'chancers' to submit untruthful applications with little fear of the consequences of a denial of amnesty, since their crimes were generally committed behind a wall of secrecy and a section 31 type 'use immunity' would prevent their evidence from being used against them.

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17 *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 712.

33 Extending 'use immunity' beyond the narrow limitations of s 31 would have had the perverse effect of ensuring that all perpetrators needed to do to ensure that certain evidence could never be used against them, would be to apply for amnesty and place such evidence on the record. If they were granted amnesty then there was no risk of prosecution, but if they were denied amnesty then their evidence could also not be used against them, thereby placing prosecutors at a considerable disadvantage. In most cases this would effectively result in an effective *de facto* amnesty even where amnesty was not granted.

34 As we elaborate on below, the TRC Act never intended there to be any 'soft options' for perpetrators, beyond the grant of amnesty if they met the requirements. In order to give the amnesty process meaning, there had to be consequences for those denied amnesty or who chose not to apply for amnesty.[18]

35 It was also open to the legislature to amend the Criminal Procedure Act 51 of 1977 (CPA) to immunise the evidence of amnesty applicants before the TRC from subsequent use in criminal trials, along the lines of the protection offered by s 204(4)(a) of the CPA to state witnesses who have not been discharged from prosecution:

> "Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence."

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18 See the section below dealing with the Bennun journal article.

36 However, no amendment of the CPA was made to similarly exclude the evidence from amnesty proceedings in subsequent criminal trials.

ADMITTING EVIDENCE FROM THE TRC IN CRIMINAL PROCEEDINGS

37 Read with other relevant legislation, we are of the view that unless section 31 was specifically invoked in a particular case (in which case there would be an official record) there is no legal impediment to admitting evidence from the TRC in subsequent legal proceedings.

38 This is made clear, in our view, based on a consideration of section 222 of the Criminal Procedure Act, 51 of 1977 (*CPA*) read with sections 34 to 38 of the Civil Proceedings Evidence Act, 25 of 1965 (*the Civil Evidence Act*).

39 Section 222 of the CPA provides as follows:

> "The provisions of sections 33 to 38 inclusive of the Civil Proceedings Evidence Act, 1965 (Act 25 of 1965), shall mutatis mutandis apply with reference to criminal proceedings."

40 Sections 34 to 38 of the Civil Evidence Act provide for, *inter alia*, the admissibility of documentary evidence as to facts in issue. Section 34 provides that:

> "(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided—
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> (a) the person who made the statement either—
>
> (i) had personal knowledge of the matters dealt with in the statement; or
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> (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his

personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

(2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in subsection (1) as evidence in those proceedings—

(a) notwithstanding that the person who made the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof proved to be a true copy.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) A statement in a document shall not for the purposes of this section be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the provisions of this section, any reasonable inference may be drawn from the form or contents of the document in which the statement is contained or from any other circumstances, and a certificate of a registered medical practitioner may be acted upon in deciding whether or not a person is fit to attend as a witness."

41 Section 35 of the Civil Evidence Act sets out the weight to be attached to evidence admissible under sections 33 to 38 of the Civil Evidence Act. It provides that, in estimating the weight to be attached to a statement admissible as evidence, regard shall be had to:

41.1 all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement,

41.2 whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and

41.3 whether or not the person who made the statement had any incentive to conceal or misrepresent facts.

42 Section 35(2) provides that the statement in question cannot be treated as corroboration of evidence given by the person who made the statement where such evidence is required to be corroborated by law or practice.

43 Section 235 of the CPA may also be of application. It provides as follows:

"235 Proof of judicial proceedings

(1) It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be prima facie proof that any matter purporting to be recorded thereon was correctly recorded.

(2) Any person who, under subsection (1), certifies any copy as true knowing that such copy is false, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years."

44 Section 235 of the CPA provides for the proof at a criminal trial of the original record of judicial proceedings by means of a copy duly certified by the person having the custody of the record.

45 However, it cannot be assumed that the proceedings of the Committee on Amnesty would automatically qualify as '*judicial proceedings*' for the purposes of this section. In *Rex v Beukman* 1950 (4) SA 261 (O) it was held that "*although the term*

"judicial proceedings" is not confined to proceedings in a Court of law, yet it must refer to proceedings in which rights are legally determined and liability imposed by a competent authority upon a consideration of facts and circumstances placed before it."

46 In *S v Carse*, the Court considered whether a meeting of an insolvent's creditors convened before a Magistrate (as chair of the meeting) amounted to a judicial proceeding.[19] The Court held that a proceeding amounts to a judicial proceeding when:

46.1 there are two or more parties before a tribunal, whether they be private persons in dispute with one another, or a private person in dispute with the State,

46.2 there is a *lis* or issue between the parties,

46.3 this issue before the tribunal is for final determination (subject to a right of appeal),

46.4 the decision of the tribunal affects the rights and/or liabilities of the parties (and possibly others as well). [20]

47 An amnesty proceeding appears to enjoy the hallmarks of a judicial proceeding, in that there were typically two or more parties appearing (the applicant(s) and families), there was an issue to be determined, namely whether to grant amnesty or not; the decision of the Amnesty Committee was final (unless overturned by a

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19 *S v Carse* 1967 (2) SA 659 (C) 660

20 *Id* at 663H-664A

court), and the decision did impact on the rights of the parties. If amnesty was granted, the applicant was granted full immunity from civil and criminal liability and the families were deprived of the right to seek a criminal prosecution or to sue for damages. The reverse was true if amnesty was denied.

48 However, notwithstanding these judicial characteristics, it is arguable that the Amnesty Committee nonetheless sat in an administrative capacity. Where a presiding officer sits in an administrative capacity, as a Magistrate does in a meeting of creditors, his function is administrative despite the proceedings being superficially judicial in appearance.[21]

49 We note that in the context of a review of a decision of the Amnesty Committee, the Court in *Derby-Lewis & Another v The Chairman of the Committee on Amnesty of Truth and the Reconciliation Commission & others* 2001 (3) BCLR 215 (C) referred to the Amnesty Committee as "*the administrative decision-maker*".[22]

50 However, even if s 235 of the CPA cannot be invoked in relation to amnesty proceedings, the record of the proceedings could be introduced into evidence by way of witness testimony. The accused could be asked to consent to the admission of the record of his amnesty proceedings as an accurate recordal of the evidence given in those proceedings, and failing such consent, the transcriber or another witness who was present at the hearing could be called.

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21 *Carse* at 664-5.

22 At 243I – 244A. See also *Nieuwoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission* 2002 (3) SA 143 (C) which involved the review of an "administrative decision" of the Amnesty Committee.

ADMISSIONS AND CONFESSIONS

51 It has been suggested that the law of evidence in relation to admissions and confessions might provide a witness or amnesty applicant protection against the subsequent use of self-incriminatory evidence given before the Commission. This suggestion is unfounded.

52 The main difference between a confession and an admission is that an admission is an extra-curial statement made by an accused which is adverse to the interests of an accused. A confession, in contrast, is an extra curial statement of an accused, which admits all the elements or requirements of an offence.[23]

53 The requirements for a confession are more stringent than those of an admission and if a statement is adduced as a confession but fails to satisfy the requirements, it may not then be submitted as an admission.[24]

54 Admissions and confessions, as a general rule, are only admissible against their maker.[25] The most obvious requirements of admissions and confessions are those contained in the applicable provisions in the CPA.

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23 DT Zeffertt and A Paizes, The South African Law of Evidence, 3rd ed, 2017, p 507.

24 As Zeffertt and Paizes (above) observe (at p 556):

"*It is crucial to understand that the classification of a statement is, in this regard, decisive and final. For, if the statement (or conduct) qualifies to be labelled a 'confession' as defined below, then, for it to be admissible it must comply with the more stringent requirements, set out in section 217, that govern the reception of confessions. If it does not satisfy these requirements, it is not permissible to tender - the evidence as an 'admission' and to have it received on the ground that it - satisfies the less stringent conditions set out in section 219A for the admissibility of admissions.*" (See *R v Duetsimi* 1950 (3) SA 674 (A) at 678-679)

25 By virtue of the statutory prohibition contained in section 219 of the CPA regarding confessions. In respect of admissions our courts have now definitively held that section 3 of the Law of Evidence Amendment Act 45 of 1988 cannot be relied on to admit a statement of one accused against another as

Admissions

55 The admissibility of admissions is governed by s 219A of the CPA, which provides as follows:

> "(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been **voluntarily** made by that person, be admissible in evidence against him at criminal proceedings relating to that offence…"

56 The meaning of "*voluntarily*" was set out in *R v Barlin* as follows:

> "The common law allows no statement made by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made – in the sense that it has not been induced by any promise or threat proceeding from a person in authority."[26]

57 Critically, therefore, the test to be applied for the admissibility of an accused is whether any statement made by an accused was not "*induced by any promise or threat proceeding from a person in authority*".

58 Notably, applicants for amnesty were required to make full disclosure to qualify for amnesty under the TRC Act.[27] An accused confronted with statements made before the Amnesty Committee may argue that such statements were induced by the promise of amnesty or the direct or implied threat of prosecution from a person in authority if the statement(s) were not made.

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admissible hearsay (*S v Mhlongo; S v Nkosi* 2015 (2) SACR 323 (CC); *S v Khanye* 2017 (2) SACR 630 (CC)).

[26] 1926 AD 459 at 462. See also *S v Yolelo* 1981 (1) SA 1002 (A) at 1009.

[27] Section 20(c) of the TRC Act.

59 At the outset we note that the notion that the prospect of obtaining amnesty under the TRC Act amounts to promise from a person in authority is simply wrong. The TRC Act set up a statutory regime for the provision of amnesty. The lawful operation of a statutory regime is not a *"promise or threat proceeding from a person in authority".* It is the operation of law. We point out further that if the prospect of amnesty were to render inadmissible admissions in an amnesty application, s 31(3) would have been entirely superfluous.

60 The test for whether a statement is an admission – in that it is a statement made against the maker's interests – is objective.[28] However, the test for whether a threat or promise induced the making of a statement is subjective.[29]

61 It is notionally possible that in a particular case, a specific person in authority induced an amnesty applicant to make disclosures with the promise of amnesty or the threat of prosecution. Any such claim by an accused person would have to be assessed having regard to the evidence relating to:

61.1 What the alleged threat or promise was,

61.2 Who made the alleged threat or promise, and

61.3 Whether the alleged threat or promise induced the self-incriminatory evidence.

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28 *Rex v Barlin* 1926 AD 459 at 465: *S v Grove-Mitchell* 1975 (3) SA 417 (A) 420.

29 Zeffertt and Paizes (above), p 560.

62 In relation to the latter requirement, any accused person seeking to exclude his or her incriminatory evidence from being admitted in a criminal trial would struggle to show that s/he was improperly induced to make the self-incriminatory statement when s/he was legally represented in so doing. In this regard

62.1 Amnesty applicants had access to the TRC Act, which was a public document, and every applicant who appeared before a hearing of the Amnesty Committee (AC) was legally represented. Indeed, the insistence by the AC that amnesty applicants be legally represented sometimes resulted in hearings being delayed.[30]

62.2 In terms of the TRC Act, the Commission was obliged to timeously inform persons appearing before it of their right to be legally represented and where such persons were indigent it could appoint lawyers to represent them,[31] which imposed challenges on the AC.[32] Commission appointed lawyers were poorly paid and did not always attract highly skilled lawyers. However, current and former state employees and members of liberation movements qualified for state legal assistance in terms of a special dispensation. Lawyers who appeared on these instructions were paid

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30 See the exchange with the Chairperson of the AC, Judge Hassan Mall on Special Report Transcript Episode 35, Section 3, at time 06:18: "Why does the Committee place so much emphasis on legal representation of applicants even in cases where it holds up the proceedings for a day when applicants don't know where their representatives are? // Well, the ground or refusal for amnesty is a matter of grave consequence to an applicant if he has already been convicted and is serving a long term of imprisonment and it is I think in our opinion very important that he should be represented so that his case can be put forward as best as it ought to be. A number of the applicants might not be particularly well-educated people, might not be sufficiently sophisticated in matters of this kind, so it is important that they should."

31 Sections 34(3) and (4) of the TRC Act.

32 Interim Report of the Amnesty Committee, p 116, para 36, Vol 5, Ch 3, Subsection 5.

substantially higher tariffs than those under the Commission's legal assistance scheme and included senior counsel in many instances. [33]

62.3 Not only was the amnesty process entirely voluntary but all applicants who appeared in hearings were legally represented. Current and former state employees, including police officers, enjoyed competent legal counsel, often senior counsel, paid for by the state.[34]

63 It is conceivable, but extremely unlikely, that in a particular cases, an amnesty applicant may be able to show on the peculiar facts of his/her case that the requirements for exclusion of his/her admissions have been met. Any such case would turn on its peculiar facts. However, there is no basis for the assertion that the inducement sufficient to render an admission inadmissible applies simply through the operation of law in the sense that the TRC Act provides amnesty to those who disclose in full. As pointed out above, the law restricting the admissibility of admissions is confined to threats and promises made by a person in authority. It has not ever, and cannot, extend to "promises" or "threats" contained in an Act of Parliament.

Confessions

64 The CPA provides, in section 217(1), as follows in respect of the admissibility of confessions:

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33 *Id* at para 39.

34 In this regard the claim made by some in the NPA that since amnesty applicants were not warned before testifying, their evidence may not be used in subsequent proceedings is nullified by the fact that they were legally represented.

> "Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating so such offence…"

65 Whether a statement is a confession is to be determined objectively.[35] The requirement that the statement must have been made "freely and voluntarily" is to be answered by reference to the test *S v Yolelo*[36] and *R v Barlin*[37]; namely, whether the making of the statement was induced by any promise or threat from a person in authority.

66 In addition, the confession must not have been made in response to "*undue influence*". In respect of what may qualify as an influence which is undue, our courts have held an influence to be undue if it would be repugnant to the principles of criminal justice to introduce such a statement into evidence.[38] The test is subjective:

> "[The] whole object of the enquiry is to evaluate the freedom of volition of the accused and this of its very nature is an essentially subjective enquiry', so that it is 'his will as it actually operated and was affected by outside influences that is the concern'."[39]

67 The question of influence is determined by a 'but-for enquiry': would the statement have been made in the absence of the purported undue pressure?[40] While there is no doubt that amnesty applicants acted under the influence of the TRC Act in their

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35 *R v Kant* 1933 WLD 128, 129–130, *S v Yende* 1987 (3) SA 367 (A).

36 1981 (1) SA 1002 (A) at 1009.

37 1926 AD 459 at 462.

38 *R v Hackwell* 1965 (2) SA 388 (SRA) at 400E; *S v Pietersen* 1987 (4) SA 98 (C) at 100F; *S v Williams* 1991 (1) SACR 1 (C) at 14H-I; *S v Ndika* 2002 (1) SACR 250 (SCA) at 255.

39 *S v Mpetha* (1) 1982 (2) SA 253 (C) at 585B. See also *R v Ananias* 1963 (3) SA 486 (SR) at 487.

40 *S v Mpetha (2)* 1983 (1) SA 576 (C); *S v Pietersen* 1987 (4) SA 98 (C); *S v Colt* 1992 (2) SACR 120 (E).

pursuit of immunity, the prospect of amnesty under a lawful statutory regime that was a central feature of the transition to democracy could never amount to "undue influence".

THE RIGHT TO A FAIR TRIAL

68 The Constitution guarantees the rights of accused persons to a fair trial.[41] The ultimate test for the admissibility of evidence – aside from the test of relevance – is contained in section 35(5) of the Constitution, as follows:

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

69 If s 31(3) is of application in any particular matter than the evidence in question is inadmissible in subsequent legal proceedings. If s 31(3) is not implicated, there is no violation of fundamental rights because the authorities are clear that the right to silence and the right against self-incrimination are not infringed when you voluntarily choose to speak in the hope of obtaining a benefit.[42]

70 So, no issue arises under s 35(5) of the Constitution.

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41 *S v Chauke* [2012] ZASCA 143 at para. 19. See also *S v Nombewu* 1996 (2) SACR 396 (E) at 420A-E; and *S v Manuel* 1997 (2) SACR 505 (C) and *S v Marx and Another* 1996 (2) SACR 140 (W) at 144.

42 Bail proceedings: *S v Dlamini*; *S v Dladla and Others*; *S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); Disciplinary proceedings: *Davis v Tip NO and Others* 1996 (1) SA 1152 (W); Striking off proceedings: *Law Society of the Cape of Good Hope v Randell* 2013 (3) SA 437 (SCA).

THE HOLLINGTON RULE

71 We understand that reliance might be placed on the so-called Hollington Rule to support the claim that amnesty evidence is inadmissible in criminal trials.

72 Before turning to the rule, we note that factual decisions by one court are not binding on another court; as they are opinions.[43] Trials involving serious crimes are heard by judges:

> 'A Judge is a trained judicial officer, and he knows that he must decide every case which comes before him on the evidence adduced in that case. He knows further that a decision on facts in one case is irrelevant in respect of any other case, and that he must confine himself to the evidence produced in the case he is actually trying.'[44]

73 A criminal trial judge would also be aware that the State would still have to prove the facts required for the criminal conviction, notwithstanding earlier judgments in civil matters on the same facts. [45]

74 The Hollington rule says that the fact that a person may have been convicted in criminal proceedings is not admissible in subsequent civil proceedings as proof of his guilt. Essentially, under the rule, a previous conviction amounts to no more than an opinion which has been expressed regarding certain facts and does not determine them.[46]

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43 *Pelser v Director of Public Prosecutions, Transvaal, and Others* 2009 (4) SA 52 (T) at para 8.

44 *Danisa v British and Overseas Insurance Co Ltd* 1960 (1) SA 800 (D) at 801F-G.

45 *Pelser* at para 9. See also *R v Lechudi* 1945 AD 796 at 801.

46 Lagoon Beach Hotel v Lehane *2016 (3) SA 143 (SCA) at para 12.*

75 The Hollington Rule, to the extent it applies, pertains only to opinions and conclusions. It is of no application to the underlying evidence disclosed in amnesty proceedings, namely the amnesty applications and testimony in amnesty hearings, which is the primary subject matter of this opinion.

76 However, in the event that the NPA seeks to prefer crimes against humanity charges against apartheid-era accused, it may wish to rely on the findings and conclusions contained in various decisions of the AC, as well as the TRC Report, in order to demonstrate that the crimes in question were part of a systematic or widespread set of violations perpetrated against civilians. For that reason, we consider the application of the Hollington Rule in South Africa in the annex attached to this opinion.

THE BENNUN ARTICLE

77 The only journal article that we are aware of dealing with the legal effects of the amnesty proceedings and the admissibility of amnesty records is the 2003 piece by Mervyn E Bennun titled "*Some procedural issues relating to post TRC prosecutions of human rights offenders*."[47] Bennun's article is useful as it explores possibilities of using evidence from amnesty proceedings against commanders who issued orders to commit crimes to subordinates (the amnesty applicants), as alluded to above.

78 Bennun asserts that:

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47 2003 SACJ 17.

> "… the point must be made that the [TRC] Act clearly envisages the prosecution of alleged human rights offenders. Indeed, the concept of amnesty makes no sense unless it is linked to a credible alternative that a person who has not successfully applied for an amnesty may be prosecuted as explained in AZAPO v President of the RSA. There is only one prosecution process in South Africa, and the Act does not envisage that someone who did not qualify for an amnesty under the Act falls to be treated in any way differently from anyone else who may be investigated and prosecuted…"[48]

79 Bennum notes that

> "The special significance of the proceedings and findings of the Committee on Amnesty is that they may include references to, and findings about the criminal liability of, individuals other than the applicants themselves, and in respect of whom prosecutions must now be considered. The findings, it is argued below, may constitute admissible evidence amounting to *prima facie* proof of guilt."[49]

80 The author suggests that evidence from amnesty proceeding "*might influence discretionary prosecution decisions to be taken in respect of persons other than the applicants*."[50] While we agree that such evidence ought to influence and prompt prosecutorial decisions, Bennun errs when he confines such decision to '*persons other than* [amnesty] *applicants*." He also erred when he suggests that s 31(3) of the TRC Act, "*was, without doubt, intended to encourage amnesty applications*."[51] These errors arise from a misreading of s 31 of the TRC Act.

81 Bennun draws attention to Section 20(7)(b) of the TRC Act:

> 'Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first mentioned person.'

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48 Pages 17 – 18.

49 Page 19.

50 *Id*.

51 Pages 23 – 24.

82 Bennun suggests the wording "*addresses some other basis for liability in order to ensure that, ….in, granting an amnesty to one person will not frustrate criminal proceedings against another person whose liability is 'contingent' on the liability of the person who has been amnestied*." He goes on to say that the section can be given a sensible meaning by reading it as covering the conduct of persons who, if they fall within one or other of the following categories, may be criminally liable:

82.1 those who qualify as secondary parties and coprincipal offenders;

82.2 those who aided, abetted, counselled, or procured the amnestied conduct of others; and

82.3 those whose liability arises out of the doctrines of incitement, conspiracy or attempt. [52]

83 Bennun suggests that s 20(7)*(b)* is aimed at ensuring that amnesties granted to subordinates cannot be invoked to shield their commanders. He adds that evidence may be used in the prosecution of one suspect arising out of the amnesty proceedings relating to another suspect. [53] Our view is that, at the minimum, the section guarantees that the grant of amnesty to one perpetrator may not be used by his accomplice, co-conspirator, subordinate or commander to escape criminal liability.

84 According to Bennum, where during an amnesty proceeding a commander confirms an order he issued, or does not deny it, and where the AC concludes that:

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52 Pages 20 – 21.

53 Page 23.

> *"…*the person in question was indeed the commander who gave the orders under which the applicant acted, it does not seem to be unreasonable to admit that finding as prima facie evidence that the commander was indeed guilty in one of the forms reviewed above e.g., as having incited, or acted as an accessory to, the offences of the subordinate." [54]

85 Bennun concludes with the following comments:

> "… nowhere, whether in the Promotion of National Unity and Reconciliation Act 1995 nor in the AZAPO case, nor in the Constitution, is there any hint that an amnesty and all its implications may be regarded by human rights violators as offering any soft options.
>
> … the whole concept of amnesty makes no sense unless it is linked to the realistic prospect of prosecutions against those who have either not applied for amnesty or who have applied unsuccessfully. No reasoning which is based on an equivalence or analogy between a successful amnesty application and an acquittal can be jurisprudentially sound. It does not seem to be unreasonable to link the concessions and tolerance demanded of the victims of human rights violations to those who violated their dignity and their lives with severity and those whose conduct took them outside that tolerance, and the concessions are meaningless unless they are balanced against legal doctrine which facilitates the prosecution of those whose conduct went beyond amnesty.
>
> Admissible evidence against alleged human rights violators who are not amnestied, and which has been revealed by the Committee on Amnesty, might help to address the required policies of the National Directorate of Public Prosecutions …. It is submitted that the above analysis involves no violation of the constitutional rights of the individuals concerned.[55]

IGNORANCE OR MISTAKE OF LAW

86 Finally, we note that there appears to be a widely held view that evidence led during the TRC's amnesty process is inadmissible in subsequent legal proceedings, particularly criminal trials. While it is understandable that defence counsel would subscribe to such an interpretation, it is also a view held by some prosecutors and even by the TRC itself.

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54 Page 31.

55 Pages 36.

87 As demonstrated in this opinion, it is an erroneous view based on a misreading of s 21 and/ or s 31 of the TRC Act. The view was not uniformly held, and we have pointed to examples where counsel for various applicants and witnesses in amnesty hearings highlighted the extremely narrow application of s 31.

88 Nonetheless, it must be asked what arises where amnesty applicants believed, based on erroneous advice, that whatever they said in an amnesty proceeding could never be used in a subsequent criminal case. Would they be able to assert that they only made their statements based on such belief, and that but for such belief, they would not have made such statements? In other words, they would claim they were improperly induced into applying for amnesty based on a misreading of the law, or poor legal advice to the effect that whatever they said, could not be used against themselves.

89 We are of the view that in relation to admissions, a misreading of the law or the receiving of incorrect legal advice does not amount to a promise or threat. In relation to confessions, we are not aware of a case in which wrong legal advice amounted to 'undue influence' or 'undue pressure'. We doubt that incorrect legal advice can amount to undue influence or pressure.

90 In *S v De Blom* 1977 (3) SA 513 (A) it was held that in suitable cases, ignorance of the law may provide an excuse for otherwise criminal behaviour. However, the De Blom rule says that mistake of law is relevant specifically because *mens rea* must extend to intention in respect of unlawfulness. So, if the accused thought that s/he was acting lawfully, s/he lacked dolus in respect of unlawfulness. That is far removed from the proposition that a mistake as to the evidentiary consequences of

making self-incriminatory statements in an amnesty proceeding can somehow change those evidentiary consequences. The former is an issue of whether the State has proved the mens rea element of the offence charged, whereas the latter does not go to the proof of any element of the offence.

CONCLUSION

91 For the reasons set out in this opinion, we conclude that:

91.1 While section 21 of the TRC Act prevents a court from drawing an adverse inference from any delays or issues arising from the suspension of civil and criminal proceedings occasioned by the amnesty process, it does not prohibit the use of amnesty records in subsequent cases.

91.2 Section 31 of the TRC Act only precludes the use of testimony in subsequent legal proceedings in very narrow circumstances, namely when self-incriminating testimony was compelled, and only when the Commission so ordered, and only after the Attorney General had been consulted. It was of no application to amnesty applicants since they testified without compulsion.

91.3 Even where s 31 was applied, it does not stop the evidence in question from being used against others.

91.4 There is no other clause in the TRC Act, the CPA or any other law, that blocks the use of other statements or testimony made by persons before the TRC in subsequent legal proceedings, including criminal proceedings.

91.5 The choice by the legislature not to extend the "use immunity" protection to amnesty applicants must have been deliberate, and in our view was based on sound policy considerations, namely that those seeking to abuse the system by dressing up their crimes as "political" and/ or engaging in deception and half-truths should not be rewarded with such protection.

91.6 Testimonial and documentary evidence from the TRC may be admitted in subsequent criminal proceedings by applying various provisions of the CPA and the Civil Evidence Act, and/ or calling transcribers or other witnesses who were present at the amnesty hearings.

91.7 In relation to amnesty evidence that amounts to admissions or confessions, accused persons may object to their admission in subsequent criminal trials on the basis that they were improperly induced into making them by the promise of amnesty and/ or the threat of prosecution. This would have to be assessed by the trial court on a case-by-case basis. In our view, the claim that such improper inducement arose by the operation of law is completely unsustainable.

91.8 Even if an admission or a confession made during the amnesty process is not admissible against the maker in a subsequent criminal trial, it may still be used in the prosecution of another person.

91.9 Accused persons are also likely to claim that the admission of amnesty evidence infringes their right to a fair trial in terms of s 35(5) of the Constitution. However, s 35(5) is not implicated since the right to silence and the right against self-incrimination were not infringed by the amnesty process.

91.10 The Hollington Rule, to the extent it is recognised in South African law, only applies to opinions or conclusions. It does not apply to the underlying evidence disclosed in the amnesty proceedings, namely the amnesty application and the witness evidence reflected in the transcripts of the hearings.

91.11 Where a commander, accomplice or co-conspirator confirms his or her role (or does not deny it) in an amnesty proceeding, such evidence may be admitted as *prima facie* evidence of his or her role in the offence under consideration.

91.12 Section 20(7)(b) of the TRC Act is significant in that it is aimed at ensuring that an amnesty granted to one perpetrator cannot be used to shield his or her commanders, accomplices, or co-conspirators from criminal liability.

91.13 There is no hint in the TRC Act that the amnesty and its implications may be regarded as offering soft options to human rights violators. Indeed, the underlying concept of amnesty only makes sense if it is linked to the realistic prospect of prosecutions against those not amnestied. Accordingly, the amnesty process should not be seen as a risk-free exercise for perpetrators who would always be protected, no matter the outcome.

91.14 Amnesty applicants may not rely on mistake of law to claim that their self-incriminatory statements should be rendered inadmissible in criminal proceedings because they incorrectly assumed that this would be the case. The De Blom rule only applies for purposes of showing whether the necessary *mens rea* was present in respect of showing unlawfulness. This is far removed from the claim that a mistake as to the evidentiary consequences of making self-incriminating statements in an amnesty hearing can somehow neutralise such consequences.

91.15 Ultimately it is up to each court hearing a criminal trial to determine what evidence is admissible, its evidential value and how it may be used in the proceedings.

92 We advise accordingly.

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14 July 2022

ANNEX: THE HOLLINGTON RULE AND ITS IMPACT ON OPINION EVIDENCE

1 In the English case of *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 (CA), death deprived a plaintiff of his only witness in a civil claim for damages, which led him to put up evidence of the criminal conviction of the deceased for the same incident to establish a *prima facie* case of negligence against him. The Court of Appeal held that the evidence of the prior conviction in a criminal court was inadmissible, and the plaintiff's action failed.

2 The Hollington rule was subject to much criticism by English courts and academic commentators. Lord Denning MR in *Goody v Odhams Press Ltd* [1966] 3 All ER 369 called the rule a "*strange rule of law which says that a conviction is no evidence of guilt, not even prima facie evidence*". It has been suggested that the rule '*required exorcism'*.[56] The rule was ultimately abolished in England by the Civil Evidence Act 1968.

3 In South Africa the rule was adopted by the SCA in *Hassim (also known as Essack) v Incorporated Law of Society of Natal*[57] and cited with approval by the Constitutional Court in *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) ("Prophet"). In *Prophet*, which considered whether evidence gathered during a search of a house should be excluded from a forfeiture application, it was held that the "*findings of the Magistrate as reflected in the transcript in a related criminal trial were […] irrelevant and may be described as*

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56 JR Spencer in 'The ghost of the rule in "Hollington v Hewthorn": Exorcist required' (2014) 73 *The Cambridge Law Journal* 474

57 1977 (2) SA 575 (A) at 764E-765E

"superfluous" or "supererogatory evidence" because they amount to an opinion on a matter in which a judge might, in the forfeiture application have to decide."[58]

4 In *Van Zyl v Jonathan Ball Publishers (Pty) Ltd* 1999 (4) SA 571 (W) the applicants sought to interdict a publisher from selling and distributing a book which contained allegedly defamatory passages regarding applicants' alleged involvement in various criminal and unlawful activities of the erstwhile Civil Cooperation Bureau (CCB).[59] The respondents relied on findings of the TRC and an inquest court to substantiate the book's contents. The applicant claimed that the Hollington rule precluded reliance on such findings as they were opinions. In addition, the applicant claimed that s 31(3) of the TRC Act "*was all the more reason to ignore the evidence concerning the TRC*."

5 The Court in *Van Zyl* held that the Hollington Rule and s 31(3) were not of application and admitted the findings of the TRC and the inquest court considering various factors, including those set out in s 3(1)(c) of the *Law of Evidence Amendment Act* 45 of 1988,[60] dealing with the admission of hearsay evidence, noting that:

> "I am precluded from concluding that the TRC findings are true but not that it made those findings and published a report and that these were made available to the public and the nation.

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58 *Prophet* at para 42.

59 The CCB was a secret counter insurgency unit of the South African Defence Force, which perpetrated serious crimes against anti-apartheid activists.

60 The section reads: 3. (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless – (*c*) the court, having regard to – (i) nature of the proceedings (ii) nature of the evidence, (iii) purpose for which the evidence is tendered, (iv) probative value of the evidence, (v) reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends, (vi) any prejudice to a party which the admission of such evidence might entail, (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

> The same is true of the Lubowski inquest. The inquest finding was published. That is uncontested. The death of Lubowski was investigated at the TRC. That is uncontested. The TRC published its findings into the death of Lubowski which included a reference to the CCB and to the applicants in damning terms.
>
> Section 31(3) of the Act does not assist the applicants. The hearsay evidence referred to has been admitted for the purposes stated earlier. I will not consider material precluded by section 31(1) of the Act."

6 The rule was more recently the subject of judicial consideration in the case of *Institute for Accountability in Southern Africa v Public Protector* 2020 (5) SA 179 (GP) (hereinafter referred to as "IASA"). In that case the applicant sought an order declaring the Public Protector unfit to hold office because she had been the subject of several adverse judgments. The Economic Freedom Fighters joined the proceedings argued, relying on the Hollington rule, that the findings of other courts were not admissible as evidence.

7 The Court noted that there was academic disagreement in relation to *Hollington,* with some arguing that it only disallowed evidence of a previous criminal conviction in civil proceedings, while others felt that it also excluded the findings of civil courts. Coppin J declined to breathe "*further life into the erroneous rule in Hollington*" since "*a compelling case has been made out for its strict containment, and its abolition (or more appropriately, extirpation) for being wrong, as has occurred elsewhere*."[61]

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61 *IASA* at para 30. See, inter alia, OT Zeffertt and AP Paizes The South African Law of Evidence (Lexis Nexis; 3ed) 355-359. See also T Gaqa "The Rule in Hollington v Hawthorn in the Light of section 17 of the Civil Proceedings Evidence Act 25 of 1965 in South Africa" (LLM Mini Thesis; UWC; 13 December 2018).

8 While noting that the rationale for the Hollington rule was that the findings of a previous court constitute opinions and for that reason are irrelevant and inadmissible in subsequent civil proceedings, Coppin J concluded that they cannot be equated with the opinions of ordinary individuals and cannot be treated as such, since they were made by judges, who have a duty to reach opinions aided by procedures and the law of evidence, which are designed to ensure that they base their opinions on the correct information. Moreover, such opinions are binding on all persons and those organs of state to which they apply. [62]

9 Coppin J noted that *R v Lechudi* 1945 AD 796 held that although the findings of a court in civil proceedings were inadmissible in subsequent criminal proceedings, "*it is most certainly not authority for excluding the findings of fact relied upon by the applicant as inadmissible in the present proceedings*." The *IASA* Court ruled that the evidence of the 5 earlier judgments against the Public Protector was not excluded.[63]

10 Coppin J noted that the SCA in *Lagoon & Beach Hotel Pty Ltd v Lehane NO & Ors*[64] ("Lagoon Beach") and the Constitutional Court in *Prophet*, despite widespread criticism of the Hollington rule, and without considering the impact of s 18 of the Supreme Court Act 59 of 1959[65] (or s 34 of the Superior Courts Act 10

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62 *IASA* at para 31. See S165 of the Constitution.

63 However, the court pointed out that it was the National Assembly's duty to decide on the fitness of the PP to hold office, and that it was not for the court to prescribe to the National Assembly what it ought to conclude in the light of the findings of fact made in the five earlier judgments, and it refused to make the declaratory order sought by the applicant.

64 2016 (3) SA 143 (SCA)

65 Section 18 is titled "*Certified copies of court records admissible as evidence*". It reads: "Whenever a judgment, decree, order or other record of the court of a division is required to be proved or inspected or referred to in any manner, a copy of such judgment, decree, order or other record duly certified as such

of 2013) and s 17 of the Civil Proceedings Evidence Act[66] on the application of that rule, seemed to have confirmed its continued application. [67]

11 Bennun considered the extent to which the Hollington Rule applies to findings by the TRC. He concludes that the rule is "*now of limited or no application*" and that the record of amnesty proceedings may "*accordingly constitute important incriminating evidence*". He suggests that the availability of this evidence will affect the exercise of the discretion to prosecute. [68]

12 On the application of the Hollington Rule to decisions of the Amnesty Committee, Bennum writes:

> "The uncertain status of the rule means that we may look afresh at the question of whether the decisions of the Committee on Amnesty on an amnesty application are admissible in evidence in the subsequent trial of a person linked in those proceedings to the applicant for amnesty. It is submitted that there is a strong case to be made for the view that these matters would be admissible. It is submitted that neither the rule simpliciter nor the reasoning on which it is based can apply to exclude the findings of the Committee on Amnesty from the evidence before a subsequent criminal trial."[69]

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by the registrar of that division under its seal shall be *prima facie* evidence thereof without proof of the authenticity of such registrar's signature." Act 59 of 1959 was repealed and replaced by Act 10 of 2013, where the same section appears at s 34 under Part 2 which deals with adducing evidence and procedural matters.

66 Act 25 of 1965. Section 17 is titled "*Documentary Evidence (General Provisions)"* and falls under Part IV which deals with admission of documents and official records. S17 reads: "The trial and conviction or acquittal of any person may be proved by the production of a document certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such registrar, clerk or other officer, to be a copy of the record of the charge and of the trial, conviction and judgment or acquittal, as the case may be, omitting the formal parts thereof."

67 *IASA* at para 25.

68 Mervyn E Bennun, "*Some procedural issues relating to post TRC prosecutions of human rights offenders*." 2003 SACJ 17.

69 *Id* at 29.

13 Bennun was of the view that given the standing of the rule in *Hollington* was so insecure there:

> "is every prospect …. that a criminal court today may now come down firmly on the view that a decision of the Committee on Amnesty may be admissible as prima facie evidence, at the least, of the truth of its findings notwithstanding the 'best evidence' rule. The differences between a criminal trial and the proceedings of the Committee on Amnesty tend to increase rather than decrease the strength of this argument." [70]

14 Bennun noted the view of Lord Goddard in *Hollington* that the issues in the preceding criminal trial were between different parties and that judgments *inter partes* should not be admissible against persons who were strangers to those proceedings.[71] This concern would naturally not apply to amnesty applicants who were subsequently charged. Bennum submitted that the concern "*would not apply to the criminal trial of a commander who was cited in the amnesty application of a subordinate in respect of the matters dealt with in that application, and subsequently lying at the heart of the trial of the commander*." This follows because commanders typically endorsed the amnesty applications of their juniors and confirmed their orders or testified in amnesty hearings and if they did not testify, they would have had opportunities to intervene to protect their interests. [72]

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70 *Id* at 32.

71 In *R v Lee* 1952 (2) SA 67 (T) at 69E – G, it was observed: "that a judgment *in personam*, whether given in civil or in criminal proceedings, though it is evidence of the fact that the judgment was given, is not evidence, against persons who are not parties to the proceedings, of the truth or correctness of the judgment.[71] The rule has been described as follows:' Judgments *inter partes*, or, as they are sometimes called, judgments *in personam*, are not, with one exception, admissible for or against strangers in proof of the facts adjudicated. They are not admissible against them because it is an obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger, and over the conduct of which he could therefore have exercised no control- or, to express the same sentiment in technical terms *res inter alios acta alteri non nocere debet* - and they cannot be received in their favour even as against a party thereto, because it is thought, with very questionable propriety, that the previous rule might work injustice unless its operation were mutual.'" (Taylor, *Evidence* (12th ed., Vol. 2, p. 1057, para. 1682).

72 Bennun at 32.

15 Bennun points out that there seems to be a clear distinction between a prior criminal and prior amnesty proceedings with the latter only offering *prima facie* proof of the criminal liability of a commander. He notes that in *Hollington's* case:

> "…the plaintiff was faced with a total lack of evidence on an issue fundamental to the civil claim, and unless the outcome of the prior criminal trial was admissible then the civil claim had to fail. But, whereas in *Hollington* the tendered evidence was offered as conclusive proof of its contents, **but as a matter of principle any findings by the Committee on Amnesty could not be offered as more than prima facie evidence of a commander's guilt.** These findings may also be relevant to the credibility of the accused. One may put the matter even more strongly: it may well be the case that the best evidence of the credibility — or lack of it — of accused commanders' defences is how they used the opportunities accorded to them to intervene in the amnesty applications."[73] (Bold added)

16 The Hollington Rule is likely to be narrowly construed in future matters given its description as "*erroneous*" and the judicial call for its *"strict containment"* and *"extirpation."* We are of the view that a court may be persuaded to admit amnesty findings as *prima facie* evidence of the veracity of such finding. However, even if the opinions and conclusions of the TRC Report and AC decisions are excluded, at the very minimum, the documents themselves may still be admitted for purposes of demonstrating that the matters in question were dealt with by the TRC and AC, and that their reports were published.

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[73] Bennun at 32 - 33.