Who should be held responsible for the human rights abuses and violence which have been inextricable elements of apartheid? Will the transition to democracy in South Africa be served or undermined if such crimes are forgotten or forgiven? These questions have been the center of focus in South Africa for nearly three years.

In the bilateral talks held between the South African government and the African National Congress since the middle of 1990, the two most contested issues have been the release of political prisoners and indemnity for political offenses. That process, which at the time was understood to apply solely to anti-apartheid activists, has now been extended by the South African government to encompass pro-apartheid actors, most importantly, government security forces.

On November 9, 1992, President de Klerk enacted the Further Indemnity Act which grants liberal amnesty to all those whose criminal actions committed before October 8, 1990, are found to have been motivated by "political objectives". The clear intent is to absolve security force personnel whose crimes were committed in defense of apartheid and under color of government authority. The passage of the Act occurred in the context of mounting evidence of security force involvement at the highest levels in assassination squads and township violence.

THE CRIMES OF APARTHEID

In international law, political offenses are usually deemed to have taken place during some form of anti-state activity, such as an uprising or other expression of dissent. In contrast to this traditional model, the recently enacted indemnity may be extended to individuals who committed gross violations of human rights while acting in support of the State.

In South Africa these human rights violations have included torture, deaths in detention and extra-legal killings, offenses which violate South African domestic laws as well as international law. Also included are those practices that were mandated by South African law, that is, those laws and practices necessary to implement the policy of apartheid, a policy which constitutes a "crime against humanity."
Literally thousands of individuals are implicated in these abuses. They include those who acted directly on the orders of superiors in the South African government, as well as those who may have engaged in abuses on their own initiative. The range extends from the lowliest orderlies, manning the hand-cranked generators routinely used for dispensing electric shocks during interrogation, to senior officers and possibly Cabinet ministers.

Torture and mistreatment characterized the experience of most South African detainees. The South African government’s response to mounting opposition was harsh: under authority of a declared state of emergency, over 50,000 people were detained without trial. At least 20 per cent of those were children, the vast majority of whom were tortured or mistreated during their detention. Independent human rights groups encountered children as young as seven years old who had been brutally beaten and/or electroshocked.

Deaths in detention have been commonplace occurrences. The Human Rights Commission, an independent South African monitoring group, recorded that between 1963 and the middle of 1990, 73 people who were being held for political offenses died in jail under circumstances that strongly implied torture. During 1992 alone, 119 people who were being held for a variety of offenses, died in police custody. On July 26, 1992, South Africa’s most prominent independent pathologist, Dr. Jonathan Gluckman, revealed disturbing statistics on deaths in police custody. Of a sample group of 200 people on whom he performed autopsies, 90 percent, he claims, died as a result of torture.

Perhaps most disturbing are the mounting disclosures of security force involvement in political assassinations and township violence. Since the early 1970’s assassinations have haunted the anti-apartheid movement, and have dramatically increased in recent years. In contrast to the 45 murders occurring during the five year period between 1985 to 1989, an estimated 119 activists have been killed by assassins between 1990 and the end of 1992. Many victims were well known: Griffiths Mxenge, the Durban human rights lawyer who was brutally hacked to death in 1981; Ruth First, the exiled academic who was blown up by a letter bomb in 1982; Dulcie September, the ANC representative in Paris who was gunned down in 1988; David Webster, the activist who helped found the Detainees’ Parents Support Committee, who was shot in 1989; human rights lawyer Bheki Mlangeni who was killed by a parcel bomb in 1991; and Reggie Hadebe, ANC official who was shot to death in October 1992. While the assassins were always difficult to trace, in several cases the security forces have been clearly implicated.

During 1992, several independent human rights organizations, spanning the political spectrum and all with reputations for impeccable research, issued reports which presented strong evidence that the security forces play a central role in orchestrating the political violence that has resulted in an estimated 7,500 deaths in the past two years. The reports of these human rights organizations, based on extensive interviews with hundreds of eyewitneses, find that the overwhelming majority of victims appear to be affiliated with the ANC and that, in instance after instance, the military and police joined Inkatha attacks against the ANC, transported Inkatha vigilantes in security force vehicles, stood by or directed while Inkatha attacked, and intervened only to stop ANC supporters from defending themselves.
Late last year, additional evidence was disclosed in three separate judicial proceedings that further implicates the security forces in the violence and also strongly suggests that President de Klerk and his cabinet have acquiesced in (if not approved of) security force misconduct.

In July of 1991, after admitting that the South African government had secretly funded Buthelezi’s conservative and anti-ANC Inkatha movement, de Klerk promised that the South African government would cease all clandestine anti-ANC activities and appointed a cabinet-level committee with the ostensible purpose of implementing this directive. However, in November 1992, a government-appointed commission of inquiry chaired by Judge Richard Goldstone made a startling announcement that seriously challenged de Klerk’s credibility. From May to December of 1991 - at the same time de Klerk promised an end to all clandestine anti-ANC activities and was negotiating with the ANC over South Africa’s political future - South African Military Intelligence (MI) employed a former police officer and convicted murderer, Ferdi Barnard, to conduct a covert campaign to induce returning members of the ANC’s armed wing, Umkhonto we Sizwe, to engage in criminal conduct.

The Goldstone Commission produced documentary evidence that the MI chief, Lt. General Rudolph Badenhorst, personally approved of Barnard’s employment for the purpose of developing a plan of covert action to destabilize the ANC. The Commission also disclosed that the Minister of Defense at the time, Roelf Meyer - widely regarded as one of de Klerk’s closest confidants and now chief negotiator for the National Party - knew of Barnard’s activities.

At the same time that Judge Goldstone disclosed Barnard’s activities on behalf of MI, a separate judicial inquest heard testimony from three separate witnesses that Barnard boasted that he was responsible for the 1989 assassination of anti-apartheid campaigner and the University of Witwatersrand anthropologist Dr. David Webster. Barnard has admitted that, before joining MI in 1991, he was employed by the Civil Cooperation Bureau (CCB), the secret South African military unit which the Harms Commission accused of assassinating anti-apartheid activists.

Also in November, documents submitted to yet another inquest investigating the killing of anti-apartheid lawyer Bheki Mlangeni showed that Lt. General George Meiring, head of the army, authorized in early 1992 a covert operation, "Project Echoes," in which MI sent agents to London to feed journalists information falsely accusing the ANC of links with the Irish Republican Army and the Palestine Liberation Organization. In addition, there was other testimony before the Goldstone Commission that MI had been providing military training to Inkatha vigilantes and had imported into Natal fighters from RENAMO, the South African supported Mozambican guerilla movement, who then were assigned to attack ANC supporters.

THE GOVERNMENT RESPONSE

While the South African President has appointed a judicial commission, headed by a highly respected jurist, Judge Richard Goldstone, to investigate the violence, he has not taken effective action to restrain the security forces. For example:
In 1990, a government-appointed commission of inquiry headed by Justice Louis Harms, heard substantial evidence that a death squad existed within the police and military. A paramilitary unit within the South African Defence Force, the CCB was implicated in a series of murders. Harms found sufficient evidence to recommend the prosecution of CCB members in one assassination and the further investigation for the purpose of prosecution in three other cases. Although the Harms Commission recommended criminal prosecution, the South African government has refused to prosecute any of those named as responsible.

Dr. Gluckman, reportedly decided to publicize his accusations of murder in police custody when appeals to State President F.W. de Klerk and others, were ignored. The South African government appointed a team of six magistrates to investigate the charges of South African pathologist Dr. Jonathan Gluckman, who accused the police of torturing and murdering blacks in custody. Critics have charged that the inquiry will at best be superficial, since in the past, magistrates have been accused of routinely discounting evidence against the police in custody cases. Further, the recent discovery of secret surveillance devices in Dr. Gluckman's home and office suggests that the government may be expending greater energies and resources on trying to discredit Gluckman than on conducting a thorough and effective investigation into his charges. In countering Gluckman's charges, the Minister of Justice stated that on investigation of 118 suspicious deaths in detention, he found that only 4 policeman had been charged, only two of whom were convicted of murder.

In September, President de Klerk announced measures to reform the South African Police: early retirement of 13 generals; an affirmative action program; internal unit to investigate charges against the police; a community relations unit and sensitivity training. There were no prosecutions or suspensions for cause. The 13 forced retirees do not include those implicated in serious crimes.

For years President de Klerk has adamantly denied that the security forces may be involved in misconduct and strenuously defended their conduct, blaming the political killings almost exclusively on so-called black-on-black violence or a few rogue individuals within the security forces. In December, under pressure of mounting disclosures of South African Defence Force secret intelligence operations, President de Klerk admitted the involvement of top South African Defence Force officers in political assassinations and attempts to derail the negotiations. He announced the dismissal of 16 South African Defence Force officers and the suspension of another seven officers. The identities and crimes of those fired and placed on compulsory leave have not been revealed.

In October, President de Klerk hurriedly enacted the Further Indemnity Act which empowers him to grant indemnity to any person who "advised, directed, commanded, ordered or performed any act with a political object." The Act states that amnesty may be granted for offenses committed before October 8, 1990, but permits an extension of that period at the discretion of the President. Civil suits are pre-empted along with criminal liability. The process
of granting indemnity is initiated by an application procedure in which anyone who believes he or she is entitled to indemnity for crimes committed in furtherance of a political end, may apply to a body called the National Council on Indemnity ("Council").

At the center of the controversy surrounding the Act, is a provision requiring the Council proceedings to be shrouded in secrecy. All members of the Council are required to take an oath of secrecy prior to assuming their duties as members of the Council. Additionally, all other persons allowed into the proceedings will be made to take the oath of secrecy. While the names of those indemnified would be published, the nature of the crimes for which they were granted amnesty would be withheld. The Act makes any public disclosure of Council proceedings that is in contravention of the secrecy provision, a crime, punishable by fine or a one-year prison term.

The Further Indemnity Act has been harshly criticized within South Africa and internationally. Opposition to the bill in parliament was so great that it failed to get the majorities necessary in the three chambers to enact the bill. President de Klerk was forced to revert to the rarely used procedure for breaking such deadlocks, the President’s Council, whose membership is weighted in favor of the National Party. The maneuver was criticized by both liberals and conservatives.

Government critics claim that the Act evidences bad faith on the part of the government. They charge that the move represents an attempt to cover-up damaging evidence of the nature and extent of high level government involvement in human rights abuses being revealed in trials, inquests and commissions of inquiry currently proceeding in South Africa.

AMNESTY AND NATIONAL RECONCILIATION

While human rights groups concede that some form of amnesty may be necessary for a successful transition to democratic rule, they charge that the de Klerk legislation contravenes the requirements of international law and will undermine rather than promote reconciliation and the ethical and legal underpinnings of a new society. They argue that to have legitimacy, the process must meet the following criteria:

1) There must be a clear legal distinction between government officials carrying out activities illegal under international law and individuals or organizations acting in resistance to the illegal policies of that government. The actions of individuals who, in resisting apartheid, violated South African domestic law cannot be equated with the actions of agents serving the apartheid state, who violated not only the ordinary criminal laws of their country, but also fundamental principles of international law.

2) Amnesty, which is forgetfulness of the offense, and pardon, which is forgiveness of the penalty, may be granted by the state only in cases where the state itself has been wronged or is the victim of the offense. The state may not unilaterally forgive or forget offenses committed
against victims other than itself. Moreover, international law which confers competency on states with respect to a variety of matters, denies states the competence to amnesty gross violations of non-derogable human rights.  

3) The policy of amnesty must represent "the will of the people." Therefore, it may only be granted by a legitimate government representative of the population as a whole. The present South African government does not meet that criteria. Therefore, any act of amnesty that would receive the popular support necessary to achieve the goal of reconciliation, could only be taken by a democratically elected interim government.

4) There must be no blanket amnesty granted before the full measure of the crimes committed by state agents are revealed along with the identities of the offenders. Legitimacy depends on full disclosure and acknowledgement of responsibility. "The truth must be officially proclaimed and publicly exposed. The truth must be complete." The government must accept the responsibility of exposing publicly the whole truth: the nature and extent of the abuses; the identities of those responsible for devising the policies and practices that led to the abuses; and the identities of the victims; and the identities of those who knowingly aided and abetted in the commission of the crimes. This requirement goes far beyond the accomplishments of the series of government appointed commissions of inquiry that have existed to date, which have been impeded by limited terms of reference, investigative capability and political will.

5) The South Africa-based Lawyers For Human Rights has argued that an amnesty which upholds the principle of accountability must have three elements: exposure of the truth, prevention of future abuses, and redress for the victims. Not only do victims have a right to have the truth of what happened to them and their loved ones made public, such truth-telling is often the first step toward healing the wounds. Full disclosure must be a pre-requisite for amnesty. To enhance the prevention of future abuses the amnesty process must avoid bestowing on officials a sense of impunity. Consequences must attach to their actions. The severity may range from public recrimination to dishonorable discharge or prosecution. Amnesty should be conditional and operate in the same way as parole. Finally, amnesty should be limited to absolving the applicant only from criminal prosecution. Civil liability should not be affected. While financial damages can never compensate a victim for the loss, it can have a significant symbolic value. These requirements are not met by the Further Indemnity Act passed in November.

6) South African human rights groups have examined the experiences in such countries as Namibia, El Salvador, Argentina, Uruguay and Chile. They have concluded that the experience in these countries suggests that the question of whether or not to institute prosecutions depends

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1 Certain rights are considered so intrinsic to one's humanity that international law bars their limitation under any circumstances. Included are the right to life, freedom from torture, freedom from cruel, inhuman or degrading treatment.
on a number of factors, the most important of which are the nature of the crime (violations of non-derogable human rights cannot be excused) and the extent to which prosecutions would aid or retard the consolidation of democracy. A recent ANC document states:

"It is not a question of victors punishing the vanquished, or of anyone losing or saving face, but of joint responsibility undertaken by all South Africans to affirm norms and standards of accountability that become part and parcel of the new democratic society and bind all future governments. People in positions of power, now and in the future, must know that they will be held accountable for abuses of the law and violations of human rights not only by history but by the agencies of law."