Submission to the Minister of Justice,
Mr Dullah Omar MP, on the subject of:

Proposed legislation on: Amnesty/Indemnity and the Establishment of a Truth and Reconciliation Commission

by

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Submission to the Minister of Justice, Mr Dullah Omar, June 1994.

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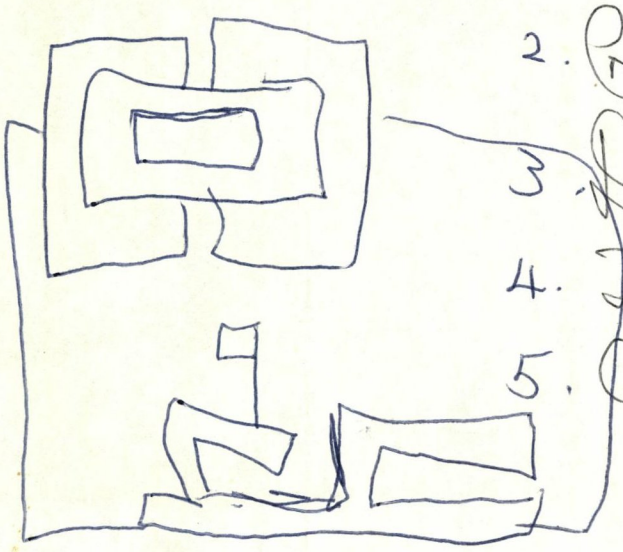

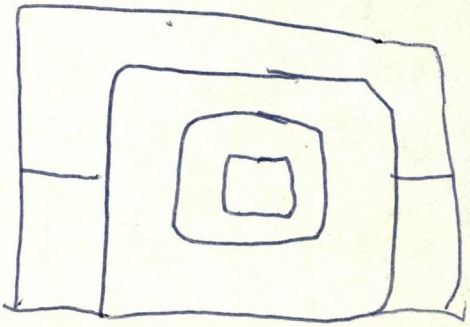

Treaty. Sign. Ratify.
Aut. incorp. / Int. Offic.

35 (1).

Issues: Fed.
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INTRODUCTION

This submission is concerned with the issue of seemingly imminent "amnesty" legislation in South Africa, and with the related issues of public access to information relating to past human rights abuses during the Apartheid era, as well as during the subsequent negotiation period. The delicate historical process of negotiated transition in the period since February 1990, has resulted in the new government of national unity inheriting a dependence on many of the former regime's civil service institutions and personnel. Of particular significance here, are the agencies of state security - including the policing and military institutions - which were central to sustaining the Apartheid system deemed illegal at international law.

Many of these institutions and personnel were allegedly directly involved in the clandestine torture, extra-judicial executions and enforced disappearances of those involved in resistance to the system, yet the nature of the transition means they also continue to be depended upon to sustain law and order within a 'new' society confronting a potential upward spiral of political and criminal violence. In addition, many of those who are now in power within the new government of national unity, were themselves actively involved in the armed resistance to Apartheid which, it is argued, also entailed the violation of human rights within the country and beyond its borders.

It is in this delicate political context that the question re-emerges as to what is to be done in respect of these past criminal abuses of human rights? Nor is it the first time that these concerns have been addressed. Indeed, from the very outset of the negotiations between the Nationalist government and the African National Congress (ANC), a central bargaining point has been the relationship between indemnification of returning exiles and the associated requirement of full disclosure of their political crimes - demanded by the government as a pre-requisite for the release of all political prisoners. This fed into the negotiations climate and set a premium on bi-lateral agreements between the government and the ANC on these issues, in order to prevent the entire process being derailed.

Whereas the early concerns revolved around the indemnification of returning exiles, subsequent negotiation focused on questions of amnesty in respect of members of the state security forces who had been involved in covert activities which were illegal even by the standards of South African law. The establishment of the Goldstone Commission of Inquiry into Violence and Intimidation further stimulated debate over the merits of a general amnesty, resulting from the Commission's call for such an arrangement in order to better facilitate its task of gathering information on the activities of the SADF, the SAP and the Kwazulu police, as well as the military wings of the ANC and the PAC.[1] Albeit on different grounds, the issue of indemnity or amnesty was once again linked to the concern for disclosure of information relating to (political) criminal acts.

Whatever its position within bi-lateral talks, politically the ANC had to resist the right of the then illegitimate regime to indemnify its own functionaries. Representatives of the

[1] Business Day 10/08/1992

liberation movement argued that, although not opposed in principle to the notion of an amnesty, this decision should appropriately fall to a new government of national unity under the new constitution. Despite this, on October 16 1992, The Further Indemnity Bill was introduced in parliament and promised, if passed, to empower then President De Klerk to forgive any politically motivated crime, with the sole condition of review in secret by a government-appointed commission. The only public record relating to the decision - in stark contrast to the conditions set out in the Pretoria and Groote Schuur Minutes which dealt with political prisoners and returnees - would be a list of those to whom immunity had been given... and the records of the review body could be destroyed.

The point was made by Davis et al. that the Bill effectively created an obligation to suppress the truth. It was further argued by them that this explained why a 'Further' Indemnity Bill was required: The State President already had the power, in terms of the Indemnity Act 35 of 1990, to indemnify any person or category of persons, by publication of certain facts in the Government Gazette. It was argued that De Klerk needed the Further Indemnity Bill to give him the power to conceal the truth.[2] Subsequent reports indicated that the National Party government was still attempting to negotiate an extended blanket self-amnesty at the end of 1993. It was reported by the Sunday Times that government sought to have the general amnesty extended to include all political offenses committed before December 1 1993, in terms of which the identity of the killers of at least 10 000 victims of political violence over the past three years, would, by implication, remain secret - and the victims' families would be denied any right to compensation, whether by law or otherwise.[3]

It is particularly significant that the main principle reflected in the preamble to De Klerk's proposed Further Indemnity Bill, was a concern to "promote reconciliation and peaceful solutions". However, as noted by the Parliamentary Committee of the General Council of

[2] Davis, D., Cachalia, F. and Storey, D. "A Power to Conceal the Truth", The Star, 23/10/1992. The Bill was defeated in the House of Delegates (Indian House in the tri-cameral parliament). De Klerk's subsequent attempt to push the Bill through via the Presidents Council attracted a public outcry - including the article by Davis et al written in response to the Bill. A few days later the ANC published its own report on the abuses in the detention camps in Uganda, Tanzania and Angola. ANC President Mandela apologised and took responsibility on behalf of the ANC leadership.

[3] Fortunately, the ANC rejected the position put forward by the government at this time. However, the point is made by Davis et al. that any acts such as this, which were passed by the then government, should be treated as disguised self-amnesty laws - passed by a government forgiving itself, and therefore as dispensable. Despite the fact that this may have been the result of wider negotiations involving other non-governmental agencies, in terms of the reviewability of legislation under the constitution, this should not be treated as binding or free from such review... at least until ratified by the current government of national unity.

the Bar of South Africa (GCB), this general concern with reconciliation must

> "...be balanced in the crafting of the statute itself by a concern for the administration of justice... It is apparent that a blurred pursuit of 'reconciliation and peaceful solutions', without adequate regard for its impact on policing, the courts, and the control of crime, will do more to threaten social stability."[4]

Despite the ostensibly noble motivations for national reconciliation, any amnesty/indemnity arrangement without a parallel obligation to disclose the nature of the crimes perpetrated, however critical it may have been in driving the negotiation process forward, in fact has grave implications for the longer-term prospects of national reconciliation. In particular, for the victims of these abuses of power - on whichever side of the political spectrum they may reside - the implication is that they may never have access to the information essential to their rehabilitation. The prospect is that there will be no public or private acknowledgement of their past, let alone any capacity for redress at law. One possible consequence of this is that, in the absence of any such public acknowledgment, coupled to the impossibility of restitution though the law, widespread resentment is likely to manifest itself in informal retribution at both an individual and a collective level, resulting in escalating rather than de-escalating violence under the new democratic dispensation.[5]

Equally significant is the fact that in the absence of full disclosure and public knowledge of past human rights abuses, the inherited institutions of the new government may well retain unchallenged their organisational culture of clandestine, unaccountable and covert activity. This institutional culture has historically been fostered by the myriad of legislative measures which have actively preserved secrecy and governmental privilege in the name of state security and which have thus contributed to widespread corruption and abuse of power.[6] In no context has this been more evident than in the spheres of intelligence gathering, law enforcement (in the historical context of criminalised political activity) and activities ostensibly pursuant to state security. Unless it is subject to the

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[4] Memorandum by the Parliamentary Committee of the General Council of the Bar of South Africa (October 23 1992), pp.1-2

[5] Simpson, G. "Blanket Amnesty Poses a Threat to Reconciliation", Business Day, 22/12/1993.

[6] For a brief discussion on the broad-based definitions of "security" in South African legislation as well as for a partial description of the range of this legislation, see: Africa, SE. "An Assessment of National Security Legislation in South Africa", Military Research Group, unpublished (1992). Also see in Williams, R. "Covert Action and Democracy: General Considerations and Concepts", Military Research Group, unpublished (1991); and Baxter, L. opcit., pp.235-6. For a slightly different prism on the pervasive effect of secrecy clauses within security, armaments, intelligence, defence and law enforcement legislation, see: Simpson, G. "Militarisation and the Environment: Secrecy Clauses and the Role of Security Legislation in Environmental Degradation", Unpublished paper (1992).

public scrutiny which US Judge Louis Brandeis has deemed the "best of disinfectants"[7], this organisational culture of covert activity within state institutions will continue to plague any future democratic dispensation which has the misfortune to inherit a civil service and state security establishment which, at best, may be passively resistant and, at worst, actively hostile to new democratisation initiatives.

In the South African context, therefore, politicians and legal planners alike, ignore the resilience and independent dynamic of traditional forms of civil administration, particularly in the politically motivated realm of the 'secureaucrats', at their peril. Indeed, the growing concern (in the course of the transitional process) with the need to render the activities and internal functioning of policing and other security establishment institutions "transparent", suggests the necessary awareness - at least on the part of some of the politicians.

In this context, the whole question of "recovery of the truth" has a central pro-active and remedial role. This may take a number of forms. In post-World War II Germany, the vehicle was highly public criminal prosecutions in the form of the Nuremburg Trials. In more sensitive negotiated transitions such as in the Latin American context, often the mechanism which accompanied the granting of amnesties was a judicial "Truth Commission" which sought to uncover the past without jeopardising the tenuous negotiated truce through the threat of extensive prosecutions. None of these mechanisms really compare with the magnitude of the social and administrative experiment in the new "unified" Germany after the collapse of the Berlin Wall. In this instance, the proposed vehicle has been the granting of extensive rights of public access to the records of the former State Security Service - the Stasi Archives.

Some of these methods of truth recovery attempted within the international experience will be outlined in the pages that follow, highlighting the similarities and differences to the South African situation. At this point, suffice it to say that all these initiatives concerned with various forms of public disclosure in respect of past abuses of human rights, to a greater or lesser extent, claimed to service two clear objectives:

1. On one hand, they were all motivated by a primary concern with the process of national reconciliation and the related interest in the 'rehabilitation' of victims of these past abuses.
2. On the other hand, all of these initiatives laid claim to a preventative function, frequently manifested by the ostensible concern to either purge or transform the institutions of the state which allowed these past abuses.

It is similarly in relation to these two guiding concerns that the final paragraphs of the interim constitution, under the heading "National Unity and Reconciliation", links the issues of reconciliation, reconstruction and future amnesty arrangements:

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[7] Baxter, L. Administrative Law, Juta & Co.: Johannesburg (1984), p.233

"The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed." [8] (My emphasis)

Ultimately, the extent of the dual concerns discussed above, and the relationship between them and the questions of amnesty or indemnity granted to the perpetrators of past political crimes, revolves around policy decisions of the new government. Indemnification of the perpetrators is likely to be considered necessary to securing the disclosure of such information as is required to service the objectives of national reconciliation and the rehabilitation of past victims. This is especially the case considering the covert nature of these past abuses and the usually exclusive access which those responsible have to verifiable information. Furthermore, the methods imposed by future legislative measures, particularly in respect of the question of prosecutions, may be substantially limited by the political constraints imposed by concerns over the rather tenuous loyalties of the security forces. Yet punitive measures of some sort may well be demanded by the concern to purify a future administration of the ill influences of those who have previously been involved in the illicit utilisation of state power for the purposes of human rights abuses - both in order to build the legitimacy of state institutions in the post-Apartheid era, as well as to ensure that such abuses do not occur again.

The grave problem which is potentially posed by extract from s 251 that is cited above, is the simple use of the word "shall" which has been highlighted. The strong implication is that amnesty will be granted, and this may impose severe limitations on the ambit of a future Truth and Reconciliation Commission (for example in linking indemnity to disclosure), as well as complicating attempts to strike down earlier "self- amnesty" legislation on the basis that it is conflict with the new constitution. In the proposals which follow, however, this potential limitation will not be fully dealt with in the knowledge that, at worst, this could even require a constitutional amendment to s 251. At very least, any pending legislation would have to be carefully framed so as to ensure it remains consistent with the section.

[8] S 251, Constitution of the Republic of South Africa Act, 200 of 1993, p.180.

PUNISH OR PARDON?

Implicit in the above discussion is the inevitability that the amnesty/indemnity debate engages with two polar opposite positions: punish or pardon. These competing instincts have their roots in the dual priorities of, on one hand, securing the future loyalty of the security establishment which the new government has inherited, or on the other, purging government of the influence of those responsible for such abuses in the past, whilst simultaneously doing comprehensive justice in full public view. In respect of the latter, Cachalia makes the point that in addition to the traditional criminal law theories of punishment as retribution, deterrent and compensation, we must add a fourth: the need to establish the rule of law and the legitimate authority of the new government.[9]

Here Cachalia poses the question as to whether distinctions of degree (such as only the punishment of serious or gross violations) should be made in respect of the punitive nature of whatever system of justice is sought. He argues that "the moral imperative" does not always yield a conclusive answer to this and that other needs and objectives may demand a different approach. In particular he refers to the need for national reconciliation or the need to secure the compliance of strategically located elites in the society.[10]

Ultimately, he argues, it is clear that these two polar options

> "... are not in fact mutually exclusive. They exist along a policy continuum, the precise mix will depend on the political context."[11]

Thus, according to Cachalia, despite the affirmative obligation on states to investigate and prosecute gross human rights violations which exists in international law, the better view appears to be that such states have a discretion in the exercise of this obligation. However, it is generally agreed, he continues, that all governments, at the very least, have an obligation to establish the facts so that the truth becomes publicly known and officially part of a nation's history. This obligation remains where particular conditions may demand that clemency is the best possible policy option in a particular state at a particular time.

As to the content of this obligation to disclose the truth, Cachalia quotes Henkin:

> "... gross abuses of human rights must be fully and officially investigated, with due regard to fair procedures. The identity of the victims and what happens to them, and the identity of the planner and of the perpetrators, must be made known. There must be both knowledge and acknowledgement; the events need to be officially recognised and publicly revealed. Truth-telling responds to the

[9] Cachalia, F. "Human Rights in Transitional Situations: Towards a Policy Framework", Unpublished Memo., Centre for Applied Legal Studies (October 1992), p.1.

[10] Ibid.

[11] Ibid.

> demand of justice for the victims, facilitates national reconciliation and prevents those who perpetrated and supported the violation from nourishing and perpetuating exculpatory versions of the events that occurred."[12]

However, in strong contrast to Cachalia's position, it is argued by Africa Watch that a State is not at liberty to adopt measures that conflict with international law.[13] Even in the case of South Africa, party to only a few of the international human rights treaties, it is argued that the state is still subject to the norms of customary law in the field of human rights (in many instances somewhat uncertain or in the process of evolution) that have developed over the decades since the second world war.[14]

There are two relevant categories of international law cited in this context:

1. The principles that have criminalized policies and practices perfectly legal within South Africa - that is the whole corpus of racially discriminatory policies or Apartheid itself, as well as the repressive 'security-based' legislative mechanisms required to service the system; and
2. The obligation to investigate and punish human rights abuses - including activities that are and have always been illegal under South african law and which imposes an obligation to punish, at the very least, those guilty of torture, extra-judicial execution and enforced disappearances.[15]

Despite the somewhat tenuous nature of the status of the international customary law obligations, the Africa Watch report argues that a future South African regime is under an obligation to prosecute and punish those responsible. If this is somewhat tenuous in

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[12] Ibid., p.2

[13] It is not the intention of this submission to discuss in all its detail the debates about the nature of the duties imposed on states by international law to prosecute human rights abuses. In this context see: Orentlicker, DF. "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", Yale Law Journal, Vol.100, No.8 (June 1991), pp.2537-2615; and Roht-Arriaza, N. "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law", California Law Review, Vol.78, No.2 (March 1990), pp.449-513.

[14] "South Africa: Accounting for the Past - Lessons from Latin America", Africa Watch, Vol.4, No.11 (October 1992), p.18

[15] Davis et al. identify a third intermediate category which lies between the notion of Apartheid as a societal crime on one hand, and illegality under national law. This category of illegality they refer to as "draconian security legislation enacted to protect the system". Opcit. I am conceptually including this aspect within the first category of Apartheid crime which was technically legal within the South African system, but which was clearly in contravention of international human rights standards.

respect of the former category, then the obligation in respect of the latter, it is argued, cannot be disputed.[16]

> "Human Rights Watch [the parent structure of Africa Watch] believes that the obligation to investigate and punish gross abuses of human rights is clearly established under international law. Consequently, while the exact content of a policy on accountability is up to each state, and an amnesty may be justified in some circumstances, a government is not acting in accordance with its obligations under international law if it purports to grant impunity to those guilty of the most serious crimes."[17] (My emphasis)

On this basis it is also argued that a new regime may therefore annul such a self-amnesty proclaimed by the outgoing government (as occurred in Argentina) and proceed to hold the guilty retrospectively responsible for their acts. Also in contrast to Cachalia's suggestion, the Africa Watch report, whilst recognising the premise that political expediency may demand some immunity from prosecution, argues that at very least there must be a hierarchy of crimes established with a view to ensuring that the most serious human rights abuses do not go unprosecuted and unpunished.

Based on the Latin American experience, the report therefore argues for prosecutions and suggests that although it is difficult to achieve a full legal accounting for violations - especially where there is a degree of continuity from the old regime to the new -

> "... it is possible to achieve accountability at the highest levels for even the worst crimes, if the political will is there." [18]

Apart from the problems of illegitimacy of general amnesties in the eyes of the victimised population, it is also argued by Africa Watch that such amnesties, far from promoting reconciliation, severely compromise it. In particular it is suggested that blanket amnesties may contribute to sustaining the culture of official covert violence within the institutions of state "security". The logic is that past impunity promotes future indiscretion. By contrast, it is claimed that the very process of prosecution and punishment serves to re-establish the credibility and independence of the judiciary and of the new government.

It appears that even within the paradigm of the Africa Watch report, Cachalia's position, with some additional sophistication, is arguable. The crux appears to lie in the notion that in any event, the incoming government, as long as it is committed to the principle of accountability, will have to determine how best to achieve the transition to the rule of law. In so doing, it will also be best placed to determine precisely what punitive measures best suit the crimes in question - and this may well be determined by reference to a range of politically expedient factors. Indeed, it is arguable that if handled appropriately, the very process of full public disclosure through a "truth commission", may be construed as

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[16] Africa Watch, Opcit., p.19

[17] Ibid., p.20

[18] Ibid., p.3

entailing a punitive element for those whose human rights abuses are officially disclosed and acknowledged. However, it will be suggested below that official public disclosure alone, (despite being a necessary precondition for indemnification of perpetrators) is not adequate to dispense with the state's obligations in international law. It is argued here that both strategically (for the sake of legitimacy of 'new' state institutions) and in principle, an additional punitive element (which may fall short of criminal prosecution) must be entailed.

The precise nature of any punitive component attached to the process of recovery of truth, must be very carefully structured if it is not going to have the effect of undermining entirely the information gathering which lies at heart of the process and which is ultimately vital to nation building and reconciliation. Such a punitive component may severely affect the potential of an amnesty arrangement to effectively elicit information which would otherwise remain hidden from public scrutiny. It may also stimulate reaction and political activism amongst state security institutions which severely undermines both attempts at transition to the rule of law and the effective peace-keeping abilities of the successor state. It should also be acknowledged, however, that there is some healthy scepticism about the prospects of voluntary disclosure in the context of such a promise of indemnification, which is based on the effective failure of Latin American truth commissions in this regard.

However, the bottom line is that the nature of the South African transformation determines that neither of the polar punish or pardon positions can adequately fulfil the competing concerns set out above. It is the complex politics of transition which largely shapes the policy debate involved. This strongly suggests that any proposed amnesty legislation will inevitably confront a tricky walk along a tightrope between political expediency and formal justice.

LESSONS FROM LATIN AMERICA

Before turning to the task of framing and motivating South African legislation which seeks to resolve some of the dilemmas dealt with above, it may be useful to document some of the experiences of other transitionary societies which have gone the route of "truth commissions" accompanied by legislated amnesties. The best documented comparative material has emerged from Latin American countries over the past two decades and it largely with reference to these experiences (documented in Appendix 1) that this section is concerned. However, it should be noted that there is at least one African case - that of Uganda - which warrants examination.

Although there are obvious features which distinguish the South African situation from that, for example, in Argentina or Chile, some of the general lessons from the Latin American experience can nonetheless profitably be built into the proposals and motivations which follow.

Arguably, it was the Argentinean experience which went furthest in attempting to reconcile a limited prosecutorial process with the process of "truth recovery". However,

despite the prosecution of members of the former military junta in that country, as well as the publication of a detailed report on disappearances, the power of the military was largely sustained and a backlash served in the long term to substantially undermine the initiative and to undo much of its achievements. In this process, a warning is sounded about the potential of a discredited or failed punitive process to do more damage than a less ambitious one. Idealistic images of justice must, to some extent, be subjected to the test of harsh political reality - that is, the reality of sustained power relations in society. This does not imply that prosecutions per se are necessarily excluded, but rather that attempts to "soften" the process for fear of alienating the security establishment, may in fact contribute to sustaining their power in such a manner as to destructively undermine the prospects of reconciliation and confidence building in new state security structures.

By contrast the Chilean approach was considerably less far reaching. The major problem here appears to have been the limitations on the investigative powers afforded the Chilean Truth Commission. As a result, there has been considerable popular discontent about the failure of the Commission to effectively elicit the necessary information about the "disappeared" as well as it inability to attribute individual responsibility for past human rights abuses. This despite the official acknowledgement of these past abuses by president Aylwin. There were no systematic legal proceedings in Chile, with the result that the Truth Commissions findings were never validated in the courts of law. The positive lessons from the Chilean experience potentially reside in the creative achievements of the "Corporation on Reparation and Reconciliation" which was established to consider compensation measures for victims (or their families) of past abuses, to assist in searching for the remains of victims and to formulate proposals for the consolidation of a culture respectful of human rights. Despite the residual power of the military in Chile, which the Truth Commission left largely intact, the creative measures sought to provide compensation - without unduly burdening the successor regime financially - may offer important lessons for South Africa.

In both Paraguay and Uruguay, it is argued that the failures were even more substantial than in Chile or Argentina in that the processes in those countries failed to even provide the degree of public recognition of past suffering achieved in Argentina or Chile. By contrast, the potential of the process in El Salvador, remains to be fully evaluated, although Human Rights Watch is critical of the time constraints imposed on the El Salvadorean Truth Commission as potentially hindering its effectiveness. Furthermore, dependency on the military to obtain information on individual responsibility is seen as a problem. On the other hand, it is argued by Human Rights Watch that the objectivity and standing of the Truth Commission in El Salvador, is strengthened by its status as a United Nations facilitated initiative and it is thus seen to have great potential despite the absence of any effective prosecutions. Whilst South Africa will not (and should not) seek any similar UN involvement, the importance of public perceptions of objectivity are obviously crucial to the terms of reference and the composition of a South African Truth and Reconciliation Commission.

Ultimately the Latin American examples, despite being liberally cited by South African proponents of a Truth Commission, are primarily examples of failure rather than success of such a reconciliation process. It is therefore with caution that we should quote these experiences and with due regard to redressing the errors made in these countries, as well

as to acknowledging the differences in the unique South African context.

A PROPOSED FRAMEWORK FOR PENDING LEGISLATION

The legislative directives set out below constitute no more than a conceptual framework for such legislation. No attention has been given at this stage to the technical imperatives of legislative drafting, nor to the detail required in each of the proposed sections. This is not draft legislation, but a mere outline of the potential span of such legislation, painted in only the very broadest of strokes. Nonetheless, for ease of discussion, the framework provided broadly takes the shape of a piece of legislation. In the commentary which follows, some attempt will be made to explain the strategic and principled choices which have been selected in relation to the discussion above and the lessons from the international experience.

OBJECTIVES OF THE PROPOSED LEGISLATION

1. The objectives of this proposed legislation are:

   (1) To facilitate the process of national reconciliation and nation building, based on the official acknowledgement of the experiences of victims of gross human rights abuses during the Apartheid era.

   (2) To this end, to secure the full disclosure of information relating to politically motivated extra-judicial killings, enforced disappearances or physical and psychological torture of victims, particularly, but not exclusively at the hands of members of government security agencies during this time.

   (3) To facilitate the reparation, compensation and rehabilitation of past victims of such politically motivated violence.

   (4) To ensure the prevention of any similar future abuses at the hands of state functionaries or institutions and thereby to assist in building the legitimacy of state institutions that are conducive to a stable and fair democratic political system.

   (5) Subject to S 4 below, to provide for the indemnification of those responsible, in exchange for the full and voluntary disclosure of their involvement, whether direct or indirect, in the past gross abuses of human rights and their involvement in politically motivated violence.

TRUTH AND RECONCILIATION COMMISSION

2. In fulfilment of the objectives of this proposed legislation as set out above, and in terms of his powers under S 82(1)(g) of the Constitution of the Republic of South Africa Act No. 200 of 1993, the State President shall appoint a Commission tasked with investigating and publishing findings and information relating to past gross abuses of human rights during the Apartheid era.

3. The Commission will be called The Truth and Reconciliation Commission, hereafter referred to as "the Commission".

4. (1) The gross abuses of human rights with which the Commission will concerned will be:

   (a) assassinations and other extra-judicial killings;

   (b) enforced disappearances;

   (c) physical or psychological torture; and

   (d) other illegal acts of violence which were politically motivated or pursuant to an ostensible political purpose.

   (2) The jurisdiction and concern of the Commission will cover both offenses committed within South Africa and beyond its borders.

5. Commissioners and the head of the Commission will be appointed by the State President, and should include legal and human rights experts, representatives of non-governmental human rights organisations, military and policing experts and other relevant civilian interest groups. The head of the Commission must be a senior Judge of the Supreme Court of South Africa.

6. (1) The Commission shall have full investigative powers, including powers of subpoena and to request further particulars in respect of any evidence before it.

   (2) Submissions will be invited from victims, their immediate families, persons having relevant information and other parties with a legitimate interest, including, but not limited to, human rights organisations and other non-governmental organisations.

   (3) The South African Police Service and the National Defence Force are obliged by this Bill to assist the Commission in every way possible in securing, procuring and supplying information relevant to the Commission's investigations.

(4) In order to supplement and where necessary verify the voluntary disclosures made to the Commission, the latter shall have full and confidential rights of access to such security police and military files as are deemed necessary by the Commission to the fulfilment of its mandate to establish the truth in respect of past gross human rights abuses and the identity of the perpetrators.

7. (1) Pursuant to the objectives set out in S 1 above, Commission hearings will be held in public, provided that the Commissioner has the discretion to instruct that a particular hearing be held in camera, where the Commissioner is of the view that:

(a) the life or physical well-being of a party affected by the evidence may be endangered by such a public hearing; or

(b) a public hearing may compromise future good government or the credibility of an important state institution; or

(c) a request for privacy which has been received by a specific victim who does not want his or her victimisation publicly disclosed, is justified.

(2) Where such a hearing has been completed in camera under S 7(1)(a) or (b), the Commissioner may thereafter nonetheless choose to publish, in full or in part, a record of the hearing where, if in his or her opinion, such publication would not attract the consequences anticipated under (a) - (c) above. Similar publication in respect of S 7(1)(c) can only be undertaken if the data reported has been de-personalised, and with the approval of the affected victim or his or her immediate family.

8. In its hearings, the Commission must respect all the norms of procedural justice, including the rights of legal representation, the rights of those affected to due notification, to bring evidence in their defence, as well as the right of any affected party to remain silent in respect of evidence brought against them.

9. The Commission should seek to complete its work within two years of its appointment, but this period can be extended by the State President upon recommendation by the Commissioners.

10. On completion of its work, a full and detailed report shall be submitted to the State President including a comprehensive listing of all the victims, the crimes which they suffered and, where such information has been conclusively established, the identity of those both directly and indirectly responsible. If satisfied, the State President will then officially ratify and publicly acknowledge the contents of the report, which shall then be published.

11. In addition to the detailed narrative report to be submitted to the State President in terms of S 10 above, and pursuant to the objective set out in S 1(4) above, The Commission is also empowered to make specific recommendations as to the removal of serious offenders from positions in public office, the denial of certain benefits of public office, or as to demotion from certain positions of power and influence in public office. Such dismissals, denials or demotions may then be implemented by the State President in consultation with Ministers in charge of the relevant state institutions.

VICTIM AID AND OTHER REHABILITATIVE AND REPARATIVE MEASURES

12. The Commission will appoint a Compensation Tribunal, the function of which will be to investigate and determine appropriate compensation for victims (or their immediate families) referred to in the disclosures, who have not already been adequately compensated. The Compensation Tribunal may also evaluate and recommend direct victim aid measures including psychological counselling and other non-patrimonial assistance.

13. This section provides for a right of access by individuals to their personal files and to any records kept about them within the archive of the former state security institutions, in order to both:

(1) assist victims or other interested parties in bringing evidence before the Commission; and

(2) provide victims and their families with more comprehensive rehabilitative assistance than are catered for under the limited categories of gross human rights abuse dealt with by the Commission under S 4 above.

INDEMNITY FOR PAST OFFENDERS

14. In pursuit of the objectives as set out in S 1 above, those responsible for the politically motivated violence and offenses under S 4 may, subject to the criteria in S 14 (1) and (2) below and upon application to the Commission, be granted indemnity from criminal prosecution in respect of those offenses for which they make full voluntary disclosure to the Commission within six months of its appointment.

(1) On condition of full disclosure, indemnity will be automatically granted to the perpetrators in respect of such offenses committed before 8 October 1990.

(2) Indemnity in respect of such offenses committed after 8 October 1990, but before 6 December 1993, and for which the applicant has provided full disclosure to the Commission, will be at the discretion of the State President based on recommendations by the Commission.

(3) Non-disclosure in respect of any such offence committed during any of the time frames covered in this Act or subsequent to 6 December 1993, will mean that the perpetrator will not be indemnified from prosecution in respect of that criminal act, even where the perpetrator has disclosed information and applied for or received indemnification in respect of any other criminal act.

COMMENTARY ON THE PROPOSED LEGISLATIVE FRAMEWORK

Objects of the Proposed Legislation

In terms of s 1 of the proposed legislative framework ("the Bill"), the central objective of this legislation is to foster meaningful national reconciliation premised on a primary concern for full disclosure and public acknowledgement of the historical suffering of victims of human rights abuses under Apartheid. Although the Bill seeks to be sensitive to the political constraints imposed by the delicate process of negotiated transition - and particularly the need to sustain the tenuous loyalties of the military and policing establishment inherited by the new government - its objectives clearly subject this to the primary concern for the victims of these historical abuses.

The proposed Bill is therefore resistant to any short-cut and short-sighted notions of "forgive and forget" reconciliation. For this reason, as much as for the purpose of meeting the obligations imposed by international law, the indemnity provided for past offenders under the Bill remains subject to - and conditional upon - its functionality in respect of the primary object of full disclosure of the crimes committed. Indeed, it is arguable that legislation which provides anything short of this, would potentially fall foul of the fundamental right to human dignity as enshrined in Chapter Three of the new constitution.[19]

Ambit of the Proposed Legislation

With regard to the two distinct categories of international law obligations which have been identified above, the proposed legislation does not attempt to deal with the broad crimes against humanity inherent in the Apartheid system per se. The ambit of the proposed Bill only engages with the "gross human rights abuses" perpetrated during this period and which were illegal even by the rather less rigorous standards of South African law. This is borne less of any attempt to establish some moral hierarchy of offenses in principle, than it is a strategic decision based both on practicality and political reality.

The magnitude of the tasks of review and disclosure of the victimisation of an entire society over a period of at least forty five years, is quite simply impossible. Some of the

[19] s 10, Constitution of the Republic of South Africa Act, No.200, 1993.

most fundamental abuses of the Apartheid system, such as forced removals or the denial of ordinary citizenship rights, censorship, systematic discrimination in the supply of services and restrictions of freedom of movement and association, have all affected the entire population - rather than just a select group of victims. It would therefore simply be counter-productive to engage in such a process only to fail or to resort to superficiality as a result. In any event, most of these broad abuses consequent upon the Apartheid system are better engaged with for the purposes of reconciliation, through the changes wrought by the political process itself, or through the process of rewriting official history. Indeed, the current political climate and rhetoric suggests a substantial popular commitment to reconciliation at the political level - and, in any event, this could not realistically be achieved as effectively by any Truth and Reconciliation Commission.

Although it is by no means ideal in principle, political and practical reality therefore dictates that there is a need to limit the ambit of the Commission under the proposed legislation, so as to render its task manageable and in order to take on and expose the most serious and dramatic forms of human rights abuse - both in the name of substantive justice, as well as for the sake of the affected victims and their families.

On this basis, the definition of "gross human rights abuse" provided by the Africa Watch report is used as a guideline - in part because it also resonates with the ambit of comparable investigations in the Latin American context. 'Gross abuses of human rights' is defined there as consisting of: genocide, arbitrary, summary or extra-judicial executions; forced or involuntary disappearances; torture or other gross physical abuses; and prolonged arbitrary deprivation of liberty.[20] Even this definition is narrowed somewhat within the proposed Bill and, for example, it does not include detention without trial per se.[21] It should also be recognised that the more extreme the abuse, the more delicate the process of truth recovery becomes, especially in the South African context as outlined. The proposed legislative framework nonetheless seeks to prioritise these most serious of human rights abuses, out of both preventative and punitive concerns at international law, as well as concerns for the victims.

However, there is a potentially important problem with the "gross human rights abuses" definition offered in the proposed legislative framework above. If it is accepted that this definition includes only the most serious human rights abuses as indicated, then other politically-motivated criminal activity where the consequences of the offence are relatively minor - such as some assaults, attempted crimes or arson attacks - might be excluded. If this is so, then the perpetrators of gross acts could be indemnified on full disclosure

[20] Africa Watch, Opcit., p.23

[21] It is clear that the definition of physical or psychological torture could include the 'prolonged arbitrary deprivation of liberty' and would certainly include any form of torture in the course of such detention. However, here again it must be borne in mind that some estimates suggest that over 25 000 detentions took place in South Africa under general law since 1963 and another 54 000 under emergency regulations between 1985 and 1990 alone. This poses serious practical considerations in respect of the role of a Truth Commission in this regard.

before the Truth and Reconciliation Commission, while those perpetrating relatively minor offenses will, in theory, remain liable to prosecution. Similarly the victims of these lessor crimes would not be able to seek compensation from the proposed Compensation Tribunal. For this reason, it is imperative that the ambit of the legislation as a framework for the investigations of a Truth and Reconciliation Commission be explicitly defined and narrowed. To the extent that indemnity is discussed at all under the legislation, it is only in respect of the specific (and most serious) crimes which fall within the ambit of the Truth Commission's investigations. This should not be seen to exclude the capacity of perpetrators of less dramatic crimes to confess, repent and be indemnified under a separate indemnity/amnesty act - even though this would not fall within the frame of reference of a future Truth and Reconciliation Commission.

Another important aspect of the ambit of the proposed legislation is its concern with 'politically motivated' violence in s 1(2) or violence which was 'politically motivated or pursuant to an ostensible political purpose' in s 4(1)(d). It should be noted that Davis et al., in their critique of De Klerk's Further Indemnity Bill (presented to parliament in October 1992), were particularly worried by the "tautologous definition of a 'political offence' measured by no objective standard and making no distinction between the seriousness of offenses or between perpetrators and those who gave the orders." [22] This point is well taken and is conveniently treated here as a definitional problem which will have to be resolved by technically astute drafting! Having said this, it should be recognised that this is indeed a problematic definitional task, considering the integrated nature of political and criminal violence in the South African context. Some headway is made in this regard through the narrow definition within the Bill of the offenses under scrutiny - as this dispenses with the rather complex and frequently arbitrary task of attempting to define certain crimes as capable of containing a political content, whilst others are excluded. Some criteria which may be considered in developing a drafted definition might include: offenses committed by a member of a political party/armed formation/security force; offence committed under orders; and the nature of the act itself, for example, rape could not ever be considered a "political offence" for the purposes of the legislation.

Another important dimension of the ambit of the proposed legislation is made explicit in s 1(2). The ambit of the proposed Bill very deliberately does not exclude gross human rights abuses perpetrated by non-governmental agencies or personnel. In so doing, the proposed legislation seeks to fulfil the imperative that the recovery of truth should not be politically selective. Clearly the abuses of 'all sides' in the South African conflict should be subject to investigation - especially because hostilities ultimately ceased by mutual agreement through a negotiated process. This contains the implied danger that both sides may have an interest in keeping the abuses out of public view.

However, the impression should be avoided that the abuses of one side excuse those of another; and the special nature of crimes committed by the state - which has used its power to abuse and not uphold the law - must not be ignored. Indeed, the proposed Bill clearly prioritises the legacy of state violence as being fundamental to the quest for

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[22] Opcit.

sustainable democratic accountability and to the transformation of state institutions.

Punitive and Preventive Dimensions

In response to Cachalia's view that official public disclosure may serve the punitive function necessary to dispose of the state's international law obligations to punish offenders for gross human rights abuses, it was stated above that this alone (despite being a necessary precondition for indemnification of perpetrators) is not sufficient. Both strategically (for the sake of legitimacy of 'new' state institutions) and in principle, an additional punitive element (which may fall short of criminal prosecution) must be entailed. This additional element is contained within s 11 of the proposed legislation, which empowers the Commission to recommend the removal of past offenders from the public service.[23]

This measure is arguably critical to any programme aimed at undermining the sustained culture of covert action within the state's institutions, particularly the police and military. As such it is an important contributor to the re-establishment of the rule of law and to the legitimacy of the new government. Apart from a punitive effect for those responsible, it has a clear preventative element as well. Furthermore, the proposed legislation seeks to build in safeguards against the potential abuse, selective application or inconsistent standards in applying this "punitive" measure. This is done by way of a three-part process: first the Commission itself must make the recommendation, then the State President must approve it, and finally implementation only takes place in consultation with the relevant Minister.

The general idea has its roots in the hitherto untested powers of the El Salvadorean Ad Hoc Commission to examine the cases of individual officers and to remove offenders from active service. The extent of the historical abuses and of culpability in the South African context may make this rather difficult to implement - but it seems to be the one punitive element which offers the potential to purge state institutions of these influences, without necessarily compromising the need to solicit and publicly disclose information relating to past serious indiscretions.

Also, the South African situation should be distinguished in one crucial respect from the general circumstances which appear to prevail in the Latin American context. Here, there is less of a culture of direct political intervention by the military/security establishment than is the case in the former context. This means that whilst the entire process of truth recovery and reconciliation could be held hostage by well organised and threatening

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[23] The principled intention here is that "public service" is broadly defined so that it not only refers to "security bureaucrats", but would also include newly elected or appointed civil servants as well. The non-discriminatory purview of the Truth and Reconciliation Commission would, therefore, by definition, threaten any former non-governmental operatives who engaged in the sorts of human rights abuses contemplated by the legislation, with the same punitive measures as are contemplated in respect of members of the security forces etc.

military institutions in the Latin American context, in South Africa truth recovery coupled with the removal of key offenders from government service is less likely to be disruptive or threatening to the stability of the government. On the contrary, this process is critical to the entrenchment of an embryonic culture of accountability within these state apparatuses. It offers a critical route to restoring public confidence in the integrity of the security forces by ensuring that the practices of the past cannot be repeated. At one and the same time, such a punitive measure is unlikely to undo the whole disclosure requirement of the proposed legislation in quite the same way that the threat of criminal prosecutions may do. However, it must be recognised that this remains a compromise position in principle, one which is held hostage by the pre-requisites of political expediency.

Of course this punitive aspect of the proposed legislation is only functional in conjunction with the effective publication of such information as is disclosed or elicited through the operation of the Truth and Reconciliation Commission - as set out in s 6 to s 8 of the proposed legislation. In this context, Zalaquett makes the point that for such a publicity programme to be effective, certain conditions must be met to achieve legitimacy. He makes the point that the truth must be known and it must be complete (that is who planned, carried out and ordered the abuses), especially where covert activity has acquired state sanction and has begun to intrude into the organisational culture of the state as has been the case in South Africa. The truth must be officially proclaimed and publicly exposed. Public knowledge is essential as these past abuses affected not only the direct victims, but the society as a whole. Absence of full public knowledge threatens rather than servicing the objectives of reconciliation and nation-building.[24] Zalaquett continues:

> "[H]iding the truth allows the military or other groups or institutions responsible for past abuses to escape the judgement of history and to insist on exculpatory versions of what happened; new recruits will absorb an institutional tradition which has not expunged its most objectionable aspects... For all these reasons it is not sufficient that well-informed citizens have a reasonably good idea of what really happened. It is not enough either that the mass media or other sources disseminate the truth, however widely. The important thing is that the truth is established in an officially sanctioned way, in a manner that allows the findings to form part of the historical record of the nation and that establishes an authoritative version of the events, over and above partisan considerations."[25]

Indeed, one key motivation for this sort of full disclosure which is easily overlooked, is the need to provide opportunity for the perpetrators to 'repent', to change and to commit themselves to a new and fundamentally different organisational culture.

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[24] Zalaquett, J. "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints", in State Crimes: Punishment or Pardon, Aspen Institute (November 1988), pp.30-31

[25] Ibid., p.31

Public Hearings and In-camera Hearings

In order to achieve the appropriate publicity of the process of disclosure, s 7(1) of the proposed legislation provides that Commission hearings will be held in public. This is likely to be extremely controversial as it must be acknowledged that little control can be asserted over precisely what sort of information is disclosed to the Commission. It must be recognised that there is great potential for devastating personal, social and political effect of the revelation of such information, even without the prospect of prosecution.

A clear example would be in respect of information disclosed which relates to the role of past informers who are now highly placed officials within the new government. There is equally the danger that disinformation and false files may be provided to the Commission and this could generate confusion and conflict. Therefore, there may be an imperative to weigh the validity of such information before it is publicly revealed. Indeed, some might argue that the substantial consequences for the political process and the prospects of reconciliation may demand that information such as this needs to be suppressed and that in these circumstances, "forgive and instantly forget" may well be the best route to a peaceful political process. This is not the position being suggested here, however, there is implicit in s 7(1)(a)-(c) a recognition that in certain circumstances information may need to be verified or accredited in the eyes of the Commission before publication can take place. Once such information has been held to be sufficiently reliable, then publication of the record of the proceedings may go ahead and the position of the offending person within public bodies will be subject to the same scrutiny by the Commission.

Composition and Powers of the Commission

Zalaquett makes the point in the Argentinean context that the National Commission on the Disappearance of Persons (CONADEP) gathered impressive information about how the system worked, but that because of its limited investigatory powers, it could not account for the fate of most of the "disappeared", nor could it effectively establish who was responsible for those crimes. Ultimately, CONADEP lacked the power to exact the critical information held by the military and the result, he suggests, was that the overall effect of the subsequent amnesty law passed in Argentina in 1987, was to consolidate the power, confidence and cohesion of the military within the fledgling civilian democracy.[26] It is with this in mind that an attempt has been made within s 6 of the proposed legislation, to ensure that the Commission has full and effective investigatory powers and is not simply an information gatherer. Of particular significance here is the Commission's controversial right of access to 'security' files. This will be dealt with in some detail in a later section of this submission.

In terms of the composition of the Commission, the overriding motivation in the proposed Bill, is a concern for legitimacy through full official backing. For this reason it is no less than the State President who will appoint the Commission and who will ratify and acknowledge its report. This is in contrast to the recommendations of the Parliamentary

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[26] Ibid., p.57

Sub-committee of the General Council of the Bar of South Africa (in respect of the earlier proposed Further Indemnity Act), that appointments be made by the Chief Justice and not by the State President. However, the General Council will hopefully be satisfied by the proposal that a Supreme Court judge be appointed to chair the Commission and by the recommendation included in the proposed legislative framework, that a view to the need for legal expertise be given serious consideration in appointing members of the Commission.[27]

One additional point needs to be made in this respect. The tasks of the Commission must be carried out by an official body seen to be impartial and seen to be appointed by the new government of national unity. In my opinion, this strongly motivates against the suggestion that the Goldstone Commission's brief is simply extended to fulfil the functions of the Truth and Reconciliation Commission. Quite apart from the fact that the Goldstone Commission was established by the former regime, its operations and findings were not uncontroversial and this may affect the confidence of those seeking to give evidence before such a Commission.

Furthermore, considering the vibrancy of the non-governmental sector in South Africa, especially in the para-legal and human rights fields, it seems critical that we learn from the Chilean experience and that, as far as is possible, we integrate these organisations into the functioning Commission - both at the level of provision of information and evidence, as well as within the structures of the Commission itself. This is the motivation for specific reference to these groups in s 5 and s 6(2) of the proposed legislation.

Extra-territorial Effect

In terms of s 4(2) the Bill also applies extra-territorially. This is important in terms of the Nuremburg Principles and international law more generally, in that as a matter of legal principle, it should not matter whether the crimes were committed on South African soil or beyond the borders of South Africa. Furthermore, the effect of this provision is that it allows for the investigation of abuses which occurred beyond the borders of South Africa, including the alleged assassinations of Apartheid's opponents, as well as the abuses alleged to have occurred within ANC camps in the front-line states.

International Law Requirements for Full Procedural Justice

Although the rights to full procedural justice would, in any event, probably be imposed under the new constitution (for example there is specific provision under the constitution in respect of the right to remain silent (S 25(3)(c)), this is an important - if somewhat bland - express undertaking in respect of international law obligations. This matter and its practicalities are complex and will not be dealt with in detail here. However, suffice it to note Zalaquett's words of warning that eliciting the truth whilst respecting the norms of a fair trial have proved very difficult in the truth commission context. He therefore argues for creative thought to be given to novel and original procedures to facilitate the process of truth recovery, such as the establishment of special plea bargaining procedures for the

[27] Opcit., p.3

purpose of full disclosure.[28]

A particular problem which needs to be borne in mind and which appears to have plagued the El Salvadorean experience, is the due process considerations of any punitive measures contemplated - such as the proposed removal of offenders from public office on the basis of the Truth Commission's recommendations. Some thought must be given to the precise nature of the procedures employed if the functioning of the Truth and Reconciliation Commission itself is not to be crippled by resistance through litigation.

Limited Time Frame for Truth Recovery

There are three key reasons for the limited time frame stipulated in s 9 of the proposed legislation. Firstly, it is important that the Commission has a limited period of sitting so as both to avoid the potential of it becoming a vehicle for ongoing "witch hunts". Secondly, in possible conflict with this view (but with the same consequence), it is important for the Commission to be seen to be acting quickly and within a set time-frame - before political commitment evaporates, those subject to investigation become too resentful, and current problems occupy all available time. Thirdly, it is important that the time period be limited (without being unrealistic or impractical) so as to allow community confidence to be built in the security forces, as well as stability within the forces themselves.

Having motivated thus, it remains to be restated that the primary function of the Truth and Reconciliation Commission is to service the effective recovery of truth. This means that ultimately such "journalistic concepts" as time limits (to quote IEC Chairperson Judge Johan Kriegler), must of necessity be flexible in the final instance. This explains the capacity, provided for in s 9, for extending the sitting of the Commission if necessary.

Less flexible must be the time frame within which voluntary disclosure needs to take place in the context of the provisions for indemnification under s 14 of the proposed Bill. There must be some pressure on former perpetrators to act quickly and this will also serve to undermine the levels of uncertainty and suspicion which can dominate or disrupt both the security forces and the political process more generally, if this process is to drawn out. The proposed time limit for voluntary disclosure is six months from the date of establishment of the Commission - however this is not rigid and may be insensitive to practical considerations.

Publication of the Identity of Perpetrators

Full public disclosure (which is a central object of the proposed legislation) could not be properly serviced in the absence of the publication, not only of the acknowledged experiences of a list of victims, but also of the names of the perpetrators responsible (s10). Furthermore, the punitive action provided for under s 11 (the recommendation of removal from the public service) would not be possible without detailed disclosure of this

[28] Zalaquett, Opcit., p.31

nature.

However, some debate remains as to whether publication of the names of those responsible should be comprehensive, or should take some account of a distinction between "order givers" and those "acting on orders". There is some suggestion that this distinction could simply be based on rank and that all officers under a certain rank should not be named. Another concern expressed is that those named and linked to the perpetration of particular crimes, may themselves become the victims of informal retribution - and clearly the Commission would not be able to offer comprehensive protection.

On the question of "acting under orders", Marcus and Unterhalter make the valuable point that this view implies a dangerous principle of government: officials may use criminal means in the execution of State objectives because even if the objectives fail or change and even if the government falls or changes, officials and members of government will be protected by virtue of the fact that they acted as officials under orders.[29] These authors also point out that the National Party government never acknowledged that torture, assassinations and disappearances were part of its "total strategy". Indeed, the former government studiously relied on the bad apple theory of policing when such crimes did come to the fore. In this context, the distinction of "acting on orders" largely falls away: either the perpetrator himself or the order giver was acting beyond orders. On these grounds, Marcus and Unterhalter argue, there is no basis to grant an indemnity - and there is certainly no basis to withhold the names of those claiming that they acted under orders.[30] So, either the former government must confess to its "total strategy" or must leave its misguided operatives to the mercy of this aspect of the proposed legislation.[31]

Furthermore, if the concern is in any way to meet the obligations imposed by international law, then it should be noted that the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment not only outlaws torture, but precludes reliance upon superior orders or exceptional circumstances as a justification for the use of torture.[32] Zalaquett also motivates this position arguing that international law in terms of Nuremburg Principle IV states that such orders are no basis for exemption from criminal responsibility, unless a moral option was not possible in practice. International law also bars the use of the excuse of superior orders as a means to circumvent the state's duty always to punish certain crimes.[33]

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[29] Marcus, G. and Unterhalter, D. "Its Good to Confess", Saturday Star, 03/10/1992.

[30] Alternatively, we may accept that the entire military establishment, including the top leadership, are bad apples... and grant them an indemnity on this basis alone.

[31] Opcit.

[32] Ibid.

[33] Opcit., p.43

Furthermore, it is equally arguable that full publication of the identities of the culprits, when coupled with institutional acknowledgment, may serve the vital role of freeing innocent soldiers and police, as well as the state institutions themselves, from the taint of association. This seems to have positive potential as part of the process of rebuilding public confidence in these institutions.

For all these reasons it would seem that, in the absence of criminal prosecutions (where there has been full disclosure), there can be no legitimate suggestion in principle that full details of the perpetrators and their crimes should be withheld, if the objectives of this proposed legislation are to be realised. The only credible suggestion might be that some form of witness protection programme may be necessary and should be investigated or possibly included within the powers of the Commission.

Compensation and Victim Aid

Zalaquett makes the simple argument that in terms of reparative measures, all attempts to compensate victims must be made. Knowledge of the truth is regarded as the bare minimum in this context, along with the building of a fair political dispensation.[34] However, it is suggested here that more comprehensive compensation measures need to be investigated and, following the lead provided by Chile's "Corporation on Reparation and Reconciliation", creative planning needs to engaged in and this could be the function of the Compensation Tribunal proposed under s 12.

Included here may be the establishment of a Victims Compensation Fund. However, unless it is proposed that this mechanism be funded from the coffers of the police and military pension or provident funds (something which would arguably be most effective in deterring voluntary disclosure!), then the basic problem in this context is that an already financially over-burdened successor regime is being held liable for compensating the victims of its predecessor government.

Ultimately it must be acknowledged that the proposal in respect of a Commission Compensation Tribunal is a rather simple and under-researched solution to a much wider problem within the proposed legislation. It largely substitutes for answering the key point made by most of the authors on the subject of victim compensation - that damages should first and foremost be sought from those responsible. There is nothing in the proposed legislative framework above which prevents victims from instituting civil claims against those responsible, although in many cases plaintiffs would have to work their way around the prescription of their claims. However, it seems likely that after the disclosure of a particular criminal act, the success of a civil action by the victim is almost guaranteed.

This is probably the gravest weakness of the proposed Act in its current form. It seems rather risky to rely on indemnity from criminal prosecution as a vehicle for encouraging full disclosure, if the consequence is simply going to be a civil claim from which no indemnity is secured. It therefore seems likely that the indemnification offered by the proposed draft legislation will have to be extended to include indemnity from civil

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[34] Ibid., p.36

liability - however I am reluctant to incorporate this compromise until alternative sources of compensation have been elaborated upon under s 12 of the proposed Bill. This section and the Compensation Tribunal which it seeks to establish is simply too tenuous in the above proposal to act as a comprehensive substitute for the civil rights of victims.

I have therefore taken the point made by the General Council of the Bar in this regard, that indemnity from civil liability in this context:

> "...will irreparably damage the reputation of any system of justice [and]... will invite retribution in its most barbaric form, given that innocent victims (such as dependants) will have no legal redress whatsoever."[35]

Until fiscal and financial advice is taken on the possibility of giving the Tribunal under s 12 some teeth, it would be problematic to remove the prospect of civil liability for the perpetrators. However, it is recognised that this may constitute a serious flaw in the disclosure that is being sought and, to this extent, this aspect of the proposed legislation must be acknowledged as incomplete. Without necessarily eliminating the civil rights of victims, one possible solution to this dilemma might be that:

(1) Where victims are awarded compensation by the Compensation Tribunal, they will be barred from pursuing further compensation through civil litigation.

(2) Where victims have already received monetary compensation through civil litigation, then no award will be made to them by the Compensation Tribunal.

Indemnification Linked to Disclosure and Time Frames for Indemnifiable Offenses.

The purpose of this proposed legislation is to facilitate the disclosure of information about gross human rights abuses of the past, particularly by the security forces. Indemnity arrangements potentially serve to create the space for such disclosure. However, limited indemnity arrangements may be motivated by the claim that they may assist is securing evidence pursuant to which subsequent prosecutions may ensue. In this case two severe problems arise: 1. What mechanisms could be designed to reward cooperation without making blanket agreements that would be open to abuse and which might defeat the original intentions? and 2. Should cooperation be rewarded? Are the ethical and normative difficulties in grading human rights abuses, in order to use some of the perpetrators to catch others, possible to overcome?

In any event, the political reality in South Africa is that most of the perpetrators are still within the current system and, to some extent, threaten to undermine a government which does not indemnify them. Secondly, full scale prosecution may simply do too much damage to law enforcement agencies being depended on by the new government. For

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[35] Opcit., p.4 addendum.

these reasons any notion of limited indemnity with select prosecutions, seems an unlikely political prospect. However, the fundamental reason for a compromise of criminal justice which is as sweeping as that contained in s 14 as proposed above, is simply that limited indemnity arrangements could not properly service the objective of the proposed legislation because of the considerable uncertainty which would exist in respect of who and which acts would be indemnified. Under these circumstances, full voluntary disclosure would simply be too risky for past offenders.

For this reason, it is proposed that all offenses up to October 8 1990 be automatically indemnified on full disclosure. However, in respect of offenses during the negotiation period and which occurred after the passage of the Indemnity Act of 1990, this indemnity becomes somewhat less certain in that it is subject to the discretion of the State President, based on recommendations by the Commission. Finally, no indemnity should be granted in respect of any offenses committed after December 6 1993 - the date upon which the negotiating council finally ratified the new constitution. This graded indemnity arrangement is linked to dates which are largely symbolic, but it also serves to distinguish, in practice rather than in principle, between politically motivated violent crimes which are more or less "forgivable".

The flip side of this coin, however, is that there will be no indemnity granted in respect of any acts for which there has not been full disclosure. This measure effectively utilises the indemnification of offenders as a direct tool for securing the disclosure of information.

One problem imported by the proposed indemnity clause is the difficulty it presents in relation to the circumstances of perpetrators who have already been convicted and imprisoned for offenses which would have fallen within the ambit of the proposed legislation, but who have not enjoyed the option of indemnification in exchange for full voluntary disclosure. The implication is that those who have been caught do not have access to indemnification, whereas those who have not yet been caught, do have this option. It is also arguable that a legitimate expectation was created throughout the negotiation process that the Indemnity Act would be extended and that convicted political offenders would be granted amnesty of some kind. This dilemma, implicit in linking indemnification to full disclosure, must be seriously given consideration - especially considering the current mood within the prisons.

Public Access to Security Records Under s 5(4) and s 13

In principle, this proposed access to security records by the Commission as well as by individual victims, operates as an additional incentive to those in the know to voluntarily disclose such information as is at their disposal. It is a critical "push-factor" or pressure on perpetrators to disclose information, in the knowledge that non-disclosure is not necessarily a guarantee that the information will not become available by some other means. Should such information emerge without having been voluntarily disclosed by the perpetrator, then such a perpetrator would not be indemnified from prosecution. This proposal is viewed a critical to dealing with the real danger that suggestions of indemnification (or depending on one's reading of the Constitution - guarantees of amnesty), rather than having the effect of encouraging past perpetrators to confess

voluntarily, may well have the opposite effect. Access to security records by the Commission or the individual victims, may serve to pressure such perpetrators into disclosure.

Furthermore, personal access of victims to their own security files, is arguably also critical to the rehabilitative objectives set out in the proposed Act. However, there is the danger that any records relating to any official knowledge of past gross human rights abuses as defined in the proposed legislation, may have been destroyed by this time - if recent press revelations are anything to go by. In any event, this question is enormously complex and raises important issues, not only in respect of rights to access to government held information and privacy rights under the new constitution (s 23 and s 13 respectively), but it also goes to the transparency of state institutions which is so fundamental to functioning democracy itself.[36]

It seems clear that, in the interests of a fledgling democracy in South Africa, there is a vital need to address the absence of any legislated rights of access to such information. In particular, in the search for creative redress of past injustices (at a social-psychological level at least), public access to information contained in the files of the "security establishment" must be thrown open to public scrutiny as part of any national reconciliation programme. In this regard, we can probably learn a great deal from the German experiment, despite its arguably excessive fervour - which the fragile South African peace probably could not afford.

The legacy of Apartheid policing has generated entirely enmeshed concepts of law enforcement, national defence and state security which plague attempts to define the legitimate and necessary limitations on rights of access to government-held information. This is hopefully a problem which the process of transition itself, through reshaping the notions of state security, will ultimately resolve. However, if this is to pave the way to any meaningful public access to such information, a review of the morass of security legislation with a view to reasonably restricting the secrecy requirements therein, will clearly be necessary. This is essential, not only in the interests of individual access to information, but in respect of a wide range of public interest concerns.[37]

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[36] Because of the importance of this aspect and because of its potentially enormous value in the matter currently being investigated, a separate section of this submission is devoted to exploring some of these issues. See Appendix 2.

[37] An illustrative example is the public interest in environmental protection. My article tentatively examines the role of secrecy clauses within "security legislation" in inhibiting the flow of information vital to public interest in environmental protection. Acts which either directly or indirectly achieve this in the name of state security, include the Defence Act 44 of 1957, the Armaments Development and Production Act 57 of 1968, the Protection of Information Act 84 of 1982, The National Key Points Act 102 of 1980, the National Supplies Procurement Act 89 of 1970, The Petroleum Products Act 120 of 1977, the Nuclear Energy Act 92 of 1982 and the Internal

It is argued here that in the South African context there can be little debate over the public interest in access to information contained in the former security establishment records. What is slightly more controversial, perhaps, is the suggestion, as in the German case, that this should be extended beyond individual access to their own files and should include some public rights of access as well. Whilst it is probably true that the German Stasi Records Act of 1990 goes too far in this respect, particularly in allowing private bodies such extensive access to the Stasi files, there remains an obvious reconstructive and rehabilitative rationale in actively facilitating public knowledge and acknowledgement of this past legacy. There appears to be no better regulated method of facilitating this than through the proposed Truth and Reconciliation Commission.

A further problem emerges from the legacy of oppressive intelligence gathering. Like the Stasi, the methods of the South African security establishment have been less than savory and the intelligence gathered and documented clearly crosses the theoretical divide between public and personal information and between reliable and false information. When dealing with the question of access to these records, these facts feed the already problematic conflict over private versus public interest rights and raises the critical question of how best to regulate access to this information.

Clearly the intricacies of this process were not adequately addressed by the Procurement of Information Clause within the Transitional Executive Council Act[38] which was concerned only with the rights of access to information as between members of the Council and which, in any event, in much the same language as prevailing security legislation, sustained most of the blanket exemptions in the name of confidentiality, privacy and the various elements of "state security".[39] In particular, the Act could not help individuals to gain access to their records.

The next question is whether such public and private access could be facilitated by a

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Security Act 74 of 1982, to mention but a few. Simpson, G. opcit. Also, see: Africa, SE. opcit.

[38] S 22 of Act No.151 of 1993.

[39] The restrictive effect of the clause is explicit in S 22(3) which states:
"No provision of this Act shall be interpreted as entitling the Council or a subcouncil to have access to any information or document -
(a) which does not have a bearing on the objects of the Council;
(b) access to or disclosure of which is prohibited in terms of any law or the common law, and ...
[which threatens the physical life or safety or the invasion of privacy of any person or which poses a threat to state security]...
(d) compiled by or in the possession or under the control of ny intelligence service or structure in South Africa, except in so far as disclosure thereof in necessary for the purposes of S 20."

South African Freedom of Information Act (FOIA)? Quite apart from the problematic locus of much of the intelligence and "security" information with which this paper is concerned - within the heart of either the state security or law enforcement exemptions under the FOIA - there are other clear problems with the FOIA as a vehicle for this kind of access. The central problem is most effectively dealt with by Andrussier who documents how, in the US context, personal privacy concerns have served to shape the narrow interpretation of the "public interest" definition and have thus provided the stumbling block to access to information under the FOIA.[40] This would undoubtedly plague the South African quest for access to personal information in this context. Indeed, the apparent usefulness of privacy interests as a vehicle for counter-FOIA actions in the US, strongly contradicts Hosch's view that the Privacy Act of 1974 doesn't provide adequate protection to individuals from invasion of their privacy through excessive rights of access to personal information.[41]

The basic problem is that whilst an act such as the US Privacy Act is supposed to ensure access by individuals to the records kept about them (for the purposes of ensuring they are correct and that use thereof is limited to the purpose for which the information was given etc.), it also serves very effectively to prevent public access to personal records. The nature of the access which is being discussed in this paper and which was contemplated by the Stasi Records Act in the German context, clearly crosses this public/private divide and is therefore more likely to be defeated by a privacy-type act, than assisted by it.

The only viable solution to this very specific problem seems to be, as in the German case, an equally specific legislative measure to deal with this particular dimension of the right of access to government-held information. The strength of the Stasi Records Act is that it subjects privacy rights to the greater import of public interest in access to personal information - not in general, but in the very specific context of a quest for national

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[40] Citing the narrow interpretation of the court in Department of Justice v Reporters Committee for Freedom of the Press 489 US 749 (1989), Andrussier points out that under the FOIA, (at very least in respect of Exemptions under 7(c)) the most that the public interest definition could offer is citizens' right to be informed about "what their government is up to." According to the court in this matter, the purpose of the FOIA should could not be interpreted to require government to be a central depository of information about private citizens, accessible at the request of any person for any reason. See: Andrussier, SE. "The Freedom of Information Act in 1990: More Freedom for the Government; Less Information for the Public", Duke Law Journal, No.3 (June 1991), pp.753-800.

[41] Hosch, HC. "The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis", Vanderbilt Law Review, Vol.36, No.139 (1983), pp.139-197. The author argues for the explicit constitutionalisation of privacy rights as the only way of preventing legislatively sanctioned invasion of these rights.

reconciliation based on the disclosure of past violations of human rights.

In the South African context, with similar concerns for social reconciliation and reconstruction in the shift to democracy, perhaps we can remedy the excessive elements in the German act. Public access to the relevant records can be limited to the Truth and Reconciliation Commission, on one hand, and to individuals in respect of their own files and based on their rehabilitative needs, on the other. However, in the meantime, two problems remain: firstly, there is no effective mechanism which will generate the particular sort of access to information required here; and secondly, by the time there is, there may well be nothing left in the relevant data banks.

It is with this in mind that a clause has been included in the proposed legislation on the Truth Commission, although it is clear that the clause itself as framed, doesn't even begin to grapple with the analytical problems raised by this section of the submission. It is also not practical to document here the full proposals and range of lessons which potentially reside in the German experiment. However, I have included the bulk of a research document prepared by me on this matter in Appendix 2. The article also examines the problem of access to security files through the prism of a recent application by Brian Currin of Lawyers for Human Rights.

CONCLUSION

In the transition process, human rights organisations are necessarily drawn into the ambiguities of transitional situations where human rights issues have to be reconciled with complex political process. This involves dealing with past human rights abuses, establishing the truth and confronting the different degrees of legal responsibility. In South Africa, as in Argentina, the transition is so intertwined with human rights issues and the establishment of a new bill of rights, that it is impossible to address the latter without being mindful of the complexities of the former. This is inevitably much easier for international human rights organisations such as Amnesty International, than it is for local structures more sensitive to the local political dilemmas and the priority concerns for future reconciliation and relative stability. The result is that the normative standards and techniques used by such international human rights groups in fighting current abuses by governments, are often simply inadequate.

However, this generates the central dilemma over the extent to which successor governments are pressurised to meet their international law obligations in respect of human rights abuses. These international standards have traditionally been the yardstick utilised by domestic as well as international human rights lobbyists. Under what circumstances can governments be excused from fulfilling such obligations in respect of past abuses if it appears to be beyond their power to do so? The tendency is to maximise the responsibilities of successor regimes, regardless of the political consequences. But to set up standards that are insensitive in this regard could actually undermine international standards and domestic stability of the successor regime.

In this regard, however, South Africa must be distinguished from the all-powerful military regimes in Latin America - and the unique power of the politics of reconciliation must also be factored into the equation. In any event, the Latin American experience suggests that attempts at collective amnesia serve merely to consolidate the power and cohesiveness of the military and security establishments within the society and the polity - the very forces deemed capable of holding this sort of process of justice to ransom in the first place.

Few of the amnesty-type arrangements which have been reviewed in this paper are not premised on the claim that they service national reconciliation. Yet the primary compromise tends to be a kind of "reconciliation" which services the concern for secrecy held by a powerful security apparatus which, in the South African context, the new post-Apartheid government will inherit. The primary object of the exercise appears to be to secure the loyalty of these security forces to a future government.

Rather than an objective of consolidating the power of the security establishment, any evaluation of the policy on responsibility for state crimes should be founded within the context of a policy aimed at consolidating human rights. For the sake of legitimacy, this demands both full disclosure as well as a primary concern for the fulfilment of the will of the people - rather than the military. In short, there must be knowledge and acknowledgment - the events need to be officially recognised and publicly revealed. This truth telling must be responsive to the demands of the victims rather than those of the perpetrators.

APPENDIX 1

THE LATIN AMERICAN EXPERIENCE[42]

ARGENTINA

In the period after March 1976, when the government of Isabel Peron fell in a coup, the new Argentinean military regime completed the demise of the rule of law which the predecessor regime had begun. A campaign of forced disappearances, interrogations, torture and extra-judicial executions ensued and continued until the demise of the military regime resulting from the failed attempt to take the Falklands Islands in the early 1980s. Argentinean society began a gradual return to civilian government from late 1982. However, during the early period of this transition, considerable power remained in the hands of the generals who, in late 1983, promulgated a general amnesty for all criminal offenses committed during the "war against subversion" between May 1973 and June 1982. Significantly, the 1983 Amnesty was rationalised as servicing national reconciliation, despite it being considerably weaker in respect of those who had taken up arms against the government during this period.

However, the newly elected government under President Alfonsin established a "National Commission on Disappeared Persons" (CONADEP) which received testimony from relatives and survivors from both within and outside the borders of Argentina. Human Rights organisations turned over their documentation as evidence, and branches of the Commission were established in several major urban centres. In September 1984, CONADEP delivered its report to the President. In a summary of the 50 000 pages of evidence, the report was published under the title "Nunca Mas" - Never Again - and contained an annexure of the 9 000 names of the disappeared.

Perhaps most significantly, having declared the self-amnesty of the generals to be nullified, the Alfonsin government also sought to prosecute those responsible for the crimes detailed in the Nunca Mas report. Five out of the nine Junta members who had ruled Argentina during the dictatorship were brought to trial and were convicted of crimes over which they had been "in control", though they had not been the actual perpetrators. The sentences they received ranged from 4 years to life imprisonment.

Immediately pressure mounted from within the military establishment in respect of the more than 2 000 complaints pending against other members of the armed forces.[43] This

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[42] Material in this section is drawn from a range of sources cited in the course of this paper. In particular, much of the information was summarised from Americas Watch publications. These references will not be cited individually unless quoted or summarised specifically.

[43] It is pointed out in the Africa Watch report that under Argentine Law, any person can institute criminal proceedings by filing a complaint, and the courts are obliged to investigate the

pressure resulted in legislation in December 1986 imposing a time limit (of only 60 days) for all such prosecutions. In 1987 a group of officers took over a military compound in Beunos Aires and demanded an amnesty law and the dismissal of all serving generals. Although the "rebellion" was put down, in June of that year an Act was passed, effectively indemnifying most members of the armed forces. Although the Act excluded certain crimes such as rape, it indemnified all officers below the rank of Chief of Security Area or Sub-area.

When Peronist candidate Carlos Menim won the presidential elections amidst severe economic pressure in 1989, he immediately issued a decree pardoning 39 military officers accused of human rights violations, along with a range of others, including 164 officers alleged to have taken part in mutinies against the Alfonsin government.

It is suggested that the Argentinean experiment was the most significant and far-reaching amongst similar attempts in Latin America. It is on the basis of the Nunca Mas report and particularly the prosecutions which followed, that the Africa Watch report cited above heralded "... what could be achieved if the political will was there." [44]

However the potential lesson from the Argentinean experience seems to be precisely that the initiative to prosecute resulted in the sort of backlash from a still powerful military, which ultimately defeated the objects of the CONADEP. In this process a warning is also sounded about the potential of a discredited or failed punitive process to do more damage than a less ambitious one. Idealistic images of justice must, to some extent, be subjected to the test of harsh political reality - that is, the reality of sustained power relations in society.

CHILE

From 1973, after Pinochet's overthrow of Salvador Allende, Chile bore witness to now infamous human rights abuses, including summary executions, disappearances, torture, forced exile and internal banishment, illegal operations in foreign countries, etc. Massive protests resulted in Pinochet's defeat in a plebiscite in October 1988 and to open elections in 1989, which in turn led to the victory of Patricio Aylwin who became president of Pinochet's "authoritarian democracy" with limited control over the military and limited legislative freedom. Pinochet himself retained the position of commander-in-chief of the army.

This rendered the post electoral government unable to repeal laws such as the "tying up laws" which transferred out of the control of the incoming civilian administration security and police personnel, security-force records and numerous state properties including those

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allegation and gather evidence for a prosecution. Those establishing an interest can participate in the trial, although in a secondary role to that of the prosecutor. Africa Watch, Opcit., p.8

[44] Africa Watch, Opcit., p.8

allegedly used for torture. An amnesty law, decreed in 1978 and covering offenses committed up to that time, was vehemently defended by the right wing and particularly by the armed forces as a prerequisite for their cooperation with the new government.

Despite this, in the name of national reconciliation, President Aylwin established a "truth commission" under former senator and respected lawyer, Raul Rettig, which was instructed to complete its work within 6-9 months. The Commission received archival material and lists of victims from both Chilean Human Rights organisations, as well as from the military. The Commission held hearings in the rural areas and also solicited information from exiles. However, the Commission was limited to the gathering of information and was not empowered to conduct detailed investigations. Nor was it enabled to attribute individual responsibility for abuses.

In February 1991, a 2 000 page report was submitted to Aylwin, including a substantial list of victims and the detail of some 2 000 cases in which people had died as a result of human rights abuses by government agents. The report was extremely critical of the Chilean secret police (DINA) and of the judiciary for failing to act to restrain these abuses, thus presenting a clear picture of institutional responsibility. President Aylwin went public acknowledging the experiences of victims under the old dispensation. However, he received limited support and the report was lost amidst the high profile assassination of a prominent right-wing Senator - allegedly by left-wing extremists. Furthermore, it was argued by some that the Rettig Commission's findings were seriously under-stated and recent press reports indicate continued dissatisfaction on the part of many of the relatives of the "disappeared" and some victims and their relatives have even been involved in angry clashes with the police.

Significantly, there were no systematic legal proceedings against military officials on human rights charges, with the result that the Rettig Commission's findings have never been validated in the courts of law. In 1991/2, Amnesty International reported 20 cases of torture and ill-treatment in Chile and the fact that dozens of political prisoners arrested under the previous regime were still in detention.[45] Harber also cites the cases of three journalists who have been detained or face charges for continuing to criticise the role of the military in past human rights violations.

However, the Chilean government has, following the Commission's recommendations, established a "Corporation on Reparation and Reconciliation" with a two year mandate to promote reparation to victims, assist in the search for remains of the disappeared and formulate proposals for the consolidation of a culture respectful of human rights.[46]

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[45] Cited by Harber, A., "Amnesty Alone Won't Bury the Past", Weekly Mail, 21-27/08/1992

[46] Amongst the reparations specified by the law are included a fixed pension for spouses, parents and children under 25 of the disappeared and executed; medical care without charge; scholarships for children up to the age of 35 years; and exemption from military service for relatives of the disappeared if desired.

The Africa Watch report is extremely critical of the Chilean experiment:

> "Ultimately the Chilean government has been forced by its continuing relationship with the leaders of the [former Pinochet] dictatorship to adopt a search for consensus and compromise known as the 'politics of agreements', preventing - amongst other things - decisive action on accountability for human rights abuses. It has thus promoted a policy of 'reconciliation', implying forgiveness for past abuses in return for repentance by those responsible; and though senior officials have stated that reconciliation is not possible without truth and justice, Aylwin has stated that he expects justice only 'so far as possible', while the civilian right - still less the army - does not appear repentant."[47]

URUGUAY

At the end of the 1970s, Uruguay had the highest ratio of political prisoners to population in the world. Torture, deaths in detention, disappearances etc. were commonplace during this period. In 1980 a national plebiscite heralded a period of tentative transition. However, before elections took place in 1984, representatives of the armed forces signed an agreement with a group of parties contesting the elections (popularly known as the Naval Club Pact), which allegedly included guarantees of the retention of considerable powers by the military as well as that there would be no prosecutions of members of the armed forces for past human rights violations. Those who opposed the pact were detained and proscribed from participating in any political activity.

Despite the Naval Club Pact, the new President Julio Maria Sanfuinetti, sought to reintroduce the rule of law into Uruguay and, amongst other things, freed all political prisoners and excluded from the amnesty, military and police personnel responsible for human rights abuses during the military regime. Approximately 180 cases came before the courts, but progress was hindered by lengthy challenges to the jurisdiction of the civil courts (as opposed to the military courts) in respect of these matters.

In mid-1986, however, the President did an about-face and attempted to shift the process from a prosecutorial one handled by the courts, to a short-cut political solution shaped by parliament. Shortly after the Uruguayan Supreme Court's decision in favour of civilian jurisdiction in two key cases of disappearance, President Sanguinetti made public a statement by 17 retired generals in which they acknowledged full responsibility for human rights abuses committed by their subordinates. Thereafter, Sanguinetti obtained majority support in parliament for an amnesty law: "Law Nullifying the State's Claim to Punish", which exempted from prosecution military and police officers guilty of "crimes committed... either for political purposes or in fulfilment of their functions and in obeying orders from superiors during the de facto period."[48]

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[47] Africa Watch, Opcit., p.11

[48] Ibid. p.12. The amnesty did not cover proceedings in which indictments had already been issued, (nor crimes committed by the military high command).

Most importantly, the executive was mandated to conduct investigations into cases of disappearance and to inform the relatives of the victims of the results of the investigations. In contrast to Chile and Argentina, the executive's duty to investigate in Uruguay was delegated not to an independent commission, but to a military prosecutor. Only six cases were investigated, despite a parliamentary commission's findings in 1986 that 164 people - including 8 children - were disappeared between 1973 and 1982. Human Rights Watch claimed that Uruguay was thus in violation of its international law obligations to provide effective legal remedies in this respect.[49] An attempt to repeal the Nullifying Law by popular action also failed as 58% of voters in a national referendum supported the amnesty law.

16 outstanding claims for damages were settled by the government soon after, without proceeding to trial. It is clear that the Uruguayan experience failed even to provide the public recognition of the past suffering which was afforded by its counterparts in Chile and Argentina. In 1992, Amnesty International reported numerous cases of ongoing torture or ill-treatment of police prisoners, many unresolved by the authorities.[50]

PARAGUAY

The thirty five year rule of General Alfredo Stroessner was marked by horrific human rights abuses. In February 1989, he was overthrown by a military coup and although the military remained in power, the new President General Andres Rodriguez assumed an image of support for human rights. Three months after the coup, elections were held and Rodriguez won 70% of the vote. The new parliament immediately passed resolutions creating human rights commissions led by former human rights leaders, and called on the Attorney-General to "initiate trials in all the cases involving torture, illegal punishments, disappearances, and similar crimes, in order that those engaged in cover-ups be duly punished."[51] From that point on the entire process was effectively sabotaged by the President's office and that of the Attorney-General. No report comparable to that produced in Argentina or Chile has been produced.

Nevertheless, on May 21 1992, four high ranking police officers were convicted of the torture and murder in 1976 of Mario Raul Schaerer, a political detainee, and sentenced to the maximum 25 years imprisonment. A retired army general convicted of participating in the cover-up of the same case was sentenced to 5 years. Although still subject to an appeal, this case could provide some precedent in Paraguay as well as elsewhere in Latin America. Human Rights Watch attributes the success here to ongoing international attention and pressure in respect of past abuse in that country. Also, the relative distance between the army and the police, coupled with the prevalence of police abuse of human rights, has enabled some progress to be made against the latter without compromising or

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[49] Ibid., p.13

[50] Cited in Harber, Opcit.

[51] Ibid., p.14

threatening the institutional position of the military government.[52] The Paraguayan experience seems to be reflective of a relatively painless sacrifice to the principle of accountability, in which the high profile prosecution of a few, effectively substituted for the full disclosure of past abuses.

EL SALVADOR

El Salvador experienced a brutal civil war between 1980 and 1992 with massive violations of human rights by government forces and more limited abuses by the FMLN guerilla movement. Throughout this period, the armed forces enjoyed virtually total impunity. A United Nations (UN) brokered cease-fire in January 1992 included the establishment of a UN Observer Mission tasked with monitoring the compliance of both sides with certain human rights principles. The cease-fire also entailed the demobilisation of forces on both sides and the establishment of a new civilian police force.

Two commissions were formed to investigate abuses which occurred during the war. In April 1991, the parties agreed to the establishment of a Commission of Truth which would review "grave acts of violence which have occurred since 1980 and whose mark on society demands with great urgency public knowledge of the truth";[53] and in September 1991 an agreement on the "purification" of the armed forces created an "Ad Hoc Commission" to review the tenure of military officers, with a special focus on their human rights records. An amnesty law was also negotiated at the time of the cease-fire in January 1992, although the law specifically excluded those cases for which the Truth Commission might recommend prosecution. It did allow for a review of the amnesty six months after the Commission was due to complete its work, at which time a general amnesty could be granted.

The effect of these commissions has still to be evaluated, but Human Rights Watch is critical of the imposition of time constraints imposed as potentially hindering their effectiveness.[54] Also, it seems that the Ad Hoc Commission is overly dependent on the full cooperation of the military to obtain information on individual responsibility of officers during the period under review. On the other hand, it is argued by Africa Watch that the standing of the Truth Commission is strengthened by its UN status, and it is seen as having great potential even in the absence of any effective prosecutions.[55]

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[52] Ibid., pp.14-5

[53] Cited in Ibid., p.16

[54] Ibid.

[55] Ibid.

APPENDIX 2.

PERSONAL AND PUBLIC ACCESS TO SECURITY FILES LESSONS FROM GERMAN UNIFICATION

It is with reference to the German experience, that this submission will now examine the fraught issue of access to the records of intelligence, security and law enforcement agencies. The dilemmas which this topic poses are at the cutting edge of the tensions between the rights of access to information and those of privacy. As such, the discussion which follows will also hopefully shed some light on the debate within the American literature over the relationship of the Privacy Act to the Freedom of Information Act (FOIA as vehicles for disclosure of this sort of government held information. Furthermore, in the South African context, considering the legacy of statutory secrecy provisions in the name of state security and law enforcement, this topic poses key questions in respect of the terms in which exemptions to rights of access are defined. Some of these issues will be more directly addressed in the concluding section of this paper.

The Stasi Records Act of 1991

In order to draw adequate comparisons from the German experience after unification, some of the objective conditions must be mapped out so as to properly understand the context within which the Stasi Records Act was passed, as well as some of the purposes of the Act. The Act was the product of a particular process of "transition" in the new Germany which, although it has been presented historically as a process of "unification", was, in many respects, more akin to a "conquest" of the former German Democratic Republic (GDR) by West Germany. This is significant in that no "deals" comparable to those in the South African and Latin American contexts had to be struck. The process is quaintly referred to as "the peaceful revolution" by the Stasi Records Authority[56], but the point is that in the process of the collapse of East German communism, through popular action, the entire Stasi archive was effectively "captured" before it could be destroyed.[57] This action was an indicator of the oppressive centrality of the state

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[56] "Brochure of the Federal Commissioner for the Records of the State Security Service of the Former German Democratic Republic: The Task, Structure and Work of this Authority", unpublished (March 1993), p.2.

[57] At the Berlin Central Depot, it is claimed that 18 burned out shredding machines were found in the basement, along with masses of shredded documents and up to 20 000 bags of papers that had simply been torn up. From these bags it was nonetheless possible to reconstruct approximately 5 000 files. Interview with the Publicity Officer under the Federal Commissioner (Pastor Joachim Gauck) for the Stasi Records Act, Berlin (September 4, 1993).

security service within the popular consciousness, and was allegedly sparked by rumours that thousands of personal files were being destroyed.

It is alleged that the Stasi employed as many as 110 000 full-time employees, not to mention the countless "informal employees" (informers) referred to by the Act.[58] It is also stated in the Brochure of the Federal Commissioner for the Stasi records, that the Stasi was:

> "...not an 'ordinary' secret service, but was one which intervened in the lives of countless numbers of persons, influenced professional success or failure, systematically exploited human weakness, and stopped at nothing, not even at the use of the most intimate information..."[59]

The result was an enormous collection of detailed and often intimate data affecting millions of former GDR citizens, as well as many non-GDR 'data-subjects'.[60]

By September 1993 it was estimated that the 3 406 employees specifically employed for the purpose of organising and processing the Stasi legacy (within fourteen branches under the Federal Authority), had successfully reconstructed approximately 70% of the files in the Stasi Archive. All of this was done in order to service the objectives of the Stasi Records Act as set out in S 1:

> "The Act regulates the custody, preparation, administration and use of the records of the Ministry for State Security of the former German Democratic Republic (GDR) and its preceding and succeeding organizations (state security service) in order to:

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[58] Ibid. The Federal Commissioner's Brochure estimates the figure more conservatively at 97 000. Opcit.

[59] Ibid., p.1.

[60] The term 'data-subjects' is used in the legislation to refer to "victims" of Stasi surveillance about whom information was gathered and processed. The whole archive is alleged to consist of approximately 180 km. of written documentation organised into files, in addition to another approximately 20 million pages of data on microfiche. Interview, opcit.

i. facilitate individual access to personal data which the state security service has stored regarding him, so that he can clarify what influence the state security service has had on his personal destiny;
ii. protect the individual from impairment of his right to privacy being caused by use of the personal data stored by the state security service;
iii. ensure and promote the historical, political, and juridical reappraisal of the activities of the state security service;
iv. provide public and private bodies with access to the information required to achieve the purposes stated in this act."[61]

By March 1993, just fifteen months after the Act was passed, the Authority had received more than 600 000 applications to inspect records, and approximately 1 250 000 applications for investigations - in total more than 1 850 000 requests.[62]

In terms of S 1, the act specifically seeks to provide access to the Stasi records in respect not only of individuals about whom the information revolves, but also in respect of public and private bodies which have an interest in access, as well as to individuals concerned with political and historical reappraisal, including members of the press and broadcasting sectors.[63] The full implications of the Act can only be appreciated if each of these categories are examined in some detail.

1. Individual Rights

S 3 of the Act provides a prior right to individuals to enquire of the Federal Commissioner whether there exist records which contain personal data regarding them. This entitlement ensures that access is not denied by virtue of a lack of knowledge of the precise location or content of personal data. Once it has been established that such personal data does exist, the section goes on to extend the right to inspect the records and to be provided with the records as directed by other sections of the Act. Furthermore, S 3(2) extends to individuals the right to use the information and records obtained as provided by general law. This means that such information may be used in pursuit of criminal prosecutions or delictual actions. However, S 3(3) does impose limits on the access to - and use of - information gleaned, in that it is "not admissible to impair the legitimate interests of other individuals by disclosing information, permitting inspection of records or providing records." In this manner the privacy rights of third parties are explicitly protected, although this is subject to the establishment of a "legitimate interest" on the part of an allegedly affected third party.

In detailing the specific use to which state security service records may be put by individuals, the Act distinguishes between: data-subjects; third parties; and state security

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[61] Stasi Records Act, S 1.

[62] Brochure of the Federal Commissioner, opcit., p.5.

[63] This latter category is specifically dealt with under Chapter 3 of the Act.

service employees and beneficiaries.[64] These distinctions are important in regulating not only the use to which information may be put, but they also shape the policy of the Act in respect of access to - and correction or erasure of - personal information contained in the records. The Act is clearly more sensitive to the privacy rights of data-subjects and third parties than it is to the former Stasi employees or 'beneficiaries'. Thus, S 12 stipulates that where data contains information on data-subjects or parties other than the applicant, inspection of the records will only be allowed with the consent of the affected parties, or if the records have been 'depersonalised' through erasures etc.[65] By contrast, the Act provides that the correct names of informers or full-time employees who gathered or supplied the information on the data-subject, will be provided to the latter on request:

> "The interest of employees and informers in keeping their names a secret shall not rule out disclosure of their names."[66]

Furthermore, S 15 of the Act allows data-subjects and third parties to request the depersonalisation of their files through erasure of personal data[67], provided that: 1. there are not other affected parties who have an interest in the information for the purposes of evidence; 2. that the information is not necessary for research related to 'political and historical reappraisal'; and 3. if no access request is pending from a competent body. By contrast, although former Stasi employees and informers do have rights of access to their own files, this remains subject to the privacy rights of the data-subjects and cannot result in the depersonalisation of the employee's or informer's files.[68]

Finally, although data-subjects are not obliged to provide reasons for their request of access, any request for urgent access must be motivated - and the Act specifically notes some of the requirements which would satisfy the request for priority treatment. These urgency requirements are instructive in that they give a good indication of some of the priority concerns of the Act. They include requests for the purposes of 'rehabilitation', compensation, averting infringement of privacy rights, or exonerating the data subject

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[64] Defined by S 6(5) as persons who were substantially assisted by the state security service, in particular by being provided with economic advantages, who were protected by the state security services from prosecution for a criminal act or who, with the knowledge, connivance or assistance of the state security service planned, or committed criminal acts.

[65] However, S 12(4) does provide for release of the records where separation or depersonalisation of the data is impossible, if there is no 'legitimate interest' on the part of other data-subjects or third parties in keeping the information secret. S 13(7) stipulates that in these respects third parties applying for information will similarly be covered by the conditions in S 12.

[66] S 13(5).

[67] After 1 January 1997.

[68] In terms of S 16.

from the accusation of co-operation with the state security service.[69]

From the above it is evident that in attempting to strike a balance between the competing public interests in access to information contained in the Stasi archives on one hand, and interests in privacy on the other, the latter rights are clearly subject to policy concerns in respect of the former. Rights to privacy simply don't extend to those who are effectively defined by the Act as the objects of scrutiny - the former employees and informers of the Stasi establishment. This suggestion is even more clearly borne out by the discussion which follows on rights of access by public or private bodies.

2. Access to and Use of Records by Public and Private Bodies

S 4 of the Stasi Records Act sets out the general rules for admissibility of use and access to the documentation by public and private bodies and the precise rights are documented in S 19 - S 29 of the Act. The use to which such information may be put is, like the use of information by individuals, limited by the specific prohibitions incorporated under S 5 of the Act. This latter section stipulates that:

> "It is inadmissible to use personal data to the detriment of data subjects or third parties if it was collected about them in the course of deliberate, including secret, information-gathering or spying on these persons."[70]

Public and private bodies are also prohibited from using accessed records - as are individuals - for a limited time period, if the use of such records could jeopardise the carrying out of a criminal prosecution. However, this does not apply if it would "unreasonably impair individuals in obtaining their rights", in which case the use of the records should occur in agreement with the relevant public prosecutor or with the court.[71]

The Act also imposes on public and private bodies the reciprocal obligation to relinquish all relevant records in their possession to the office of the Federal Commissioner for the Stasi records - in the case of private bodies, unless they can demonstrate proof of

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[69] These urgency requirements are set out in S 12. It is worth noting here that S 15 extends most of the rights of data-subjects to close relatives of missing or deceased persons, including the right to access in order to 'rehabilitate' such deceased or missing persons, or to protect their rights to privacy.

[70] S 5(1). Once again, a clear distinction is implicit here in that it is only data-subjects and third parties who are thus protected. Informers or employees of the Stasi do not have the same rights of privacy in this regard.

[71] S 5(2).

ownership of such records.[72] More striking, is the fact that the Federal Commissioner for the Stasi records is specifically entitled to records of the German Socialist Unity Party and some other organisations, in as much as they relate to activities of the state security service.[73] This is particularly significant as it clearly contravenes the 'privacy' rights of the Party in pursuit of the supposedly greater social interest in uncovering the past activities of the former GDR security establishment. It is clauses such as S 10 which consequently raise the suspicion that the Act may in effect sanction an 'anti-communist witch-hunt' - as much as it is servicing the public interest in allowing the society to deal with its past. These concerns are to some extent reinforced when examining the more detailed and pervasive rights of public and private bodies to use Stasi records which they have accessed.

Generally, direct access to the records for these bodies is more limited than it is for data-subjects, however, public and private bodies can request disclosure of information if this is for an 'admissible purpose' and the records are, in the opinion of the Federal Commissioner, necessary for the stated purpose.[74] Rights of inspection of the records are only permitted where declarations by the Federal Commissioner's office are not sufficient.[75] It would therefore appear that access by public and private bodies is narrowed by the requirement that they must state and show an 'admissible purpose' in seeking access to the files, whereas this is not a requirement for individual data-subjects and affected third parties. However, the definitions of what constitutes an 'admissible purpose' invites further scrutiny[76] and, because of the magnitude of the implications, will be documented in detail below.

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[72] S 8 and S 9. Where proof of ownership is provided under S 9, the records may still be seconded for duplication.

[73] S 10.

[74] S 19(3). The sub-section also stipulates that where the request is from a court, public prosecutor, or policing authority, the check on admissibility of the purpose will only happen if due cause exists.

[75] S 19(5). And original sources shall be provided only if they are indispensable, particularly as evidence.

[76] S 20 sets out the legitimate purposes for the use of records by private and public bodies where such records contain no personal data, and S 21 does the same in respect of records which do contain personal data. However, as the two sections provide virtually identical descriptions of legitimate purposes, I shall deal only with the former section as applying to both categories of information. I cannot detect any reason why these two sections should exist separately, especially considering the fact that they are both subject to the identical limitations in terms of a statutory period of 15 years after which the listed 'admissible uses' no longer apply. The only possible difference is that use of documents containing personal data is subject to the specific prohibited uses set out in S 5(1), which has been dealt with above. See footnote 22.

S 20(1) lists ten broad categories of admissible purposes, including detailed descriptions under some of the categories. The first five categories include the following: rehabilitation and compensation claims; protection of privacy; clarification of the fate of missing persons and of unexplained deaths; cessation or suspension of pension payments; and clarification, taking custody, and safekeeping of assets of the former GDR as part of economic reconstruction. However, the most controversial 'admissible purposes' appear to be those contained in S 20(1)(6) and S 20(1)(7), both of which have fundamental implications for the nature of the reconciliation process as envisaged by the Act, as well as for limitations on privacy rights implied in it.

S 20(1)(6) identifies as an admissible purpose for which public and private bodies may use and gain access to the Stasi records:

> "Investigations regarding the following persons ...in order to establish if they were employed as full-time employees or as unofficial informers of the state security service, unless the person being investigated was not at least 18 years old at the time in which the activities occurred:
>
> i. Members of the Federal Government or of a Land [State] Government as well as other public-law officials.
> ii. Representatives and members of municipal representative bodies...
> iv. Persons in Federal or Land public service, including municipalities and associations of municipalities, supranational and international organisations, of which the Republic of Germany is a member, as well as persons employed or who are to continue to be employed by the churches.
> v. Persons who are to continue practising the profession of notary public or attorney.
> vi. - Members of the managing board, managing directors, executives, or managers in concerns of a legal entity
> - persons who have been chosen by law, statute, or social contract to represent the majority, managing directors, executives, or managers in concerns of a majority-ruled organisation.
> vii. security clearance checks of persons
> - who are entrusted with, have access to, or could acquire access to facts, objects, or knowledge which must be kept secret in the public interest
> - who are employed or are to be employed in security-sensitive areas of installations of vital importance or of importance to defence."[77]

As if the list under S 20(1)(6) was not sufficient, S 20(1)(7) added as an admissible purpose for the use of Stasi records, similar investigations - with their consent - into the following additional list of persons:

i. Political party executives down to district level;
ii. Persons who serve as jury members;
iii. Persons who hold honorary church offices;
iv. Persons who fill national or Land-level executive positions in associations;
v. Members of workers' councils

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[77] S 20(1)(6).

vi. Persons who in all these cases are applying for public office, for a position, for a professional licence or for employment.[78]

Furthermore, in respect of many of the categories of persons who could be investigated on the request of public and private bodies in terms of S 20(1)(6) and S 20(1)(7), S 27 and S 28 added that the Federal Commissioner could also submit unsolicited reports to these bodies if, in the course of his duties, he discovers relevant information which, had it been requested, he would have had to supply.

The only additional limitations on the use of information by public bodies are those contained in S 29 which stipulates that information which is supplied on request, can only be used for the legitimate purposes for which it was requested[79] and S 30 which stipulates that where the Federal Commissioner communicates personal data to a public or private body, he must notify the subject of the data of the communication and the type of information provided.[80]

The magnitude of the 'admissible purpose' definitions in allowing for the investigation of such a wide range of public officials, is explained as essential to the process of 'purifying' the civil administration of the new unified Germany.[81] Whilst this enterprise may render understandable the inclusion of rights to investigate relevant persons within the 'admissible purposes' definition, it cannot begin to explain the wide ambit of those thereby liable to investigation. The net is clearly thrown widely enough to catch members of the legal profession, church employees, business executives or managers, party politicians, members of workers' councils, etc. Even more exposing, are the extraordinary rights of the Federal Commissioner under S 10, to the records of the German Socialist Unity Party.

It is not the implicit subversion of the very rights of privacy which the Stasi Records Act portends to protect which is disturbing about the relatively wide access granted to public and private bodies. Rather, it is the detailed documentation of specific kinds of person who are open game for effective public scrutiny in regard to their past activities. When this is added to the fact that judicial review of the Federal Commissioner's decisions is

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[78] S 20(1)(7). In terms of S 20(3), all of these uses are inadmissible after a statutory period of 15 years, after which it will no longer be admissible to charge a person with activities for the state security service, nor to evaluate to his or her detriment the fact that such activities occurred.

[79] This is an important consideration in that it effectively prohibits the "market in information" which has been associated with other kinds of access to information acts. It is also worth restating the fact that information gained can always be used to pursue criminal prosecutions and to "avert harm" in terms of S 23 of the Act.

[80] S 30.

[81] Interview, opcit.

available only when request for information are refused[82], one is left wondering precisely where the national rehabilitation process ends - and where the administratively sanctioned purge begins.

3. Use of the Records for "Political and Historical Reappraisal" and Media Access

Some of the concerns expressed above are carried through in the terms of the access granted to political and historical researchers as well as to the press and broadcasting sectors.[83] The Act does limit this kind of access to documents which contain no personal data or to data which has been depersonalised. Exceptions to this rule are made where the records contain personal information about former Stasi employees. Similarly, such information access is allowed in respect of contemporary historical personages and political office-holders or public law officials who are in office - unless they are themselves data subjects or third parties.[84] One further limitation imposed by the Act is that no personal data may be published without the consent of the affected person.

South Africa - The First Volley

Before evaluating the German experiment in the South African context, it is worth briefly examining one recent local development involving the demand for private access to classified records at the disposal of the National Intelligence Service (NIS). The matter was that of Currin v The State President of the RSA, The Minister of National Education, The Director of Archives and The Director General of the NIS.[85] Although the case did not actually come before the court, it nonetheless represents the first volley fired in the South African battle for individual access to government held files concerning the applicant.

In fact the application was neither for access nor disclosure of such records. Rather, it was to be brought under the Archives Act, No. 6 of 1962, in response to press reports that classified or confidential documents were being destroyed by various government departments, pursuant to an instruction to do so from the office of the Security Secretariat

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[82] S 31(1) states that: "Any refusal to meet a request by an authority, whether to inspect or gain access to records, will be subject to review by the District Administrative Court from which there shall be no appeal."

[83] See S 32 - S 34.

[84] S 32(1)

[85] I owe a debt of gratitude to David Dison Attorneys and particularly to Miriam Wheeldon for allowing me access to the papers in this matter.

of the NIS.[86] It was alleged by the applicant that the destruction of such records was based on a legal opinion obtained by the NIS to the effect that "classified intelligence material" by its nature did not fall under the Archives Act and therefore did not have to be retained and could be destroyed because it was supposedly no longer of any use.[87] Indeed, the relevant memo from the head of the Security Secretariat went further in urging that this be done as speedily as possible:

> "Na gesprek met die ISSK, word aanbeveel dat staatsdepartemente sorg moet dra dat alle geklassifiseerde dokumente wat nie deur die betrokke departement geskep is nie, so spoedig moontlik vernietig word behalwe in gevalle waar die betrokke dokument dien ter magtiging van 'n finansiele uitgawe of ander optrede... Dokumente wat nou ter sprake kom, is onder andere afskrifte van dokumentasie wat deur die destydse veiligheidsbestuurstelsel beskikbaar gestel is..."[88] (My emphasis)

The applicant argued that the classified documents constituted archival resources as defined by the Act and that they could not be destroyed. More significant, however, was the basis on which Currin asserted his interest in the matter. This he did on the basis that S 6 of the Archives Act provides that all archives of thirty years or older, which are not required in terms of an Act of Parliament to be kept in the custody of a particular person, shall be transferred to an archives depot. Further to this, it was argued that S 9(1) and 9(2) of the Act, when read together, give individuals the right of access to such archival materials once housed in archives depots. Thus it was claimed that in respect of the records in question, the Archives Act extended to the Currin the right of access, but in effect merely subjects this right to a delay of 30 years. As such, any destruction of these records would effectively deprive the applicant of his right of access to these records at the time when they are to be released into the archives depot.[89] To this it must be added that Currin had argued that because of the nature of his work as a human rights lawyer, it was probable that information pertaining to him and to his practices were being compiled and held in a government office. In this respect, he added, it was his intention to examine the relevant records when they became available (in 30 years) and that he therefore had a direct interest which underpinned his objection to the destruction of any such records.

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[86] See: Davis, G. "Civil Servants Told to Destroy Secret Files", Weekly Mail & Guardian (August 13-19, 1993); and Laufer, S. "Let the Healing Begin", Weekly Mail & Guardian (August 20-26, 1993).

[87] Founding Affidavit by Brian Currin, pp.14-17. See also Appendix J which contains the legal opinion given in this regard.

[88] Johan Mostert, confidential communication of July 16 1993, attached as Appendix I to the Currin application.

[89] Founding Affidavit, pp.8-11. It was argued in the alternative that the applicant had a legitimate expectation to, in due course, gain access to all archives after expiry of the time limits stipulated in the Act.

The response by the fourth respondent was short and sweet. By way of tender in terms of Rule 34, it was simply acknowledged that documents did not fall outside of the ambit of the Archives Act simply by virtue of the fact that they were classified or deemed to be confidential. Furthermore, it was undertaken that no instructions would be issued to departments to destroy records simply on the basis that they were thus classified. Finally, a further memo was sent out to all the relevant department heads which, having referred to the "openbare polemiek" generated by Mr. Currin's application to the court, stated:

> "Ten einde te verhoed dat probleme en misverstande geskep word... word u hiermee versoek om, soos in die verlede, alle staatsdokumente streng ooreenkomstig die Argiefwet te bestuur."[90] (My emphasis)

In the final analysis, the Currin application served only to emphasise the complete absence of any effective right of access by individuals to government records about themselves. Nor did the application elicit any hint that individual rights of access to records held by intelligence, security or law enforcement agencies would be secured. Furthermore, Currin did not get into court to test the efficacy of the applicant's alleged interest in the records or in their destruction and, in terms of the Archive Act, he shall have to wait 30 years to find out what, if anything, is left of his personal files!

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[90] Notice of Tender in terms of Rule 34 and attached Appendix A: Memo from the Head of the Security Secretariat: Beskikking oor Staatssensitiewe Dokumentasie.