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SOUTH AFRICA

ACCOUNTING FOR THE PAST

The lessons for South Africa from Latin America

CONTENTS

The following letter was sent to State President F.W. de Klerk by Africa Watch, on October 23, 1992. At that time, legislation which would empower the president to forgive politically-motivated crimes had just been rejected by the Indian house of South Africa's tricameral parliament, but the State President was proposing to bring it into law by decree of the little-used President's Council. Africa Watch urged the president not to take this step.

Dear President de Klerk:

Africa Watch is extremely concerned at the recent proposals by your government to grant a general amnesty to all who have committed political offenses. We do not believe that an amnesty law which allows those who have committed serious crimes in the name of apartheid to receive complete immunity from the consequences of their actions, with no condition other than a review by a secret commission and the publication of a list of names, can make any good contribution to the process of transition in South Africa. We urge you to accept the verdict of parliament, which rejected your proposed legislation, and not to pass the measure through the mechanism of the president's council.

We believe that no decision can be made to forgive crimes before the truth of those crimes are known. Moreover, Africa Watch maintains that an amnesty for those who have committed the most serious abuses is invalid under international law in any circumstances. The implications for the character of a future regime if this legislation becomes law are enormous and sinister: if South Africa is to move forward to a future of reconciliation and nation-building, it must face more honestly the question of accountability for past abuses.

The question of accountability has become increasingly important around the world in recent years, as different states attempting to make a transition to democracy have struggled to achieve a balance between retribution and forgetfulness in the interests of national reconciliation. Some of the most notable efforts to come to terms with a brutal past have been made in the Latin American countries recovering from decades of military dictatorship, where commissions have been appointed to unearth the truth of their terrible histories, and - in some cases - prosecutions have been undertaken to mete out justice to the perpetrators and grant a measure of compensation to the victims. Americas Watch, which is with Africa Watch a part of Human Rights Watch, has monitored and commented on these efforts, and has developed its own policy on accountability for past abuses.[1] The report which we attach, "Accounting for the Past: The Lessons for South Africa from Latin America," offers a comparative study of Latin American policies on accountability, and aims to highlight the lessons that may be relevant in the South African context.

The most important of those lessons is that, if a country is to come to terms with its past and successfully turn its attention to the future, it is essential that the truth of the past be officially established. It is impossible to expect "reconciliation" if part of the population refuses to accept that anything was ever wrong, and the other part has never received any acknowledgment of the suffering it has undergone or of the ultimate responsibility for that suffering. In South Africa it is particularly illusory to expect that a transition to a new multiracial society will be achieved without acknowledgment by those who supported and benefitted from government policies - overwhelmingly white - of the atrocities that were committed in the name of apartheid; or without the opportunity being given to those who were the victims of atrocities - overwhelmingly black - to testify about their experience before a body that is impartial and authoritative, and to see human rights violations comprehensively investigated and officially condemned.

Human Rights Watch believes that this process of acknowledgment is of primary importance in achieving accountability. At the same time, the beneficial effect of acknowledgment may be greatly increased by prosecutions of those guilty of the crimes that have been investigated, and by the allocation of individual responsibility that results. The experience of Latin America shows that it may be difficult to achieve a full legal accounting for violations, especially where there is a degree of continuity from the old regime to the new, but that it is

[1] Human Rights Watch's Policy on Accountability for Past Abuses is set out in the appendix to this report.

possible to achieve accountability at the highest levels for even the worst crimes, if the political will is there. The very process of subjecting previously all-powerful figures to the full scrutiny of a court of law is a dramatic step towards reestablishing in the eyes of the whole population the credibility of the legal system, the independence of the judiciary, and the ability of a new government to deal with abuses of power without the need for extra-judicial action.

The history of the different countries of South America that have faced the question of accountability shows that general amnesties for members of the security forces are universally unpopular and widely regarded as illegitimate. Far from promoting "reconciliation," they are profoundly divisive. Moreover, the price of failing to fulfil the duty to investigate and prosecute human rights abuses, and letting members of the security forces who have abused human rights go free, may be a continuing culture of official violence. Accounts of serious human rights abuse under the democratic regimes which have succeeded military dictatorships in Latin America show that the record is unlikely to change without a high-level commitment to accountability: if members of the security forces know that they enjoy impunity, torture and other abuses will continue to occur.

Even when it may be possible to justify - in the interests of reconciliation or political expediency - immunity from prosecution for those who committed the least serious abuses (for example, in exchange for cooperation in the investigation of other offenses), Human Rights Watch holds that it is contrary to international law for a state to grant impunity for the most serious abuses of rights. In these cases, truth is not sufficient and justice at all levels of responsibility is demanded: obedience to orders is no defense for those who have carried out genocide, summary executions, "disappearances," torture, or prolonged arbitrary deprivation of liberty. Moreover, although the government may legitimately forgive its enemies, it has no moral standing to forgive the crimes of its own servants, which may have been committed pursuant to its own policies. Human Rights Watch maintains that an amnesty of whatever nature is not valid if promulgated by the perpetrators themselves: it is for the victims to forgive, when they have full knowledge of the facts.

The full text of the report supports these opinions. We urge you to accept its recommendations.

Sincerely,

Aryeh Neier
Executive Director, Human Rights Watch.

The context of the call for a general amnesty in South Africa

Soon after the release of Nelson Mandela and the unbanning of the ANC in February 1990, negotiations began for the return of political exiles to South Africa, and for the release of political prisoners within South Africa. These negotiations led to the conclusion of two "Minutes," at Groote Schuur on May 4, 1990, and at Pretoria on August 6, 1990, which set up procedures and definitions to be used in the process of release and indemnity. All political prisoners were supposed to be released by April 1991, but the cumbersome procedure of application and review took longer than anticipated and was much criticized: in August 1992 the ANC continued to claim that there remained more than 400 prisoners who fell into the political category. This claim was rejected by the government on the grounds that the prisoners had all been convicted of murder and other serious crimes.

It was in the context of the debate over the fate of the remaining prisoners claimed by the ANC to be political that a general amnesty first came to be suggested: that is, an amnesty which would apply equally to supporters and to opponents of the government.[2] During the period of the multiparty Codesa (Convention for a Democratic South Africa) negotiations on the form of a transition to democracy in South Africa, which first met in December 1991, the status of the prisoners continued to be a divisive issue between the negotiating parties. In June 1992 the ANC suspended its participation in the talks in the wake of the killing of more than 40 residents of the black township of Boipatong, and demanded a full inquiry into security force complicity in political violence. Nevertheless, bilateral talks between the government and the ANC continued to address the issue of political prisoners: their release was stated by the ANC to be one of the preconditions for resuming negotiations.

A Commission of Inquiry regarding the prevention of public violence and intimidation was appointed under Justice Richard Goldstone, and began its hearings. In late July and early August a United Nations mission, headed by U.N. Secretary-General Special Representative Cyrus Vance, visited South Africa for the first time, investigating ways to revive political negotiations. In a report published on August 7, 1992,[3] the Secretary-General recommended that the Goldstone Commission undertake a series of investigations into the police, Umkhonto we Sizwe (the military wing of the ANC), the Azanian People's Liberation Army (affiliated with the Pan African Congress), the KwaZulu Police, and certain private "security firms." It was in response to these "observations," welcomed by the Commission and other parties, that the

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[2] The government had, in its *Guidelines for Defining Political Offences* of November 1990, already expanded the definition of political prisoner beyond its usual meaning, to include supporters of apartheid, but most of those who had applied for indemnity under the original legislation were in fact opposition supporters.

[3] *Report of the Secretary-General on the Question of South Africa*; UN Document S/24389, 7 August 1992.

Commission first called for an amnesty for all groups to "make the work of the Commission more efficient." The South African government also backed the idea of a general amnesty, offering in exchange to release the remaining political prisoners claimed by the ANC.

In a press release issued on August 13, 1992, the ANC stated that, while not opposed in principle to the idea, the question of an amnesty "is properly the province of an interim government of National Unity" rather than of the existing white minority government, and should only be granted if the population as a whole had agreed. They disputed the contention that a general amnesty was necessary to facilitate investigations; since, in the normal course of events, the South African courts have the power to grant immunity from prosecution to individuals who cooperate with the court to assist in conviction of criminals. Moreover, the release of political prisoners should be unconditional, and not linked to any other question. The ANC therefore suspended continuing bilateral talks on the issue of political prisoners, and stepped up its mass action campaign.

Pressure for a resolution to the deadlock in central negotiations increased following the September 7 massacre of 28 ANC supporters protesting the rule of the leader of the black homeland of Ciskei. ANC President Nelson Mandela and State President F.W. de Klerk met for a "peace summit" on September 25, 1992, and on September 26 announced that they had reached an understanding that would clear the way for a resumption of the deadlocked negotiations. Among the terms of the understanding was the unconditional release of more than 500 prisoners, to be completed by November 15. A few days later de Klerk delivered a speech in which he purported to apologize for apartheid, stating that: "For too long we clung to a dream of separated nation states, when it was already clear that it could not succeed sufficiently. For that we are sorry." At the same time he refused to admit that apartheid was ever morally indefensible, and denied that South Africa's history was "dark suppressive and unfair."

On October 16, 1992 a bill was introduced in parliament that would empower de Klerk to forgive any politically motivated crime, with the sole condition of review in secret by a government-appointed commission. In contrast to the legislation implementing the Pretoria and Groote Schuur Minutes, the only public record relating to the decision would be a list of those to whom immunity had been given; and the records of the reivew body itself could be destroyed. The ANC condemned the measure as tantamount to a self-pardon by Nazi war criminals: a few days later it tackled its own history in very different style, publishing a hard-hitting report by an independent lawyer describing brutality in ANC detention camps in Uganda, Tanzania and Angola. Nelson Mandela, president of the ANC, accepted that the transgressions which had occurred were "inexcusable" in any context, and admitted that the leadership of the party shared "collective responsibility" for the abuses. On October 21, in a surprise development, the government's amnesty legislation was defeated by the Indian house of South Africa's tricameral parliament. The President announced that he would refer the bill to the president's council, a rubber-stamping body with the power to override parliament, where it is virtually certain to become law.

South Africa is at a crucial point in its transition process. The policy it adopts on accountability for past abuses will shape the character of any future regime. This comparative study of the experience of several Latin American countries is offered as a contribution to the debate on justice and reconciliation.

Argentina[4]

The 1970s were years of unprecedented political violence in Argentina. Beginning with a campaign of assassinations initiated by the government of Isabel Perón in response to the threat of terrorist activities by several small urban guerrilla organizations, the collapse of the rule of law was completed by a coup in March 1976, in which the commanders-in-chief of the army, navy and airforce overthrew the elected government. Key articles of the constitution were "suspended," eighty percent of the judges were replaced, and far-reaching legislation was passed allowing the military forces to participate in the repression of "subversion" unencumbered by judicial oversight. Despite this array of new discretionary powers, the junta approved in addition secret plans to conduct the bulk of the "struggle against subversion" by clandestine means. A campaign of forced disappearances was begun, by which suspected subversives were abducted without warrant for arrest, taken to clandestine detention camps, interrogated under torture, and frequently summarily executed; all without admission of knowledge or responsibility by any branch of government. The vast majority of those "disappeared" were never seen alive again.

By 1980, the guerrilla groups - which had never posed a serious threat to the Argentine government - had been wiped out, together with a variety of political parties and social movements perceived by the armed forces to be leftist, which had all pursued their goals by peaceful means. However, the ill-fated attempt to capture from the British the Malvinas, or Falkland Islands, led to the demise of the military regime. A caretaker junta was put together in late 1982, to preside over a transition to an elected civilian government. During the transition, the generals published a much-derided "Final Document on the Struggle Against Subversion and Terrorism," which purported to provide a legitimate explanation for the disappearances; and in late 1983 promulgated a general amnesty for all criminal offenses committed during the "war against subversion" between May 1973 (the date of the last amnesty for political crimes) and June 1982 (when the third successive junta resigned in the aftermath of the Malvinas defeat). In an attempt to suggest that the purpose of the amnesty was national reconciliation, the law included a much more limited amnesty to benefit some of those who had taken up arms against the government. Many political prisoners immediately rejected the application of the law to them. The candidates for the presidency denounced the self-amnesty, and promised inquiries on the fate of the disappeared after the election. Raúl Alfonsín, who promised to have the law annulled, won in a landslide, with 52% of the votes cast.

Only a few days into his presidency, Alfonsín announced a series of actions to restore Argentina's adherence to the rule of law and respect for human rights. Perhaps the most

[4] *Truth and Partial Justice in Argentina*, New York: Americas Watch, reissued April 1991.

significant of these measures was the appointment of a "National Commission on Disappeared Persons" (CONADEP), which carried out a public investigation of the policy and practice of disappearances. The Commission received testimony from relatives of the disappeared and from survivors of the camps where the disappeared had been held. Human rights organizations turned over extensive material that they had gathered documenting abuses. Branches of the Commission were established in several major cities (though little or no gathering of information took place in rural areas, leading to the belief that the numbers of disappeared were probably understated). Exiles returned from abroad to testify, and statements were taken in embassies and consulates in several other countries. Police and military facilities were inspected, as well as clandestine cemeteries; provoking complaints from military authorities and leading to pressure on CONADEP to exercise restraint. A powerful two-hour program was shown on television, consisting of testimony of survivors and relatives.

In September 1984, CONADEP delivered its report to the president. Its 50,000 pages of documentation were summarized and published separately under the title *Nunca Más* (Never Again), with an annex listing the names of almost 9,000 "disappeared." The report, which rapidly became a best-seller in Argentina,[5] is a powerful indictment of the repressive policies of the military dictatorship, and of the complicity of various civilian institutions in exchange for promises of impunity.

Less successful, but perhaps more remarkable, were the government's attempts to prosecute those responsible for the crimes detailed in the *Nunca Más* report. The nine junta members who had ruled Argentina during the dictatorship were brought to trial in the Federal Courts of Appeal, which took over jurisdiction from the military tribunals. Although four defendants were acquitted, five were found guilty of crimes over which they had been "in control," though they had not been the actual perpetrators, and received sentences ranging from four years to life. The decision was a landmark in Argentina's history. However, even before the verdicts were delivered, high government officials were voicing concern over the more than 2,000 complaints pending against other members of the armed forces.[6] Calls began to be made for a "*punto final*" (full stop/period) to prosecutions, in the form of legislation placing a time limit for new cases. Pressure on the government mounted, and a *punto final* law was promulgated in December 1986, setting a 60 day limit for new criminal complaints, with the exception of offenses related to the theft and irregular adoption of the children of the disappeared.

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[5] An English-language edition was published in 1986, under the title *Nunca Más: the Report of the Argentine National Commission on the Disappeared*, by Farrar Straus Giroux of New York, in association with the Index on Censorship of London.

[6] Under Argentine Law, any person can institute criminal proceedings by filing a complaint, and the courts are obliged to investigate the allegation and gather evidence for a prosecution. Those establishing an interest can participate in the trial, though in a secondary role to that of the prosecutor.

Not satisfied with this concession, at Easter 1987 a group of officers took over a military compound in Buenos Aires, and demanded an amnesty law and the dismissal of all serving generals. On Easter Sunday Alfonsín announced that the rebellion had been put down; but the major demands of the troops were met. A number of generals were dismissed, and a "due obedience law" was passed in June 1987 which had the effect of an amnesty for most members of the armed forces, by making irrebuttable a presumption (introduced when the self-amnesty law was repealed) that defendants had acted "in error as to the legitimacy of their actions" if they had simply obeyed orders, in the case of all officers below the rank of chief of security area or sub-area. The only excepted offenses were rape, theft, and "falsification of civil status" (i.e. irregular adoption); "atrocious and aberrant acts," excepted in the previous version, were not included.

The qualified successes of Alfonsín's government were undermined by increasingly severe economic problems, and the 1989 presidential elections were lost to the Peronist candidate, Carlos Menem. Three months after taking office, Menem issued a presidential decree pardoning 39 military officers accused of human rights violations, those accused of negligence during the Malvinas war, and 164 officers alleged to have taken part in mutinies against Alfonsín, together with dozens of suspected leftist terrorists. Many Argentine citizens felt betrayed by these pardons - despite Menem's claim to moral authority deriving from his own five-year imprisonment by the previous military government - following so soon after Alfonsín's *punto final* and "due obedience" laws.

Despite its defects, the process of accounting for past abuses that took place in Argentina was the most successful among similar attempts in Latin America. The *Nunca Más* report demonstrated how a democratic government, with the cooperation of human rights organizations, could take important steps toward establishing the truth about repression which took place just a few years earlier, providing the political will was there. Moreover, in the trial of the junta members, the democratic institutions of the country had been able to deal with egregious abuses of the recent past with the dignity and majesty of a court of law; subjecting men who a few years earlier had been all powerful to the treatment that suspected criminals receive in a civilized society, and conducting proceedings with scrupulous respect for Argentine law and international standards of due process. In the process the judiciary had established its independent role and made a major contribution to an understanding of the tragedy of the "dirty war" waged by the military government against its own citizens.

Chile[7]

In September 1973 General Augusto Pinochet overthrew the elected government of President Salvador Allende, allegedly in order to prevent a Marxist-provoked internal war. For the next 16 years Chile was subjected to its first sustained military dictatorship, whose abuses included summary executions; disappearances; forced exile and internal banishment; the violation of labor rights; illegal operations in foreign countries, and countless acts of direct and indirect censorship, intimidation and violation of the home. The most indiscriminate repression took place during the mid-1970s, when the country was ruled under a state of siege, and a secret police subordinate only to the president specialized in disappearances and torture. In the dictatorship's later years state violence became more selective, but certain killings committed by the armed and security forces drew so much attention to human rights abuses that even some figures on the Chilean right became disenchanted with the regime.

Following massive protests from 1983 onwards, Pinochet submitted himself as sole candidate for president in a yes or no plebiscite in October 1988. His defeat led to open elections in 1989, and an overwhelming victory for the opposition alliance: in March 1990 Patricio Aylwin became president of the "authoritarian democracy" created by Pinochet in constitutional reforms preceding the elections. Although democratically elected, Aylwin's government has limited control of the military, limited legislative freedom, and coexists with Pinochet as commander-in-chief of the army. The government is unable to repeal laws such as those imposing the death penalty for more than three dozen crimes, or 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 used for torture. An amnesty law, decreed in 1978 and covering offenses committed up to that time, is defended by the right and by the armed forces as a prerequisite for their cooperation.

Despite these limitations, Aylwin's government has made important steps towards establishing the truth of what occurred under Pinochet's government. In April 1990 he announced the creation of a special commission "to contribute to the global clarification of the truth about the most grave violations of rights committed in recent years," since "only on the basis of the truth will it be possible to satisfy the basic demands of justice and create indispensable conditions for achieving true national reconciliation." Headed by a respected lawyer and former senator, Raúl Rettig, the Commission included human rights figures as well as former officials of Pinochet's government. It was instructed to complete its work within six to nine months. The Commission received archival material and lists of victims both from Chile's extensive and sophisticated human rights community (particularly important in the light of the time limit for the Commission's work) and from the military; it solicited information from exiles

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[7] *Human Rights and the "Politics of Agreements": Chile during President Aylwin's first year*, New York: Americas Watch, July 1991; *The Struggle for Truth and Justice for Past Human Rights Violations*, New York: News from Americas Watch, July 1992.

and international organizations, and gathered testimony in Santiago and the provinces.

In February 1991, the report of the Rettig Commission was presented to President Aylwin: 2,000 pages long, its two volumes contained essays and analysis, as well as an alphabetical list of the victims, and detailed some 2,000 cases in which people had died as a result of human rights abuse by government agents.[8] Although the Commission was limited to gathering information, rather than investigation and attribution of individual responsibility for abuses, it presented a clear picture of institutional responsibility, and was especially critical of the *Dirección de Intelligencia Nacional* (DINA), the secret police operating from 1974 to 1977, and of the judiciary for failing to act to restrain abuse. In March 1991, Aylwin gave a televised address in which, as the representative of Chilean society and government, he asked pardon of the victims and requested all who participated in the excesses committed to "make gestures of recognition of the pain caused and cooperate in diminishing it." Few public figures did so, and those who did were generally those who least needed to, the exceptions among the judiciary and armed forces command.

Although the report of the Rettig Commission was generally well received, its impact was substantially diminished by the April 1991 assassination, apparently by an extreme left-wing group, of a prominent right-wing senator. Rightist opposition leaders cited the assassination as proof of the terrorist activities alleged to justify the overthrow of Allende, and claimed that it demonstrated the need to gloss over the abuses the Rettig Commission exposed. Consequently, the report has not received wide circulation; moreover, findings by a human rights group that its figures on the dead and disappeared may be substantially understated have not been investigated. Most importantly, there have been no systematic legal proceedings against military officials on human rights charges; although in a handful of cases not covered by the 1978 amnesty individual judges have shown determination to act.

On the other hand, the Chilean government has, following the recommendation of the Commission, established a "Corporation on Reparation and Reconciliation," headed by a prominent human rights advocate: the first such institution in Latin America. The Corporation has a two year mandate to promote reparation to victims,[9] assist in the search for remains of the disappeared, and formulate proposals for the consolidation of a culture respectful of human rights. In addition, in April 1992, eight senators placed before Congress a legislative proposal to annul the effects of the 1978 amnesty law: the various organizations of victims' relatives have

[8] Human rights organizations remained convinced that the total number of deaths was substantially higher than the Rettig Commission was able, in its short tenure, to establish.

[9] The reparations specified by law include a fixed pension for spouses, parents and children under 25 of the disappeared and executed; medical care without charge and scholarships for children until they are 35 years of age; and exemption from military service for relatives if desired.

launched a campaign to collect one million signatures in support of the legislation, though its chances of success are slim.

The Chilean government has been forced by its continuing relationship with the leaders of the 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. Although the Rettig Commission went some way to establishing an "official" truth of what occurred, the Commission's findings have not been validated in the courts of law. Victims and their relatives are not satisfied, and demonstrations have resulted in angry confrontations with the police. The concept of reconciliation, broadly supported in theory, has proved profoundly controversial in practice.

Uruguay[10]

A small country of 3 million people, Uruguay began experiencing social tension in the 1950s, during a period of economic decline. As the standard of living declined in the 1960s, a revolutionary armed movement emerged, the Movement of National Liberation, or Tupamaros. The campaign against the Tupamaros led to progressive suspension of civil liberties from 1968, culminating in June 1973 with the illegal dissolution of parliament on the instructions of the military. Despite an announcement that the Tupamaros had been destroyed, the coup[11] marked the beginning of a 12-year brutal campaign to rid the country of "subversion." Thousands of people were held for months and years without charge: at the end of the 1970s Uruguay had the highest ratio of political prisoners to population in the world, and some of the worst mistreatment of prisoners anywhere. During the twelve-year period of de facto military rule, more than 100 political prisoners died as a result of torture and/or inadequate medical care; illegal kidnappings and disappearances were carried out at home and abroad; 30,000 civil servants were fired; 26 publications were closed or suspended.

In 1980 a plebiscite to approve a new constitution resulted in a vote against the

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[10] *Challenging Impunity: The "Ley de Caducidad" and the referendum campaign in Uruguay* New York: Americas Watch, March 1989; *Judiciary bars steps to identify child kidnapped during military regime*, New York: News from Americas Watch, September 1991.

[11] Although the dissolution of parliament had been carried out by the civilian president, Juan María Bordaberry, his actions were on the instructions of the military, and power resided thereafter in the 24 officers who made up the High Command of the Armed Forces (Junta de Officiales Generales), leading to a de facto military government despite the continuing presence of civilian figureheads as president.

government and forced the regime to enter into a period of transition and negotiation. However, before new elections took place in 1984, the armed forces signed an agreement, popularly known as the Naval Club Pact, whose terms were believed to include promises by a group of parties contesting the elections that the armed forces would retain considerable power in a future government, and that there would not be prosecutions of members of the armed forces for human rights violations. The leaders of the main parties opposing the Pact were detained and proscribed from all political activity. The country's military forces withdrew from government with their unity intact and with an army strongman as defense minister. Nevertheless, Julio María Sanguinetti, the candidate of the Colorado Party who won the presidential election, immediately took steps to reintroduce the rule of law. The new government reinstated the 1967 constitution; reestablished the independence of the judiciary; legalized trade unions, political parties and other banned groups; reinstated civil servants with back pay; and freed all remaining political prisoners, while excluding from the amnesty military and police personnel responsible for human rights abuses during the military regime. Attorneys representing victims of abuse presented evidence to civilian courts involving about 180 defendants, although the cases proceeded painfully slowly due to challenges to jurisdiction by the military courts.

This auspicious start was not maintained. In mid-1986 President Sanguinetti did an about-face, and began seeking a political solution in parliament to the issue of the military's accountability for past abuses. Shortly after the Supreme Court's decision in favor of civilian jurisdiction in two key cases of disappearance, President Sanguinetti made public a statement issued by seventeen retired generals in which they acknowledged full responsibility for human rights abuses committed by their subordinates during the anti-subversive campaign, and indicated that such excesses would not be repeated. Finally, after months of negotiation, Sanguinetti obtained the support of a majority in both houses of parliament for an amnesty law. The *Ley de Caducidad de la Pretensión Púnitiva del Estado* (Law Nullifying the State's Claim to Punish) exempted from prosecution military and police officers guilty of "crimes committed ... either for political purposes or in fulfillment of their functions and in obeying orders from superiors during the de facto period." The amnesty did not cover proceedings in which indictments had already been issued, nor crimes committed for personal economic gain or to benefit a third party (nor, by implication, 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 the procedure established in Argentina or Chile, Sanguinetti delegated the executive's duty to investigate not to an independent commission, but to a military prosecutor: only six cases were investigated,[12] and the investigations were severely criticized both inside and outside Uruguay. Human rights organizations, including Americas Watch and Amnesty

[12] A Parliamentary Commission on the Situation of the Disappeared and its Causes reported in 1986 that 164 people, including eight children, were disappeared between 1973 and 1982 after abductions carried out both within Uruguay and from other countries.

International, have concluded that Uruguay is in violation of its international law obligations to provide effective legal remedies in the cases of disappeared persons.[13] An attempt to repeal the *Ley de Caducidad* by popular action failed: Uruguay is unusual in that its constitution provides for a referendum on an unpopular law if signatures representing 25% of the electorate are gathered in its support; but although a citizens' movement collected the necessary signatures and the vote took place in April 1989, the amnesty was upheld by 58% of voters nationwide, following a campaign in which significant censorship was imposed on the anti-amnesty movement. Sixteen outstanding claims for damages were settled by the government soon after, without proceeding to trial. Victims of abuse and their relatives in Uruguay have not been afforded even the limited satisfaction of official and public recognition of their suffering obtained by their counterparts in Argentina and Chile.[14]

Paraguay[15]

Democratic governments in Paraguay have been few, short-lived and far between. For most of the second half of the twentieth century its small population was subject to the authoritarian rule of General Alfredo Stroessner, whose thirty-five years in power were marked by routine and horrific human rights abuse. Detention and torture of large numbers of people was common, while it is believed that fourteen people were killed and thirty-three disappeared by state agents between 1976 and 1989. Despite repeated elections and the existence of a parliament, the forms of democracy remained a sham, and the political, social and economic discrimination against non-members of Stroessner's Colorado Party was systematic.

In February 1989, Stroessner was overthrown in a military coup, precipitated by a dispute between different factions of the Colorado Party over who would succeed him. Despite replacing Stroessner with General Andrés Rodríguez, his formerly close associate, the coup did not alter the existing alliance between the military, the Colorado Party and an army strongman as president: the armed forces remain the power behind the throne. Nevertheless, upon assuming office, Rodríguez assumed an image of support for human rights. He announced that: "My government is committed to respecting human rights, such as they are written in God's law, in our consciences and in the Universal Declaration, which should be learnt by heart in elementary schools. ... All those who have committed crimes against human rights will be sanctioned." The

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[13] Articles 2 and 5(1) of the International Covenant on Civil and Political Rights, to which Uruguay is a party.

[14] The Uruguayan Service for Social Rehabilitation, which has assisted over 3,000 victims of human rights violations, has emphasized the importance of "social rehabilitation" in helping those who suffer mental or physical illness as a result of rights abuse to recuperate from their experiences and reintegrate themselves into society. Requests for psychiatric help increased after the amnesty law was passed and public interest in past violations declined.

[15] *An Encouraging Victory in the Search for Truth and Justice* New York: News from Americas Watch, October 1992.

Paraguayan press celebrated Stroessner's overthrow with extensive coverage of past human rights abuses (though Rodríguez' own past, including involvement in the narcotics trade, was left unexamined). Elections were held three months after the coup, in which Rodríguez won 70% of the vote (opposition candidates protested at the lack of opportunity to organize, and at the use of electoral rolls from Stroessner's time).

The newly-elected House of Deputies and Senate immediately passed resolutions creating human rights commissions led by former human rights leaders. The Deputies called on the Attorney-General to "initiate trials in all the cases involving torture, illegal punishments, disappearances, and similar crimes, in order that the facts be investigated and those directly responsible, their accomplices or those that engaged in cover-ups be duly punished." Within several months, however, it was clear that the executive branch would not cooperate with the supply of information; moreover, repeated attempts to expand the powers of the commissions were vetoed by the president.[16] Nevertheless, the commissions continued to hear denunciations, and organized visits around the country to confirm the reports. They pressed the Attorney-General to initiate court cases, and, when he clearly opposed trials, finally forced him to resign. However, no report comparable to those produced in Argentina and Chile has been produced.

Public interest in the details of repression under Stroessner surged in the months following the coup, but demands for truth-telling and for justice have since subsided. Several factors have contributed to the diminishing public demand for accountability, including the sense of gratitude to Rodríguez and the military for ridding the country of Stroessner, the continued political influence of the armed forces and the fear that increased demands for accountability could provoke a return to dictatorship. In addition, Paraguay has adopted the concept of "national reconciliation," although in a different sense from the rest of Latin America, denoting the call by the Catholic Church for reconciliation between the Colorado Party and the rest of society. Although Paraguay was unusual among Latin American countries in not granting any form of pardon or amnesty to the perpetrators of past abuses, cases that were brought to court became bogged down in arguments over applicable limitation periods. By 1992 only 17 cases, of the 54 which had been presented before Paraguayan courts, were still recognized by the Attorney-General as ongoing.

Nevertheless, on May 21, 1992, four high-ranking police officers were convicted of the torture and murder in 1976 of Mario Raúl 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 five years. Although there is a risk that the case may be overturned on appeal, the decision has been hailed as a breakthrough that could provide an important precedent in Paraguay and elsewhere.

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[16] Under a new constitution enacted in 1992, the executive branch can no longer veto congressional enquiries; in September 1992 the Congress created a Bi-Cameral Commission on Investigation of Illicit Acts which has already begun investigations into police activities.

Various factors contributed to this success for the human rights community. Perhaps most importantly, there has been a continued international focus on the issue of accountability; in particular, and unusually, from the United States. Moreover, in Paraguay the continued power of the military is not an obstacle to justice to the same extent as it has been in other Latin American countries: since most abuses were carried out by the police, the army has been able to disclaim responsibility, and has not felt institutionally threatened to the same extent by prosecutions. Only two retired army officers have been indicted in trials concerning human rights violations, and the jailing of the police officers may have been regarded as a relatively painless "sacrifice" to the idea of accountability.

Unexpectedly, Paraguay has become the only Latin American country other than Argentina to obtain a conviction of high-level officials responsible for the torture and death of a political prisoner. Although other aspects of the current human rights situation in Paraguay remain extremely concerning, such as continued torture in police precincts, there is now a hope built on the idea that the Schaerer case "did not belong only to Mario's family and friends, but has been and will continue to belong to a Paraguayan society that is seeking the reign of justice, so that citizens will never again be tortured at police headquarters."[17]

El Salvador[18]

For twelve years, between 1980 and 1992, El Salvador was devastated by a brutal civil war between its government and a guerrilla movement known as the Farabundo Martí National Liberation Front (FMLN). During this period, thousands of cases of political killings, torture and disappearance at the hands of government forces were recorded. Violations were also committed by the FMLN, but on a lesser scale. Despite a very few occasions on which low-ranking members of the army or police were successfully prosecuted for abuse of rights, death squads operated freely and the armed forces enjoyed virtually complete impunity, even in the most notorious cases on which international attention was focussed.[19] Finally, both sides committed themselves to achieving an end to the war. A long period of negotiation under increasingly close United Nations supervision led to a series of agreements for the ending of hostilities, culminating in a ceasefire in January 1992.

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[17] Guillermina Kannonikoff, the husband of Mario Raúl Schaerer, after hearing of the conviction of her husband's murderers.

[18] *Peace and Human Rights: Successes and Shortcomings of the United Nations Observer Mission in El Salvador (ONUSAL*) New York: News From Americas Watch, September 2, 1992.

[19] For example, the assassination of Archbishop Oscar Arnulfo Romero in March 1980; the massacre in northern Morazan in December 1981 in which perhaps 800 peasants were killed over a three-day period by US-trained government troops; the death of ten civilians at San Francisco in September 1988; and the killing of six Jesuit priests, their cook and her daughter in November 1990.

Among the agreements facilitating the eventual ceasefire was the San José Accord of July 1990, signed in Costa Rica, which provided for the establishment of a United Nations Observer Mission in El Salvador (ONUSAL) with the task of monitoring the compliance of both sides with certain human rights principles from the date of the agreement. ONUSAL began its operations in July 1991: the first time the U.N. had established such a large presence to monitor the human rights situation in a member state. The ceasefire itself provided for sweeping institutional reforms, including the dissolution of the existing security forces and rapid-reaction battalions of the army, the demobilization and reintegration of the FMLN into civilian life, and the establishment of a new civilian police force. It also expanded the mandate of ONUSAL to include the verification of all key aspects of the peace accord. Although this decision has led to a perceived conflict between the role of ONUSAL as human rights monitor and as diplomatic intermediary, which has had some adverse consequences, the overall impact of ONUSAL on the situation in El Salvador has been extremely positive.

Two commissions were formed to investigate abuses which occurred during the war. In April 1991 the parties agreed on the formation 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"; 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. The work of both commissions began in 1992. Less positively, an amnesty law was also approved by the legislative assembly at the time of the ceasefire in January 1992: although the law specifically exempted those cases for which the Truth Commission might recommend prosecution, it allowed for a review of the amnesty six months after the Commission completes its work, at which time a general amnesty could be granted.

It is too early to say what level of success the two commissions will achieve. Their work is subject to time constraints, which may hinder their effectiveness; and the Ad Hoc Commission in particular depends to a significant extent on the cooperation of the armed forces and of the El Salvadoran and United States governments to obtain information on individual responsibility for human rights abuses carried out by the army. On the other hand, the work of the Truth Commission is much strengthened by its U.N. status: even if no serious prosecutions take place, the Commission will provide a great service to El Salvador if it publishes a rigorous, truthful account of the many tragedies that shook El Salvador during the 1980s.

Historical accountability for rights abuses in South Africa

South Africa's experience is in many ways different from that of the Latin American countries. In particular, it is distinguished from them (with the possible exception of Chile) by the level to which the forms of the rule of law have been preserved throughout its history. The existence of democracy among the white population has meant that some official avenues of political pressure have remained open for use by liberal white members of parliament to criticize the most egregious abuses; a relatively independent judiciary has been able and willing on some occasions to embarrass the government by frustrating its attempts to restrict rights, overturning restrictive regulations, or ordering the release of detainees,[20] commissions of inquiry have on occasion been appointed to investigate gross abuses of power; compensation has occasionally been awarded to victims of government action for the abuse of their rights;[21] monitoring of government action by press and non-governmental organizations has continued despite efforts at censorship and harassment; and international pressure fueled by the world-wide anti-apartheid movement has ensured that the South African government has been the subject of unprecedented external examination. None of this was true to the same extent in the case of any Latin American country.

While an improvement on the most repressive periods of Argentine or Chilean history, the level of accountability of the government and security forces should not be exaggerated. South Africa's history is full of examples of the failure of the courts to challenge government policy on human rights grounds; moreover, the courts are limited by the system of parliamentary supremacy and the lack of a bill of rights against which to measure legislation. During the emergency of the mid-1980s even those applications to the lower courts that were successful were often rejected by the Appellate Division of the Supreme Court (the South African court system's highest court of appeal), which was notoriously unwilling to challenge government action. Commissions of inquiry, such as that established under Justice Louis Harms into the operation of security force hit squads, have been severely criticized for favoring the government's position. In addition, there have been persistent allegations of covert government support for groups involved in incitement of violence within the black population, for which responsibility has consistently and unconvincingly been denied by the government, in a fashion reminiscent of the disappearances in Latin America.

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[20] There is no parallel in South Africa to the rejection of nearly 9,000 (and acceptance of 30) habeas corpus applications made to the Chilean courts in Santiago alone during the dictatorship of Pinochet.

[21] For example, to the residents of the village of Nkqonkqweni, forcibly incorporated into Ciskei, who in February 1991 obtained an award of R.500,000 ($200,000) from the South African government in compensation for damage to their homes caused by the Ciskei government. In litigation for damages for police brutality, settlement out of court is reasonably common, and awards in court not unknown, although for relatively insignificant sums.

Moreover, the sheer level of abuse of power could not possibly be addressed by the small number of human rights lawyers and activists in a position to take on such work. There have, for example, been almost 25,000 detentions under the general law since 1963, while approximately 54,000 people were detained under the emergency regulations in effect between 1985 and 1990; a large number of these were abused at some point during detention. It was impossible for the vast majority to obtain legal representation, even if the courts had been willing to give an impartial hearing to every application for relief. It is certainly not the case that the rule of law has applied to all, or that all or even a significant number of those guilty of the worst abuses have been held accountable.

Amongst the most egregious abuses for which no accountability has even been considered are those committed in the name of apartheid, in accordance with the forms of South African law: in particular, the forced removals and deprivation of citizenship rights that were the foundations of the structure of grand apartheid. Less serious but important violations of internationally recognized human rights standards included widespread censorship; systematic discrimination in the supply of all services, especially the administration of justice; and severe restrictions on freedom of movement, association and assembly. Other abuses, illegal under South African law but for which the perpetrators have never been brought to justice, include numerous cases of torture in detention,[22] the operation of government-supported hit-squads,[23] and a long series of massacres carried out by members of the security forces.[24] In some cases junior members of the police or army have been brought to account, but those responsible at the highest levels for the policies leading to abuse have never been touched. An official culture has tolerated extreme violence in the enforcement of legislation which is itself illegitimate under international law.

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[22] As revealed most dramatically by the information concerning deaths in detention published in August 1992 by Doctor Jonathan Gluckman, a pathologist who carried out autopsies for the police. On August 31, 1992, a police spokesman stated that 178 people had died in police detention during the period January 1, 1991 to that date.

[23] Although investigated by the Harms Commission, following the assassination of Johannesburg academic David Webster in 1989, the Commission declined to hold senior ministers responsible for the operation of hit squads within the military, refused to make any overall recommendations, and recommended investigation for the purposes of prosecution in only one of 71 cases presented to it.

[24] Beginning with the notorious deaths in Sharpeville in 1960 and Soweto in 1976, but continuing up to the present, most recently in Bisho, Ciskei in September 1992.

International Law and the Obligation to Investigate and Punish[25]

Although it is in principle up to each nation to formulate its own policy with regard to past abuses of rights, a state is not at liberty to adopt measures that conflict with its obligations under international law. In the case of South Africa, which is party to only a very few of the large body of international human rights treaties,[26] and has consistently rejected the validity of the numerous resolutions relating to apartheid that have been adopted by the United Nations General Assembly, the state is nevertheless bound by the norms of customary law[27] in the field of human rights that have developed over the decades since the second world war.

There are two aspects of this body of international law that are relevant to the question of accounting for past abuses of rights in South Africa. First, the principles of international law that have criminalized policies and practices perfectly legal within South Africa; secondly, the obligation to investigate and punish human rights abuses, including activities that are and have always been illegal under South African law. The first category outlaws the whole corpus of domestic law implementing the racially discriminatory policies of apartheid; the second requires the South African government to punish at the very least those guilty of torture and extra-judicial execution.

The prohibition of systematic racial discrimination has become one of the most firmly-supported elements of international human rights law. Although the specific content of this prohibition is largely founded in treaties,[28] virtually all commentators agree that racially discriminatory policies conflict with states' obligations under the U.N. Charter and international

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[25] This section is derived in particular from: Diane F. Orentlicher, *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 Naomi Roht-Arriaza, *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.

[26] South Africa is a party to the Slavery Convention of 1926 and the four Geneva Conventions on the laws of war of 1949 (but not to their Protocols). It is also bound by the human rights provisions of the United Nations Charter.

[27] For a behavioral norm to be defined as part of customary international law it must both be followed in practice, and be acknowledged by states to be legally binding. Evidence that a norm has attained customary law status includes widespread acceptance in treaties, the decisions of international judicial bodies, and the actions of individual states. Inevitably, there will be principles whose status as customary law is uncertain or evolving.

[28] Including the International Convention on the Elimination of All Forms of Racial Discrimination (1965) and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

customary law. In addition, apartheid as a system has repeatedly been condemned by resolutions of the U.N. General Assembly, and in the Convention on the Suppression and Punishment of the Crime of Apartheid is defined as a crime against humanity, for which international criminal responsibility is engaged. More than one hundred states have become parties to the apartheid convention, supporting the conclusion that it too is approaching the status of customary law: even if it has not reached that point,[29] it is clear that mass atrocities committed in the name of apartheid would fall within the wider definition of crimes against humanity, as the law has evolved since the Nuremberg trials that followed the second world war. The "core principle" of that law "is both clear and widely accepted: atrocious acts committed on a mass scale against racial, religious, or political groups must be punished."[30] Furthermore, if a future government ratified the apartheid convention - surely one of the first symbolic acts that is likely to be undertaken - it would then be under a positive obligation to punish those responsible for the implementation of the policies of apartheid.

Similarly, South Africa is under an obligation to investigate and punish those other abuses in contravention of international law that have always been illegal under its own domestic law; including, at the least, torture, disappearances and extra-judicial executions. A few international treaties have specifically established the duty to bring those who have violated these rights to justice: these include the Genocide Convention, the Convention Against Torture, and the Geneva Conventions.[31] In addition, most human rights treaties require states parties both to respect the rights enumerated and to ensure their enjoyment by all individuals within the country. An important decision under the Inter-American Convention on Human Rights affirmed that:

> "This obligation implies the duty ... to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as

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[29] The Apartheid Convention has been criticized for criminalizing without distinction gross abuses, such as murder or torture of a racial group, and "measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country," whose content is much more vague and could include relatively minor abuses (Art. 2). Its status as part of customary law in all its parts is therefore contestable.

[30] Orentlicher, p.2594.

[31] The Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Geneva Conventions on the laws of war (1949). However, common article 3 of the Geneva Conventions, which covers internal conflicts, does not include the general duty to bring war criminals to trial.

warranted for damages resulting from the violation...."[32]
Finally, many human rights treaties, and the Universal Declaration of Human Rights, require states parties to provide an effective remedy for abuses. The combination of these provisions is widely accepted to have created a duty to investigate and punish abuses of rights; a duty which has also entered customary law.[33]

Human Rights 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. A successor government may therefore validly annul such an amnesty and proceed to hold the guilty responsible for their acts.[34]

How accountability in accordance with international law may best be achieved will have to be decided in each case by those responsible for engineering a transition to the rule of law. However, Human Rights Watch believes that other conditions must be met for a policy to be legitimate: in particular, a truthful account of past abuses must be established, and the policy must genuinely reflect the will of the people. In this regard, the histories of the different countries of the southern American cone offer some lessons that may be relevant to South Africa.

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[32] Velasquez-Rodriguez Case, Inter-Am. Ct. H.R. (ser.C) No.4 Para 166 (judgment).

[33] Even if South Africa refused to accept that this duty was part of customary human rights law, a new government which ratified treaties such as the Convention Against Torture would be bound by the duty to investigate past abuses under those treaties, even if it could not retrospectively be held to the terms of the treaty which go beyond customary law.

[34] Among the Latin American countries, Argentina annulled a self-amnesty proclaimed by the outgoing military government; more recently, on October 10, 1992, the Thai parliament rejected legislation designed to endorse a blanket amnesty for all those involved in pro-democracy demonstrations or their brutal suppression in May 1992, which was declared by former premier General Suchinda Kraprayoon shortly before he resigned in disgrace.

Lessons from Latin America

Above all, the Latin American experience emphasizes that, for a policy which will fix the level of responsibility for past abuses to have legitimacy, the first condition is that the truth must be known. Without knowledge, an informed decision cannot be made. Moreover, it is not sufficient for the facts to be merely available to well-informed or persistent citizens: the truth must be publicly investigated and officially proclaimed. Great importance is placed by the victims of abuse on the acknowledgment that abuses have occurred and are the responsibility of the government. The experience of testifying to an official body that takes abuses seriously contributes in itself to the healing process; hiding the truth prevents national reconciliation by denying the victims the chance to forgive in return for acknowledgment and repentance. In South Africa, where official history has been extremely partisan, perhaps the most important part of a state-sponsored but unbiased investigation would mean that all segments of the population would be exposed to the same knowledge of the past.

To have credibility, such an investigation must be carried out by an official body which is at the same time widely perceived to be impartial. In El Salvador the involvement of the U.N. has strengthened the position of the Truth Commission; while in Chile and Argentina civilian governments appointed commissions including members of all political persuasions in the belief - later confirmed - that the facts of the testimony heard would overcome partisan opinions. By contrast, in Uruguay, the failure to institute any independent investigation has led to widespread dissatisfaction with the aborted process of accounting for past abuse, and a continuing lack of confidence in the government.

In the South African context, this evidence suggests that a "truth commission" of similar stature in the public mind to those of Argentina, Chile or El Salvador would have to be appointed either by an interim government elected on the basis of universal suffrage, or upon the agreement of all parties to the negotiation process. Membership should be drawn from supporters of the existing government as well as its opponents, and the abuses of both sides should be subject to investigation.[35] While giving a hearing and legitimacy to the largely black victims of abuse, such a commission could also have an important educational effect amongst the white population. Although commissions such as the one currently headed by Justice Richard Goldstone have carried out a useful function within the constraints of the existing regime, for a body to have real credibility amongst all South Africans it cannot be set up by the government according to existing procedures.

A "truth commission" of this type must respect international standards of due process. While it should have the widest powers of investigation - including the right to subpoena

[35] The impression should be avoided that the abuses of one side excuse those of the other; 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.

witnesses and to send personnel to any place without warning, unlimited access to government buildings and records, and a mandate to carry out independent investigation (not simply to gather information) - it is important that the right to a fair trial is not preempted. At the highest levels it may be appropriate for an investigatory commission to establish individual as well as institutional responsibility for policies that led to abuse; however, more junior personnel should not have been judged in advance in the event that their prosecution is undertaken. In practice this balance may be difficult to achieve, and will have to be decided by those charged with investigation, according to all the circumstances.

In the investigatory work of a commission the assistance of human rights monitoring and advocacy groups may be crucial in the collection of high-quality information, especially if a limited time period is set for the completion of a report. Even - or especially - where the terms on which an investigating body are set up are regarded as unsatisfactory, the cooperation of the human rights community may be extremely important in establishing a truthful and thorough account of the past. The experience of both Chile and Argentina demonstrates that little is to be gained by symbolic non-cooperation; the work of the Rettig Commission in Chile in particular shows how much may be achieved in establishing a truthful account of abuses even by a body with a disappointingly limited mandate. South Africa's extensive and sophisticated human rights community would be an invaluable asset to the attempt to achieve a comprehensive and truthful report.

Compensation for human rights abuses may also be appropriate, following the model of Chile's "Corporation on Reparation and Reconciliation," but should not be regarded as a substitute for the investigation of the facts. It is more important that a genuine attempt is made to reorganize the security services to ensure that similar abuses cannot recur. At the very least, the cases of individual officers should be examined - for example by the type of investigation into military and police records that has been carried out by El Salvador's Ad Hoc Commission - to enable offenders to be removed from active service. Similarly, an official apology for past crimes, such as was delivered by President Aylwin of Chile, may go some way to rebuilding confidence in government. In this context, President de Klerk's continuing failure to acknowledge the inherent wrongness of apartheid may be contrasted with the publication by the ANC of a report on brutality at its detention camps; and with the acceptance by Nelson Mandela that the acts were "inexcusable" and that the Congress leadership shared responsibility for them.[36]

The Latin American experience of policies of accountability also shows how much the positive impact of a report setting out an "official" account of human rights abuse is reinforced by the treatment of the same issues in a court of law, and by the allocation of individual

[36] Nevertheless, members of the ANC who have committed gross abuses should not be exempt from the same process of accounting for abuses as all others who have been responsible for similar acts.

responsibility that results. While it has been difficult to achieve a full legal accounting for violations, especially where there is a degree of continuity from the old regime to the new, such as exists in Chile and Uruguay, the prosecution of senior officers in Argentina and Paraguay shows that it is possible to achieve accountability at the highest levels for crimes that can be shown to have been ordered or condoned by the commanders of particular forces, if the political will is there. By bringing before a court of law those responsible at the highest level for policies and practices resulting in the abuse of rights, and subjecting them to legal scrutiny under all the conditions of due process guaranteed by international law, a dramatic step can be made towards the establishment of a culture of respect for the rule of law in which even the worst offenders may expect just treatment.

The history of Argentina suggests that steps to achieve accountability should be taken as soon as possible by a new regime, and within a set time-frame; before political commitment evaporates, those subject to investigation become too resentful, and current problems occupy all available time. By contrast, in Chile and Paraguay, where there has been much greater continuity in government, it seems that a more gradual approach may be more effective. Given the political realities in South Africa, where members of the current government are likely to retain a substantial degree of influence, it may therefore be that attempts to achieve accountability would be more successful if undertaken relatively slowly. However, there are important differences from Chile and Paraguay: a new government will be under much less threat of military intervention than the Latin American countries, since the armed forces do not have the same tradition of political involvement, nor have they been implicated to the same extent as the police in the abuse of rights.[37] The investigation of police and army abuse should therefore carry less threat to the stability of the government (though obstruction may be expected). Moreover, South Africa may expect to continue to receive a disproportionate share of international attention, something which should support a new, majority, government. Finally, the physical infrastructure to prosecute violators is already in place: South Africa's judicial system remains intact, relatively well-staffed, and - despite some blatantly political decisions - less corrupted by state intervention than its Latin American counterparts. A tradition of criticism of abuses which has been maintained by a few judges throughout the implementation of apartheid can be drawn on to reestablish the legitimacy of the legal system.

Perhaps most importantly, the Latin American experience shows that general amnesties for the armed forces are hugely unpopular, divisive, and widely regarded as illegitimate. While it may be possible to justify, for political or practical reasons, a grant of immunity from prosecution to less serious offenders (especially in return for a contribution to the truth-telling process), this is not acceptable to the victims or to society in general if it is extended to the grossest abuses.

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[37] However, this applies only to the regular army: Military Intelligence has a long tradition of conducting destabilization activities within the homelands and South Africa's neighbors; while the "special units" used extensively in township patrolling, such as the infamous 32 Battalion, have been amongst the worst offenders against human rights.

This was most dramatically demonstrated by the campaign to gain signatures to demand a referendum on the amnesty law in Uruguay.

Finally, although there may be political reasons for trading the release of political prisoners against immunity from prosecution for members of the security forces, the situations of pro- and anti-government forces are not the same: something appreciated by the Argentine politcal prisoners who rejected the application to them of the amnesty decreed by the military government. If the government chooses to pardon and release political prisoners, including those who have committed serious crimes, this follows trial and punishment by the state which has in some senses atoned for the offense. Those who have been in exile have also suffered. Above all, the government is - even in the event of civilian casualties - the victim of crimes against the peace by opposition forces, and is therefore in the moral position to forgive those crimes. Where crimes have been committed by the existing government, in abuse of trust, it has no moral standing to forgive itself: this right belongs to the victims of that abuse.

Conclusion

South Africa is at a crossroads. If it decides that the crimes of apartheid are to go unacknowledged and unpunished, then the result will be that they will continue to be committed, and will not be forgotten or forgiven. If, on the other hand, an honest and painful look at the responsibility for the abuses of the last fifty years is undertaken, then there may be at least a chance that it can transform itself into a "united, democratic and non-racial country, with justice and security for all its citizens."[38]

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[38] U.N. Declaration on Apartheid and its Destructive Consequences in Southern Africa, Annex to GA Res. S-16/1, of 14 December 1989.

APPENDIX
Human Rights Watch Policy on Accountability for Past Abuses

Human Rights Watch holds that those who commit gross abuses of human rights should be held accountable for their crimes. It is a responsibility of governments to seek accountability regardless of whether the perpetrators of such abuses are officials of the government itself and its armed forces, or officials of a predecessor government, or members of anti-government forces, or others. We oppose laws and practices that purport to immunize those who have committed gross abuses from the exposure of their crimes, from civil suits for damages for those crimes, or from criminal investigation, prosecution and punishment.

Human Rights Watch recognizes the difficulty that some governments may face in holding members of their own armed forces accountable for the gross abuse of human rights. Also, we recognize that military regimes may insist, explicitly or implicitly, on immunity from accountability as a condition for relinquishing their offices and permitting the establishment of elected civilian governments. We do not believe that these difficulties justify disregard for the principle of accountability. We consider that accountability for gross abuses should remain a goal of a government that seeks to promote respect for human rights.

In pursuing that goal, Human Rights Watch holds:

1. That the most important means of establishing accountability is for the government itself to make known all that can be reliably established about gross abuses of human rights; their nature and extent; the identities of the victims; the identities of those responsible for devising the policies and practices that resulted in gross abuses; the identities of those who carried out gross abuses; and the identities of those who knowingly aided and abetted those who carried out gross abuses;

2. That laws and decrees purporting to immunize the perpetrators of gross abuses from accountability are null and void: (a) when promulgated by the perpetrators themselves; (b) when applied to crimes against humanity; or (c) when otherwise in conflict with international law;

3. That the duty to investigate, prosecute and punish those responsible for gross abuses is proportionate to the extent and severity of the abuses and the degree of responsibility for such abuses. Accordingly, though we advocate criminal prosecution and punishment for those who have the highest degree of responsibility for the most severe abuses of human rights, we recognize that accountability may be achieved by public disclosure and condemnation in cases of lesser responsibility and/or less severe abuses. The determination of who should be prosecuted will have to be made according to the circumstances of each situation. In making such determinations, we believe it is essential that there should be no granting of impunity either because of the identity of those responsible for gross abuses of human rights or because of the identity of the victims;

4. That popular disinclination to hold accountable those responsible for gross abuses does not negate the responsibility of a government to pursue accountability, particularly in circumstances where the victims of abuses may have been concentrated among members of a racial, ethnic, religious or political minority. A government's duty to demonstrate respect for human rights extends to all persons, and it is not the prerogative of the many to forgive the commission of crimes against the few;

5. That laws, decrees and practices that immunize members of the armed forces from accountability do not enjoy any greater validity because of a purported symmetry with amnesties for all anti-government forces. Though amnesties for crimes of opposition to the state and the established political order, including by means of armed combat, may be justified as a means of persuading members of anti-government forces to lay down their arms, we oppose their extension to those within such forces who have committed gross abuses of human rights;

6. That obedience to orders (in circumstances other than duress) is not a valid defense to charges of responsibility for gross abuses of human rights. To the extent that obedience to orders is relevant to prosecuting, it should be only as a mitigating circumstance that may be considered by judges according to the facts of each case in determining the appropriate punishment;

7. That the means employed by a government in making known what can be reliably established about gross abuses, and in investigating, prosecuting and punishing those responsible, should at all times conform to internationally recognized principles of due process of law.

Human Rights Watch believes that non-governmental human rights groups can themselves make a valuable contribution in securing accountability for gross abuses by insisting that a government's policies on these matters be publicly debated; by gathering evidence on gross abuses for submission to the government; and, in circumstances when a government has not fulfilled (or not yet fulfilled) its duty to hold accountable those responsible for gross abuses, by gathering and publishing their own carefully documented accounts.

Human Rights Watch will pursue such opportunities as may be available to strengthen the commitment to accountability in international law; will attempt to use the machinery of international law in appropriate cases to secure accountability; and will aid domestic human rights groups in other countries in securing accountability in accordance with the policies stated above.

As used here, the term gross abuses of human rights applies to the following: genocide; arbitrary, summary or extrajudicial executions; forced or involuntary disappearances; torture or other gross physical abuses; and prolonged arbitrary deprivation of liberty.

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Africa Watch is a non-governmental organization created in May 1988 to monitor human rights practices in Africa and to promote respect for internationally recognized standards. William Carmichael is Chair of Africa Watch; Alice Brown is Vice Chair; Rakiya Omaar is Executive Director; Alex de Waal, Janet Fleischman and Karen Sorensen are Research Associates; Bronwen Manby is Orville Schell Fellow; Ben Panglase and Urmi Shah are Associates.

Africa Watch is part of Human Rights Watch, an organization that also comprises Americas Watch, Asia Watch, Helsinki Watch, Middle East Watch, and the Fund for Free Expression. The Chair of Human Rights Watch is Robert L Bernstein and the Vice-Chair is Adrian DeWind. Aryeh Neier is Executive Director; Kenneth Roth, Deputy Director; Gara LaMarche, Associate Director; Susan Osnos, Press Director; Jemera Rone, Counsel; Holly Burkhalter, Washington Director; and Ellen Lutz, California Director.