DISCUSSION PAPER BY HOWARD VARNEY
EXPLORING A PROSECUTIONS STRATEGY IN THE AFTERMATH OF THE SOUTH AFRICAN TRUTH & RECONCILIATION COMMISSION

Overview

This paper explores possible prosecutorial strategies in dealing with South Africa's crimes of the past. It suggests that by applying certain criteria when deciding what cases to pursue that there are ways to tackle the most serious crimes of past in a fair manner and without exhausting prosecutorial resources. It offers prosecutors a means of identifying the most appropriate cases for prosecution in the light of the experiences of South Africa's Truth and Reconciliation Commission. The proposed strategy sits somewhere between the extremes of prosecutorial discretion of doing nothing and attempting to prosecute every case that has a potential of success. It enjoins prosecutors to take note of the particular context of each crime under consideration. The paper also considers an alternative method of dealing with perpetrators who still wish to disclose in full. Rather than amending the prosecutions policy to provide the National Director of Public Prosecutions (NDPP) with amnesty type powers it suggests the use of plea and sentence agreements to facilitate full disclosure.

The Problem

The Promotion of National Unity and Reconciliation Act ("Act" or "TRC Act")[1] provided for a conditional and transparent amnesty to be granted to those perpetrators who disclosed in full and who satisfied the tests and criteria set out under section 20 of the Act. As a direct consequence of this statutory arrangement an obligation was cast upon the justice authorities to investigate and prosecute those perpetrators who were declined amnesty (or indemnity from prosecution) and those who did not apply for amnesty. Very few prosecutions have proceeded since the winding up of the TRC. More recently the imminent arrests of three former police generals on attempted murder charges were held back on the grounds that a new prosecutions policy had to be created under section 279 of the Constitution.[2]

According to news reports, the National Director of Public Prosecutions (NDPP) will be asked to exercise his prosecutorial discretion in a way which would amount to a rerun of the truth for amnesty procedure under the former TRC.[3] In terms of this proposed policy where an accused person makes full disclosure and satisfies the same tests as applied by the TRC's Amnesty Committee, the NDPP may exercise a decision not to prosecute.

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[1] No. 34 of 1995.
[2] Constitution of the Republic of SA (Act No. 108 of 1996).
[3] See "New bid to reveal old secrets", 28/11/2004, 08:10 at http://www.news24.com

It appears that the proposed policy is an endeavour to deal with "unfinished business".[4] Such unfinished business includes giving the many perpetrators who did not apply for amnesty during the lifespan of the TRC an opportunity to come forward and disclose. There is a view that there were many offenders who wished to apply for amnesty but were prevented from doing so by leadership figures in various factions who played a "gatekeeper" type role and intimidated lower order individuals from coming forward. There were others who apparently did not have sufficient information and lacked legal advice to make amnesty applications. It is argued that by coming forward now, such perpetrators will contribute to building greater knowledge of the past. Furthermore, there are victims who will apparently be satisfied simply with knowledge of what happened rather than the delivery of justice. There may be some reluctance on the part of the government to spend vast sums of money prosecuting crimes of the past.[5] Finally there is a concern that the population at large will not accept prosecutions of liberation force members and others who were involved in the resistance to apartheid (the "moral revulsion" argument).

For the purposes of this paper I will assume that a prosecution's policy that effectively extends the TRC's amnesty regime under the guise of prosecutorial discretion is unconstitutional.[6] However it needs to be stated that the arguments put up by the proponents of such a prosecutions policy have little merit. Flawed as the amnesty process was, perpetrators who really wished to make use of the mechanisms were able to do so. Most perpetrators who applied for amnesty were already in jail or were aware that they faced imminent prosecution. The vast majority of perpetrators, particularly those on the side of the apartheid state, believed that they would escape prosecution because of a perceived lack of evidence in the hands of prosecutors and/ or the perceived unwillingness on the part of the state to prosecute. These perpetrators chose to snub the TRC process. They should face the consequences of their actions. In reality it seems that many perpetrators on all sides are seeking a blanket amnesty.[7] As this will not pass constitutional muster, it appears that the buck is being passed onto the NDPP who will in effect be asked to perform the role of the TRC's erstwhile Amnesty Committee.

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[4] See statement of President Thabo Mbeki quoted in "New deal 'stops short of general amnesty'", Christelle Terreblanche, May 18 2003, IOL website.

[5] See statement of Frank Chikane published in "Apartheid henchmen take up offer of indemnity", May 11 2003, By Christelle Terreblanche and Edwin Naidu, IOL website.

[6] See the letter titled "Proposed Prosecutions Policy: Crimes of the Past" from several concerned South Africans addressed to the NDPP, dated …December 2004.

[7] See paper by Piers Pigou published on the Institute for Justice and Reconciliation website. See in particular his references to "secret discussions" between the Geldenhuys Forum and the government and the proposals of an extended amnesty.

A Strategy

This paper seeks to offer a strategy for prosecuting South Africa's crimes of the past. Such a strategy must be consistent with South Africa's constitutional arrangements and existing prosecution's policy. At the same time, such a strategy must be fair and it should avoid absurd outcomes. It should take into consideration South Africa's history of violations, including past prosecutorial strategies and recent efforts to manage South Africa's transition. Any strategy must necessarily limit the number of cases to be considered for prosecution. Prosecutions of the past cannot proceed on an indefinite basis. Such prosecutions cannot unduly detract from current prosecutorial priorities. This means that any strategy would need to identify the most egregious of cases. Identifying the most appropriate cases for prosecution will involve applying different considerations and assessments. The following process is suggested.

1. Amnesty denied or not applied for: In the first place prosecutors will be confined to a limited pool of cases arising from the TRC process. These will be those cases in which amnesty or indemnity from prosecution was not applied for or denied.

2. Sufficient evidence: Once these cases have been determined, prosecutors will have to assess whether sufficient evidence is available to sustain a prosecution. At this point a decision may be taken to exclude cases for lack of evidence. This process will filter out many cases. Certain cases that meet particular criteria, to be discussed below, may warrant further investigations to obtain necessary evidence.

Cases which were not excluded by the TRC's amnesty process and where there is evidence available or potentially available can be referred to as "**ripe cases**" for prosecution. A case that is ripe for prosecution does not necessarily mean that it is an **appropriate case** for prosecution. In order to prioritize cases it suggested that each case be considered in the light of certain other tests.

3. Before making a decision to prosecute, prosecutors should engage in a careful assessment of the circumstances of each ripe case. This assessment will involve several considerations. Certain of these considerations necessarily involve the applying of some, but not all of the tests applied by the TRC's amnesty committee. These considerations should include:

    a) Excluding the non-political cases: The special unit following up the TRC cases will naturally wish to exclude all cases not committed in a political context.[8] Such cases should be prosecuted but not

[8] This includes a consideration of motive, the context of the act, objective of the act, whether it was primarily directed against political opponent or not, and whether the act was committed in the execution of an order or with the approval of the organization.

necessarily by the special unit. Such matters should be handed over to prosecutors dealing with routine crimes for their consideration.

b) A proportional analysis: Cases that meet the political context test should be further assessed to determine the most appropriate for prosecution. This essentially requires an examination of the nature of the crime committed and the circumstances of the perpetrator. Where the nature of the act and/ or its gravity is entirely out of proportion to the political objective pursued, such a case should be considered as **serious or egregious**. Such a case should be short listed for prosecution.

c) The circumstances of the perpetrator:

   i. **Mitigating circumstances** will be those situations in which junior perpetrators acted in accordance with issued instructions. They will also include those who were involved in, but did not orchestrate mob violence.

   ii. **Aggravating circumstances** will be those situations where the perpetrator acted in a position of great influence, authority, leadership or command. In such situations the perpetrator exercises sufficient authority to prevent the act from proceeding but fails to do so. An additional aggravating factor will be where the person exercising such authority was expected to abide by rules or standards, but did not. A further aggravating factor will be where it was open to the perpetrator to adopt a lawful means to pursue the political objective, but did not.

Prioritizing cases for prosecution

Low priority cases will include non-egregious type offences committed by persons not exercising authority, command or influence. Non-egregious type offences committed or ordered by high ranking persons or those exercising authority should also be categorized as a low priority case. However, a non-egregious offence committed by a senior person in aggravating circumstances may be sufficient for such a case to be classified as a middle order priority case. Low priority cases should not be prosecuted.

Middle order priority cases will be those cases involving egregious offences committed by junior ranks or an individual not responsible for orchestrating or planning violence. Where there are mitigating circumstances in cases involving lower ranks this may be sufficient to knock the seriousness of the crime down to a low priority case. It can be argued that middle ranks and particularly the

senior ranks who involve themselves in egregious crimes can make no claim to mitigating circumstances. This category may also include cases in which non-egregious crimes have been committed or ordered by senior individuals in aggravating circumstances. Middle order priority cases should be prosecuted.

High priority cases are those involving senior perpetrators, who have committed, ordered or orchestrated egregious crimes. This is particularly the case where such crimes were committed in aggravating circumstances. Most attention should be devoted to bringing these cases to trial.

This strategy is summarized in the table below.

	LOW PRIORITY	**MIDDLE PRIORITY**	**HIGH PRIORITY**
Low ranks/ authority	• Non-egregious offences. • Egregious offences with mitigating circumstances.	Egregious offences	
Middle ranks/ authority	Non-egregious offences.	Egregious offences	
High ranks/ authority	Non-egregious offences	Non-egregious offence with aggravating circumstances	• Egregious offences. • Egregious offences with aggravating circumstances

<u>Discussion</u>

The order of priority increases as one moves down the table, from the low ranking to the high ranking individuals; and as one moves from left to right, as the nature of the offence become more serious and/ or the circumstances of the perpetrator becomes aggravating. Prosecutorial resources should be

allocated to those crimes that are located towards the bottom and to the right of the table. Such criteria cannot be applied rigidly and prosecutors must always retain a great deal of flexibility in their deliberations.

How would this strategy apply to cases and situations facing prosecutors? It would be instructive to apply the proposed tests to potential cases. For the purposes of these examples it is assumed that the facts of each example meet the political objective test. It should be noted that the facts of some examples seem to lend themselves to conclusive decisions as to which priority label they should carry. In other examples it is not always clear where the offence belongs.

Example 1

Three police generals plot to assassinate a prominent anti-apartheid activist by poisoning him. The activist is poisoned but survives. Evidence emerges to prove the culpability of the generals. The three individuals are all high ranking officers.

The offence in question is attempted murder by poisoning. The nature of the offence potentially puts it into the egregious category. Poisoning can produce an excruciating painful and slow death process. It is often the preferred choice of killing when the perpetrators wish to give the impression of a natural death. The target was an activist who as a leading member of the church was a vocal but lawful and non-violent opponent of apartheid. These facts tend to support the claim that the action of the generals was entirely out of proportion to their political objective, namely that of resisting the liberation struggle. This may be sufficient to classify the offence as egregious, which would place it in the High Priority category.

Even if the offence is regarded as non-egregious the fact that it was ordered by high ranking police officers who could have resorted to non-lethal, non-violent and lawful means to counteract the work of the activist, aggravates the circumstances of the perpetrators. During apartheid times senior police officers had a plethora of forceful legal tools at their disposal. During states of emergency the police were even able to detain individuals without charge or trial on the subjective belief that such persons had infringed emergency regulations. Thousands were detained on the flimsiest of grounds. Other far reaching powers included the prohibition or banning of persons to their homes or neighborhoods; preventing them from communicating with others; and a total prohibition on publishing. Such persons could not even be quoted in the media. The resort to the poisoning of political opponents when the perpetrators were able to employ the full force of far reaching legal powers renders the circumstances of the perpetrators to be aggravating. Thus, even if the crime in question is not viewed as egregious, the fact that the

circumstances of the generals are aggravating places their offences into the middle order priority category. The prosecutions should accordingly proceed.

Example 2.

Thirty-seven senior leaders of the African National Congress (ANC), the largest and most active liberation movement, applied for amnesty for unspecified offences. In their application they accepted collective responsibility for the bona fide acts carried out by members of the organisation and the bona fide acts of those that acted in furtherance of the struggle which it led. The applications of the thirty seven were ultimately refused because they disclosed no offences. The ANC during the course of its liberation struggle launched a campaign of armed resistance in which bombings and assassinations amongst other violent acts were carried out. The vast majority of these acts would fall into the non-egregious category.

The armed resistance to apartheid and its violent actions taken against strategic targets were entirely proportional to the political objective of the ANC, which was the overthrow of the Apartheid regime. The ANC conducted a campaign of peaceful protest for nearly 50 years before it resorted to armed resistance in the face of clear intransigence of government authorities. Its options of peaceful action had been largely closed down. It was the stated policy of the ANC to target military, police and government targets and not to specifically target civilians.[9] All acts falling within the organisation's military policy, including those ordered by senior commanders, fall within the low priority category and should not be prosecuted. Even acts in which civilian injuries and deaths were occasioned as incidental to the main target, does not in my view move the categorisation act from non-egregious to egregious.

However, cases in which unarmed and non-combatant civilians were specifically and intentionally targeted require close scrutiny. Such cases which appear to be the result of middle or lower ranking operatives acting outside of ANC policy and direction may warrant a middle order priority categorisation and possible prosecution. In the absence of any overriding strategic objective, attacks on defenseless civilians are disproportional to the political objective of liberation and should be classified as egregious.

Other circumstances in which ANC officials may face prosecution are where persons who were held in detention centres were tortured and/ or summarily executed. The torture and/ or execution of detainees without due process are also disproportional to the liberation objective. Where such crimes were committed by low or middle ranking officials they probably fall within the middle order category, unless strong mitigating circumstances can be shown. Where such acts were ordered by high ranking individuals it may elevate the

[9] Further Submissions and Responses by the African National Congress to Questions Raised by the Commission for Truth and Reconciliation, 12 May 1997.

crime to a high priority offence. As such individuals could have prevented the committal of such crimes but refrained, the circumstances are aggravating.

Example Three

Particularly brutal crimes involving cruelty and inhumanity, such as "necklacing" require consideration. On the face of it such acts are egregious in nature. Such crimes were invariably carried out in the context of mob violence. It has already been stated that mitigating circumstances of perpetrators includes those who were not involved in the orchestration of mob violence but who were merely part of the group whipped up into a frenzy. These individuals should not be prosecuted. Those who commanded authority and influence over others and who orchestrated mob killings fall at least into the middle order priority category. It has been stated that mob type killings, such as the "necklacing" of perceived collaborators took place in abnormal circumstances in which the participants who bore the brunt of the apartheid system and state sponsored violence acted under extreme provocation. Such mitigating circumstances may be sufficiently compelling to consider the downgrading of such crimes from the middle order category to the low priority. Each incident will have to be considered in terms of its own peculiar circumstances. Certainly the higher ranking or the greater authority wielded by leaders in orchestrating such crimes the less likely that prevailing circumstances will be seen as mitigating. Indeed those who commanded great influence and authority over large numbers and who orchestrate such crimes should fall within the high priority category. Those who organized brutal atrocities as "false flag" operations in order to discredit opposing movements would fall squarely within the high priority category.

Example Four

Low intensity conflict plagued KwaZulu Natal and parts of Gauteng during the late 1980s and early 1990s ("the conflict"). Thousands perished in this conflict. Much violence was directed against people, often for simply being associated with political movements. The conflict was characterized by ongoing cycles of violence involving attacks followed by violent revengeful backlashes. The state fueled the conflict by actively supporting certain factions to commit violence and by failing to intervene in the conflict through the enforcing of the rule of law, particularly against perpetrators aligned with the apartheid state. Senior officials in the Inkatha Freedom Party (IFP) and the ANC were involved in planned acts of violence against their political enemies. Many thousands became victims and as many became perpetrators. The sheer scale of the conflict makes it a daunting prospect for prosecutors to confront. It can be argued that the many low level perpetrators who became caught up in the conflict such as those who were gang pressed into fighting simply because they lived in a certain area should all fall into the low priority prosecutions category. Many of course joined vigilante groups or self defense

units with the genuine belief that they were protecting their communities. The lines between offensive and protective actions became blurred.

It can be further argued that crimes that would be normally be considered as egregious may not necessarily be seen as egregious in the context of a vicious low intensity conflict. As in the earlier examples it is proposed that prosecutors devote their attention to examining the roles of more senior perpetrators. In assessing whether offences orchestrated by senior perpetrators are egregious or not, prosecutors will need to consider whether there was a genuine element of defense present. Certainly offences will be committed while defending a community from violent attack. It may even be argued that certain attacks of a pre-emptive nature fall to be described as defensive, such as an attack on an armed group en route to its target. However, attacks on unarmed civilians can never be described as defensive. In the context of the conflict it may be possible to contend that targeted assassinations against known warlords or known violent activists constituted pre-emptive attacks that fall to be described as non-egregious crimes. This suggests that prosecutors should be focusing on conflict related cases involving attacks on unarmed and defenseless civilians (including civilians holding prominent positions), particularly those attacks orchestrated by senior ranking individuals. Again where senior individuals were part of an apparatus such as a government (including homeland governments) with law enforcement powers the organizing of violent attacks in such circumstances should be seen as aggravating.

The question of disclosure

In South Africa today the making of full disclosure cannot be a reason not to prosecute. However, full disclosure and co-operation with prosecutors will undoubtedly have significant impact on the court's discretion at the sentencing stage. Disclosure can also be part of an investigations strategy to go after the bigger cases. In such cases a prosecutor may decide not to prosecute in order to build the evidence for prosecution of more significant offenders. Persons who make such "disclosure" may be used at trial as state witnesses to testify against accused. State witnesses may receive immunity from prosecution in return for testifying truthfully. A measure of plea bargaining is permitted in South African criminal law. Plea bargaining is the tendering of a guilty plea on the basis that there would be some agreed advantage for the accused, such as a reduction in sentence or withdrawal of other charges. Such agreements have to be confirmed by the courts.[10] Plea bargaining in South African law would not permit full disclosure in return for a decision not to prosecute.

As mentioned at the beginning of this paper it appears that there are many in South Africa who are anxious to find a way to deal with crimes of the past

[10] See "Plea and sentence agreements", section 105A of the Criminal Procedure Act 51 of 1977 as amended by the Criminal Procedure Second Amendment Act 61 of 2001.

without having to deal with expensive and time consuming trials. The proposed solution by government spokesmen of delegating an amnesty issuing type power to the National Director of Public Prosecutors is likely to be unacceptable to many South Africans, especially victims. This process will be carried out largely behind closed doors and will not attend to the needs of victims. It permits those responsible for human rights violations and who boycotted a negotiated and constitutional programme of truth and reconciliation another bite at amnesty without so much as a public appearance or acknowledgment. Their public records will not be affected in any way. If the South African government is intent on pursuing a disclosure mechanism in lieu of the normal criminal process, a possible solution is to require those who wish to disclose in full before a prosecutor to enter a guilty plea in open court in return for a reduced sentence. Such an arrangement will probably require an amendment to the criminal laws which provide for certain minimum penalties. Such reduced sentences could be in the form of suspended sentences, which will act as a deterrent against future violations.[11] Sentences could include the carrying out of a community service in the victim's community; and/ or some form of community reparations either by way of a financial contribution or symbolic act. Any amendments to the criminal laws must be narrow in scope in terms of period of operation and should be confined to those perpetrators who committed political offences during the apartheid/ conflict periods.

Such a procedure requires perpetrators to appear in open court before victims and before the wider public to acknowledge their responsibility. This is powerfully done through a guilty plea. The conviction is entered into the public record. The perpetrator is not permitted to walk away without any sanction or obligations whatsoever. Prosecutors are obliged to consult with victims on what would be an appropriate sentence. Although substantially reduced in severity, a suspended prison sentence and/ or the performance of some form of community service or reparations is significantly better than the closed doors proposal. None of these things will happen if the prosecutions policy is amended to permit prosecutors to carry out behind the scenes amnesty type functions.

Even these legal arrangements can be attacked on various constitutional grounds; however they stand a considerably better chance of resisting a legal

[11] The Rwanda Organic Law No. 08/96 of August 30, 1996 (on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990) provides for a categorization of offences (Articles 2 -3) and confession and guilty plea procedure (Articles 4 -13) for those who confess their crimes and apologize. However those offenders whose cases fall into category one, which include those who played leadership roles and those who committed crimes of genocide and crimes against humanity, may not benefit from reductions in penalties (Article 5). Such offenders may face the death sentence or prison terms. Those offenders whose cases fall in the other categories face reduced prison sentences or other penalties. Colombia is also offering reduced prison sentences to rebel soldiers in return for a commitment to peace and the laying down of arms.

challenge. This is because the proposal provides for a measure of justice in that there would be open and public accountability, a conviction in a court of law and some form of sanction.

Conclusion

Attempting to devise a prosecutorial strategy in the aftermath of the truth and reconciliation process is to step into a veritable minefield. As possible criteria, principles and solutions are ventured more nuances are revealed and more questions arise. Prosecutors must necessarily have wide latitude in their discretion to prosecute, particularly with regard to the types of cases described in this paper. No strategy can be slavishly applied. At best any strategy, including the one offered in this paper, can only act as general guidelines. Following such guidelines will assist prosecutors to act fairly and consistently. It must be accepted that particular issues and nuances that arise in one case will not necessarily arise in another. This requires flexibility in the approach of prosecutors when assessing what matters are appropriate for prosecution. The examples considered in this paper illustrate the tough job facing prosecutors in the exercise of their discretion. Prosecutors should however not turn from such challenges, even if they pose the toughest of decisions.

Although the paper proposes a disclosure mechanism involving plea and sentence agreement procedures, prosecutors and investigators should nonetheless proceed expeditiously to prepare cases dealing with the most appropriate matters for prosecution. As South Africa has experienced in recent years there will always be perpetrators who will wish to escape justice, regardless of what disclosure procedures are offered to them.