Prosecuting Human Rights Violators from a Predecessor Regime: Guidelines for a Transformed South Africa

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I. INTRODUCTION

In recent years, world politics have undergone a dramatic transformation, shedding an obsession with superpower rivalry in favor of an emphasis on unprecedented international cooperation along with transitions to democratic rule in all parts of the globe.¹ Although these new developments do not necessarily signal the end of either authoritarianism, violent conflicts, or anti-democratic ideologies, they are strong manifestations of a new world order in

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which democracy is fast becoming the paramount moral principle in the quest for political power. Not surprisingly, during the last decade the number of studies of democratic transition has exploded.\(^2\) Although these works endeavor to explore the numerous pathways to democratic transition and the resulting influences on all aspects of political and social life, studies have given only limited attention to post-transition reconciliation strategies that impact on the character of new democracies and their long-term stability.

One of the most vexing questions facing new democracies is how to treat the sordid inheritance of human rights violations perpetrated by predecessor regimes. In some instances, governments have endeavored to bring the worst offenders to justice on the ground that penalties are necessary to discourage the future commission of heinous acts.\(^3\) In other situations, governments have rejected calls for prosecutions out of fear that legal action may retard rather than advance the goal of nation-building.\(^4\) As South Africa struggles toward what many hope will be a non-racial, non-sexist, democratic political order, the issue of whether or not to prosecute human rights violators—participants in abuses during decades of National Party (NP)\(^5\) rule—demands resolution and forms part of a larger debate over the many thorny issues surrounding legitimacy and how to confer it on the nascent democracy.\(^6\)

This Article maintains that prosecution of human rights violators is an essential but not problem-free means of conferring legitimacy—both domestic and international—on any new democratic regime that comes to power in South Africa. Part II examines the issue of amnesty in the context of the negotiations currently taking place in the country. Part III deals with the concept of legitimacy.

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\(^4\) Id.


and considers arguments about the treatment of human rights violators from predecessor regimes in the international context. Part IV discusses international human rights standards to which new governments can appeal in their efforts to prosecute offenders. Part V assesses the efficacy of current South African amnesty legislation and briefly sketches prosecution guidelines for a democratic South African government. The Article concludes that a new South African government can enhance its legitimacy only by prosecuting human rights violations under international human rights standards.

II. THE ISSUE OF AMNESTY IN THE NEGOTIATIONS FOR A NEW DEMOCRATIC SOUTH AFRICAN GOVERNMENT

A. The South African Debacle

The 1990s began in South Africa with considerable drama. In early February 1990, State President Frederik W. De Klerk made a speech that many took as an indication that he was serious about transforming South Africa. The announced measures included the sanction of the African National Congress (ANC), the Pan-Africanist Congress (PAC), the South African Communist Party (SACP), and other groups; the lifting of restrictions on thirty-three other organizations, including the powerful Congress of South African Trade Unions; the release of most political prisoners; the lifting of restrictions on 374 freed detainees; the limiting of detention-without-trial to six months, with provisions for legal representation and medical treatment; and a moratorium on executions. De Klerk also indicated that he would free ANC leader Nelson Mandela, perhaps the world's most famous political prisoner, after twenty-seven years in jail. The ANC held preliminary meetings with the government and set up offices throughout the country. Other unbanned

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8 See generally Tom Lodge, Black Politics in South Africa Since 1945 (1983).

9 Kraft, supra note 7, at A10.


groups also increased organization efforts. In June, De Klerk announced the lifting of the four-year-old state of emergency for all of South Africa except Natal; months later, De Klerk also repealed the state of emergency for Natal.

Many came to believe the promise of De Klerk's February speech that “henceforth, everybody's political points of view will be tested against their realism, their workability and their fairness. . . . The time for negotiation has arrived.” Graffiti in some African townships even proclaimed, “Viva Comrade De Klerk!” Euphoria quickly evaporated, however, as people recognized that the pillars of apartheid legislation—the Land Acts of 1913 and 1936, the Group Areas Act, and the Population Registration Act—remained intact. At the same time, the government steadfastly refused to release prisoners sentenced for offenses committed on behalf of political organizations. By year's end, South Africa was close to total collapse as Africans, allegedly with police complicity, brutalized and murdered each other throughout the country in conflicts fueled by urban/rural, class, and ethnic tensions.

The February 1991 opening of Parliament brought further changes. De Klerk announced his intention to dismantle apartheid legislation. Because blacks remained without the vote, however, the rescission of the legislation did not alter the balance of power in South Africa. The NP remained firmly in control of the country, commanding the allegiance of the largest and most sophisticated military force in Africa. In the hours following the speech, more than 30,000 police took part in a nationwide crackdown in which

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12 See Fred Bridgland, Waiting for the Great Indaba, SUNDAY TELEGRAPH, Feb. 4, 1990, at 13 (“Indaba” refers to a traditional meeting).
14 Address on Change, supra note 7, at A6.
16 Kraft, supra note 7, at A12. This legislation, often referred to collectively as the cornerstones or pillars of apartheid, is described in LEONARD M. THOMPSON & ANDREW PRIOR, SOUTH AFRICAN POLITICS 20–69 (1982); see also THOMPSON, supra note 5.
17 Kraft, supra note 7, at A1.
20 See id.
more than 11,000 people were arrested. This allowed the NP to enter any negotiations over the future of the country from a position of strength. The NP quickly rejected ANC calls for an interim government to be selected by a constituent assembly of major political groupings.

B. Convention for a Democratic South Africa (CODESA)

The NP, ANC, and Inkatha continued to express their desire for talks about change against a backdrop of increasing violence in the black community. The ANC asserted that the deteriorating conditions were not merely the result of black animosities, but were instead being orchestrated by a “third force” operating either under government auspices or with government approval. After considerable public outcry, De Klerk appointed a commission of inquiry into the violence, which became known as the Goldstone Commission, named after the judge who presided over it. In September 1991, some saw grounds for cautious optimism with regard to the violence when representatives of the government, the ANC, and Inkatha signed the National Peace Accord to end violence among their supporters. As a precondition for talks with the government, the ANC abandoned the armed struggle in August 1991. It did not, however, disband its military wing despite the government’s continued insistence on this condition.

The NP, in an effort to produce a settlement favorable to its interests, agreed to negotiate with the ANC and other political

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23 Inkatha is formally known as the Inkatha Freedom Party, or IFP.
25 Id.
26 Id. Judge Richard J. Goldstone sat on the Appellate Division, South Africa’s highest court. See also Bill Keller, Cape Town Journal: In a Wary Land, the Judge is Trusted (To a Point), N.Y. Times, Mar. 8, 1993, at A4.
29 The ANC military wing is known as “Umkhonto we Sizwe,” or “Spear of the Nation.” Thompson & Prior, supra note 16, at 197.
parties that wished to participate.\textsuperscript{31} The forum, known as the Convention for a Democratic South Africa (CODESA), included representatives from nineteen political parties.\textsuperscript{32} The perception Pretoria sought to create—that CODESA was a vigorous, multi-party open discussion—was illusory. Other parties, on either the left\textsuperscript{33} or right,\textsuperscript{34} with the potential to disrupt the democratization process or undermine a new democratic order chose not to attend.\textsuperscript{35}

On December 21, 1991, seventeen of the nineteen parties\textsuperscript{36} signed the Declaration of Intent.\textsuperscript{37} The Declaration provided that CODESA would “set in motion the process of drawing up and establishing a constitution”\textsuperscript{38} that would guarantee that South Africa would be “a united, democratic, non-racial and non-sexist state,”\textsuperscript{39} with a constitution as the supreme law and “an independent, non-

\textsuperscript{31} See id.


\textsuperscript{33} Especially the Pan Africanist Congress (PAC), the South African Communist Party, and the Azanian People’s Organization.

The willingness of the current PAC leadership to negotiate with the De Klerk government has alienated many young Africans who have joined the PAC, the ANC’s main rival. Unlike the ANC, the PAC has historically been more nationalist in orientation, rejecting the ANC’s willingness to find accommodation with whites.

Regarding the South African Communist Party, the Communists did in fact have representation at CODESA because many of its members are also prominent in the ANC. On the Communist Party, see generally Lodge, supra note 8.

Further to the left of the PAC, the strongly nationalist Azanian People’s Organization (AZAPO) has indicated that it will negotiate with whites only in the context of a constituent assembly.

\textsuperscript{34} Notably the Conservative Party, which many believe enjoys widespread support from the members of the security forces and civil service, and a host of ultra-rightwing, neo-Nazi groups.

\textsuperscript{35} Except for the Democratic Party, a white group slightly to the left of NP but without broad backing, the other 14 parties were essentially NP puppets that owed their existence to Pretoria’s largesse and had negligible support from the populace. Among these were the Coloured and Indian parties in the segregated chambers of Parliament—parties created by the government in what quickly became a failed effort to co-opt the sections of the population which those parties represent. Also present were the parties from the African homelands in which Pretoria claimed that Africans had the right to self-government and self-determination and went so far as to grant four of them fictional independence recognized by no other state. See Bill Schiller, Zulu Leader to Boycott South Africa Unity Talks, Toronto Star, Dec. 19, 1991, at A3.

\textsuperscript{36} The exceptions were the Inkatha Freedom Party and the party representing the quasi-independent homeland of Bophuthatswana. The party from the quasi-independent homeland of the Giskei initially refused to sign but then reversed its position.


\textsuperscript{38} Declaration of Intent, supra note 32, § 5, at A14.

\textsuperscript{39} Id. § 5(a).
racial and impartial judiciary” to interpret that constitution. In addition, the parties subscribed to the ideas that South Africa would be a multi-party democracy with universal adult suffrage, a common voters' roll, and a basic electoral system based on proportional representation. They also agreed upon “a separation of powers between the legislature, executive and judiciary with appropriate checks and balances.” All residents were to enjoy “human rights, freedoms and civil liberties . . . protected by an entrenched and justiciable Bill of Rights and a legal system that guarantees equality of all before the law.” The diversity of languages, cultures, and religions of the people of South Africa also was to be recognized.

At the CODESA meeting, in what observers immediately construed as a statement in favor of an interim government, De Klerk announced, “[w]e are convinced it is in the best interest of South Africa and all its people for us to institute expeditiously, as a first phase, a government that is broadly representative of the whole population.” Details regarding an interim government, however, were not forthcoming from NP leaders. Two days later, De Klerk rejected the notion that the existing constitution would be suspended while a transitional government operating free of constitutional control ruled the country. He also denied that he had announced a plan for an interim government.

Despite lack of specificity over the question of an interim government, working groups that had organized themselves at the CODESA meeting moved ahead on pressing legal, political, and social issues. The entire process created considerable consternation and, often, resentment among whites, many of whom had long demanded that any new constitution be ratified by the white electorate. Accordingly, on March 17, 1992, in an effort to show that he had broad support for his initiatives, De Klerk staged a referendum among white voters. They were asked to respond “yes” or

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40 Id. § 5(b).
41 Id. § 5(c).
42 Id. § 5(d).
43 Id. § 5(f).
44 Id. § 5(e).
46 See id.
48 Id.
“no” to the question, “Do you support the continuation of the reform process which the State President began on February 2, 1990, and which is aimed at a new constitution through negotiation?” With an 87.6% voter turnout, 68.7% voted in favor of De Klerk's policies in spite of a vigorous campaign by the official parliamentary opposition Conservative Party, and perhaps also out of fear that a “no” vote would plunge the country into civil war. De Klerk's ostensible victory cleared the way for negotiations to proceed.

On April 6, 1992, after three weeks of negotiating, the parties to CODESA were unable to reach an accord on the first stage of political transition. Although they agreed that the current phase of negotiations would end with the election of an interim authority, there was no consensus over the power of the executive until that time. Indeed, the ANC and the NP offered contradictory proposals. On April 23, De Klerk proposed that there be an interim elected executive council to replace his presidential position. The ANC had no immediate reaction.

The second plenary session of CODESA, dubbed CODESA II, convened on May 15 and 16, 1992, but deadlocked over key issues. The NP and ANC were unable to reach agreement on the percentage of votes required for decisions by the proposed interim assembly about regional borders, government powers, and various regional issues. Although the government insisted that there be a

53 Id. The government favored a constitution-making body consisting of an elected bicameral transitional parliament acting under a transitional constitution. The lower house was to be popularly elected while the upper house was to have representation weighted in favor of minority parties.

The ANC sought a unicameral alternative with three checks against the ability of the majority to impose its will on the minority. These were that the constitution be drafted within the scope of the CODESA principles, the constituent assembly be elected through a system of proportional representation favoring smaller parties, and the constitution be accepted by a two-thirds majority. See generally Liz Sly, Mandela Says No to Interim Plan, CHI. TRIB., Apr. 26, 1992, at 8.
55 Id.
56 David B. Ottaway, South African Talks Fail to End Deadlock, WASH. POST, May 17, 1992, at A27.
57 Id.
seventy-five percent majority for such decisions, the ANC had been willing to accept a seventy percent vote on regional issues.\textsuperscript{58} Nevertheless, both sides expected that CODESA committees would continue work on the problems afflicting the country.\textsuperscript{59} The government and the ANC also agreed to work on drafting an interim constitution.\textsuperscript{60}

The process, however, soon collapsed. The ANC alleged that on June 17, 1992, Inkatha Freedom Party members, abetted by government security forces, killed forty-five ANC supporters in Boipatong township.\textsuperscript{61} De Klerk denied such accusations and asked that the Goldstone Commission add the Boipatong massacre to its investigative agenda.\textsuperscript{62} The ANC, unsatisfied with De Klerk's actions, withdrew from the negotiation process.\textsuperscript{63}

\textbf{C. International Community Involvement}

Speaking at a United Nations Security Council emergency meeting over the Boipatong massacre, Mandela called for a permanent U.N. special envoy who would investigate the causes of the violence and “provide the council with information for further measures to end the violence, including continuous monitoring of the situation.”\textsuperscript{64} In response, the United Nations sent former United States Secretary of State Cyrus Vance on a ten day mission aimed at persuading the government and the ANC to resume talks.\textsuperscript{65} By the time he arrived, the ANC was demanding, as a precondition for further talks, that the government accept unconstrained majority rule.\textsuperscript{66}

\textsuperscript{58} Id. Earlier, the two groups had virtually reached a compromise on a 70\% majority on other issues with the exception of bill of rights provisions for which they had accepted a higher percentage. \textit{Id.} The ANC threatened mass action in order to put pressure on the government. \textit{Id.}

\textsuperscript{59} Id.

\textsuperscript{60} Id.

\textsuperscript{61} David B. Ottaway, \textit{De Klerk's Call for Talks With ANC Is Turned Down}, \textit{WASH. POST}, June 25, 1992, at A33. Boipatong township is located south of Johannesburg. \textit{Id.}

\textsuperscript{62} Id.

\textsuperscript{63} John Battersby, \textit{Growing Violence, Stalled Talks Dim Prospects for South Africa}, \textit{CHRISTIAN SCI. MONITOR}, June 22, 1992, at 1. Nelson Mandela described the negotiations at this point as “completely in tatters.” \textit{Id.}


\textsuperscript{66} Id. Vance's journey coincided with the second day of the ANC's mass-action campaign of strikes, marches, and the occupation of government buildings—all aimed at forcing the
The ANC and its allies organized a general strike on August 3 and 4, 1992, as part of a "campaign for democracy."67 A team of ten U.N. monitors observed the strike, which was marred by incidents of violence resulting in forty deaths around the country.68 The operation was the first time that a U.N. team monitored a general strike.69 Because much of the economy was paralyzed by the strike, both sides knew that such mass action could not be maintained for more than a couple of days. Thus, the strike posed little threat to the NP government's hold on power.70 On August 5, 1992, some 50,000 blacks converged on the Union buildings, the seat of government in Pretoria, where Nelson Mandela called for the formation of a government of national unity as "an urgent and critical step" necessary for progress in the suspended constitutional negotiations with the government.71 Later that day, De Klerk indicated that there was "no fundamental difference of opinion" between the two groups and that he was "prepared to sit down tomorrow" for negotiations during a proposed two-day bush retreat.72

Shortly thereafter, the government and the ANC reportedly were discussing a general amnesty plan, put forward by the United Nations, to restart the move toward an interim government.73 Moreover, the U.N. role continued to grow: Secretary General Boutros Boutros-Ghali, favoring a return to the bargaining table, proposed in a report to the Security Council that the United Nations should station thirty observers in South Africa to bolster the National Peace Accord.74 The report also called upon the government to give the government to make concessions. The campaign, begun in early July, did not crescendo into the hoped-for "Operation Exit" that would be powerful enough to force the De Klerk government from power by August. Id.

67 Banditry Versus Politics, ECONOMIST, Aug. 8, 1992, at 32.
69 Id. Some speculated that the team's presence would lay the groundwork for a semi-permanent U.N. role in curbing the violence. Id.
70 See id.
71 David B. Ottaway, 50,000 Join ANC Rally at De Klerk's Offices, WASH. POST, Aug. 6, 1992, at A33.
72 Id.; John Battersby, South African Government and ANC Pondering General Amnesty Plan, CHRISTIAN SCI. MONITOR, Aug. 7, 1992, at 1. De Klerk indicated that the government had already resumed talks with the ANC on certain issues.
73 Battersby, supra note 72, at 1. Under the plan, security force members who had been involved in actions against the ANC and anti-apartheid activists were to receive blanket immunity. The plan also sought the freedom of 420 captives claimed by the ANC to be political prisoners. Id.
Goldstone Commission greater powers of investigation into the causes of violence.\textsuperscript{75}

Although the government accepted both U.N. recommendations, violence in South Africa continued to rise.\textsuperscript{76} The ANC still refused to negotiate on the grounds that the government tolerated attacks on its members by supporters of its long-time rival Inkatha.\textsuperscript{77} Additionally, the ANC received little support from the Goldstone Commission, which had issued a report on the causes of violence that placed primary blame on the ANC and Inkatha, and found no evidence of government complicity.\textsuperscript{78} Nevertheless, escalating violence would soon bring a confrontation between the government and the ANC.

On September 7, 1992, a massacre of some thirty unarmed peaceful ANC demonstrators by Ciskeian troops led to an agreement between the ANC and the government to hold a summit on violence.\textsuperscript{79} When the two sides met at the end of September in eight-hour closed-door talks, they agreed to place a ban on the carrying of cultural weapons\textsuperscript{80} and pledged to increase security at single-sex migrant workers' hostels\textsuperscript{81} from which many violent incidents were launched.\textsuperscript{82} The spirit of cooperation between the government and the ANC, however, was quickly dampened as Inkatha leader Chief Mangosuthu Buthelezi rejected Inkatha participation in future negotiations because of the perception that the concessions unfairly targeted his group.\textsuperscript{83} Buthelezi's behavior also raised the chances of violence by his supporters.\textsuperscript{84}

\textsuperscript{75}Id.
\textsuperscript{76}See Paul Taylor, South Africa's Bitter Loss of Hope, WASH. POST, Sept. 4, 1992, at A1. By September, an average of more than eight people a day were dying in the violence. This figure is triple that experienced in the country during the years of bitter civil unrest from 1984 to 1990. Id.
\textsuperscript{77}Id.
\textsuperscript{78}David B. Ottaway, Judge Blasts ANC, Rival on Violence, WASH. POST, May 29, 1992, at A25.
\textsuperscript{79}John Battersby, South Africa Summit Breaks Long Impasse, CHRISTIAN SCI. MONITOR, Sept. 28, 1992, at 7. The South African government requested the U.N. to help end the violence and restart negotiations. The U.N. agreed to send a special envoy within 24 hours of receiving the request. Ross Dunn, Pretoria, ANC Prepare for Summit on Violence, CHRISTIAN SCI. MONITOR, Sept. 14, 1992, at 3. In the meantime, 50 U.N. monitors had already begun to arrive in the country to monitor the violence. Id. To pave the way for the talks, the South African government conceded to the ANC demand of releasing 150 ANC prisoners. Battersby, supra, at 7.
\textsuperscript{80}Spears, axes, and other weapons favored by Inkatha members.
\textsuperscript{81}Often populated by rural Zulu loyal to Inkatha.
\textsuperscript{82}Battersby, supra note 79, at 7.
\textsuperscript{83}Id.
\textsuperscript{84}See id.
By this time, the international community was becoming increasingly involved in efforts to stop the violence in the country and to ensure a smooth transition to democracy. In addition to the U.N. monitors, teams from the World Council of Churches, the European Community, the Commonwealth, and the Organization of African Unity were either beginning operations or planning to begin them in the near future.85

D. National Party Government Measures—The Further Indemnity Act

The government and the ANC agreed to meet at a two-day "bush summit" at the end of October 1992.86 By then, commentators argued that the ANC favored either bilateral or multiparty negotiations87 and that the government was interested in a power-sharing arrangement with the ANC.88 The planned summit stalled on the issues of power-sharing and a decentralized federal government.89 Compounding the difficulties, the Goldstone Commission damaged De Klerk's credibility when it revealed that top military officers had been involved in a campaign to discredit the ANC.90 Seizing upon the government's weakness, the ANC offered power-sharing with the government for a five-year period before the implementation of black majority rule.91

In the midst of the negotiations, De Klerk introduced an amnesty bill into Parliament just as testimony before the Goldstone Commission alleged police involvement and complicity.92 Publicly

87 See id. at 1–2.
90 Id.
91 Id.

The bill gave the State President sweeping powers of indemnity. Id. at 1–2. The amnesty bill immediately became a very contentious issue; consequently, when it appeared unlikely
expressing support for the amnesty measure at the Transvaal Law Society's centenary celebration, De Klerk said that the bill's purpose was to "level the playing field" between the government and its opponents.93 Furthermore, he insisted that he did not know of any state official who committed any crime, and that the amnesty bill was not "aimed at clearing the decks for intransigent government which participated behind the scenes in all sorts of criminal activities."94

Although the bill failed to receive the necessary majorities in the segregated tricameral Parliament,95 it passed in the NP-dominated, white House of Assembly, but over the objections of the Democratic Party which insisted that there be public disclosure of the behavior of those indemnified.96 It also passed readily in the Coloured House of Representatives despite criticism from the minority Labour Party.97 Nevertheless, Solidarity, the majority party in the Indian House of Delegates, was steadfast in its refusal to ratify the bill.98 Consequently, De Klerk overcame this rebuff by resorting to the President's Council,99 and enacted the Further Indemnity Act on November 9, 1992.100

The Act provides the State President with the authority to grant amnesty to those who "advised, directed, commanded, ordered or performed" any act with a political object.101 Although the Act applies to actions committed before October 8, 1990, a discretionary clause gives the State President the power to enlarge the period as he or she deems appropriate.102 The Act proscribes both criminal
proceedings and civil suits. Instead, those seeking indemnity must apply to the National Council on Indemnity, and under the legislation, the Council proceedings are to be secret. Moreover, both its members and those present must take an oath of secrecy.

The ANC opposed the legislation, which it considered to be an effort by the government to pardon police, military, and security force members implicated in the commission of heinous acts. Furthermore, the ANC was adamant that criminals could not pardon themselves and indicated that it would not abide by the legislation if the ANC came to power. The organization also worked to bolster opposition to the bill by releasing a report, conducted by an ANC commission of inquiry, of atrocities committed in ANC-run refugee camps in Zambia, Angola, Tanzania, and Uganda.

The commission was composed of three lawyers—one independent and two ANC members—and was appointed in March of 1992 after repeated allegations by former refugees of widespread torture and other forms of mistreatment. The findings showed that committed acts included torture, which contravened both the ANC's code of conduct and former ANC President Oliver Tambo's 1980 pledge to honor the Geneva Conventions. The commission warned that the ANC would suffer from continued accusations, malaise, and recriminations unless the organization expanded upon the investigation. Thus, it recommended that the ANC “cleanse” itself of those who had committed atrocities and urged that the guilty be barred from positions of authority. Recognizing that its own membership was weighted in favor of the ANC, the commission urged that a more independent commission of inquiry be formed to explore allegations of disappearance and murder, and to bring

103 Id. § 3(2).
104 Id. § 4(1).
105 Id. § 10(7).
106 Id. Any contravention of the secrecy provision is a crime punishable by a fine or a one-year prison term. Id. § 10(9).
108 Amnesty Bill, supra note 92, at 2.
110 See id.
111 Id. at 4.
112 Id.
113 Id. at 3.
those responsible to justice. Furthermore, the commission urged that victims receive compensation for their ill-treatment as well as psychological, medical, and educational assistance.\textsuperscript{114} Acknowledging these recommendations, Mandela stated that “as a leadership, we accept ultimate responsibility for not adequately monitoring and therefore eradicating such abuses.”\textsuperscript{115} He pledged that the ANC would immediately examine the recommendations and act appropriately.

E. The “Bush Summit” of 1992

In late 1992, the ANC remained optimistic about the date and agenda for the government-ANC “bush summit.”\textsuperscript{116} On November 18, 1992, the ANC formally adopted a discussion document entitled “Strategic Perspectives” that supported a possible power-sharing arrangement with the NP.\textsuperscript{117} The document recognized the desirability of a general amnesty for security force and civil service members because such individuals had the power to obstruct the transition.\textsuperscript{118} Five days later, however, Buthelezi announced that Inkatha would not accept any date set for the establishment of an interim government if the date were to be decided bilaterally between the government and the ANC.\textsuperscript{119} His statement did not stop De Klerk from announcing on November 26, 1992, that he wanted a fully representative government of national unity in place no later than the first half of 1994.\textsuperscript{120} In response, the ANC criticized De Klerk for anticipating the outcome of the pending bilateral talks and for refusing to accede to its prior demand of elections before the end of 1993.\textsuperscript{121}

At the beginning of December, Buthelezi announced that he had plans for a new constitution in Natal province, an area including the KwaZulu homeland, that would result in an autonomous state.\textsuperscript{122}

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{117} ANC’s “Strategic Perspective” Paper on Negotiations, (BBC Broadcast, Nov. 19, 1992), available in LEXIS, Nexis Library, Papers File.
\textsuperscript{118} Id.
\textsuperscript{120} Barry Streek, \textit{FW Sets Date}, \textit{Cape Times}, Nov. 27, 1992, at 1.
\textsuperscript{121} See id.
He insisted that he would proceed with his plan regardless of what happened in other negotiations. The ANC rejected the move, saying it came “as a bolt from the blue,” and amounted to a “drastic departure from the constitutional process.” The central NP government responded cautiously, suggesting that the proposal be discussed during the multi-party talks. Although Buthelezi’s plan pointed to the potential for a fractured South Africa, the threat was submerged momentarily by attacks on whites in the Eastern Cape. The Azanian People’s Liberation Army (APLA), the military wing of the Pan-Africanist Congress (PAC), claimed responsibility. In a statement to the South African Press Association, APLA declared war on all white South Africans. The government then broke off talks with the PAC, which in a meeting with the government had committed itself to peace, until the PAC clarified its position on APLA’s actions.

When the government and the ANC finally held their much-awaited “bush summit,” they agreed on the urgency of reviving the multilateral negotiation process early in the new year, the streamlining of CODESA, and nonracial elections for a transitional government/constituent assembly by late 1993 or early 1994. They also agreed to convene another “bush summit” in January of 1993 to build upon the achievements of the December meeting. Moreover, De Klerk said in an interview that he would ensure that progress with regard to constitutional reform would continue even if a multi-party forum failed to emerge. He stated that he would continue with negotiations either bilaterally or in a smaller multi-party forum.

On top of the possibility of secession (orchestrated by Buthelezi), rising violence to achieve it, increasing attacks by APLA, and
continued ANC-Inkatha strife, De Klerk made an announcement on December 19, 1992, that exacerbated the threats of insurrection within the military as well as threats of a campaign of right-wing terrorism. In contrast to his prior defense of the security forces, De Klerk dismissed or suspended twenty-three military officers, including six generals, who were suspected of activities, including assassination, aimed at thwarting racial reconciliation.132 Although De Klerk’s actions may be construed as a major concession to the ANC, which had demanded a purge of the military as a condition for the resumption of multi-party discussions, the danger exists that his actions will push increasing numbers of whites into the Conservative Party or extra-parliamentary groups to its right.133 With such contrary and hostile forces at work, any new democratic government that emerges must move quickly to establish its own legitimacy both domestically and internationally. In so doing, it will have to deal with the issue of how to treat human rights violators from the days of NP rule.

III. LEGITIMACY AND THE PROBLEM OF PROSECUTING HUMAN RIGHTS VIOLATORS FROM PREDECESSOR REGIMES

The rise of human rights as an important part of political discourse in the international sphere during the post-World War II era has recently been consolidated, at least rhetorically, in the many transitions to democracy around the globe. In making the claim that democracy and human rights are inseparable, proponents of democratic rule draw support from an ever-growing number of human rights instruments that have become part of the international jurisprudential corpus since the founding of the United Nations nearly half a century ago.134 Moreover, because of this evolution in international human rights practice, nation-states must comply with the norms enshrined in such documents if they wish to be considered full members of the international community.


133 See id.

The Preamble to the Universal Declaration of Human Rights of 1948 provides that if human beings are not allowed to rebel against tyranny and oppression, then the rule of law must protect human rights. 135 Since the end of the Second World War, these basic human rights, largely a product of western jurisprudence, have been found frequently in constitutionally entrenched, justiciable bills of rights. Beliefs in the primacy of the individual and his or her possession of certain inalienable rights, whether or not they are recognized by the polity, derive from notions of natural law that first found expression among the ancient Greeks. 136 Although proponents of natural law generally found themselves in the minority throughout much of western history, the brutality of World War II placed natural law concepts of human rights in the center of political attention. 137

Today, the proponents of human rights do not universally agree upon their contents. There is a vigorous debate about the significance governments should accord different generations of rights—first-generation civil and political rights, second-generation social and economic rights, and third-generation solidarity rights—and whether second- and third-generation rights are enforceable or merely morally compelling. 138 Clearly, the leaders of each new


On the concept of the rule of law, see ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183–205 (10th ed. 1959). Ostensibly, the concept of the rule of law does not include rule by law or the rule of law and order, frequent phrases used by authoritarian regimes the world over. South Africa has been no exception to this trend. See Lynn Berat, A New South Africa?: Prospects for an Africanist Bill of Rights and a Transformed Judiciary, 13 Loy. L.A. INT’L & COMP. L.J. 467, 470–71 (1991). Rather, the rule of law refers to the idea that independent courts using fair procedures are to safeguard the basic rights of individuals such as equality before the law.


137 The views of those who espoused natural law concepts with regard to the issue of sovereignty for indigenous peoples are described in LYNN BERAT, WALVIS BAY: DECOLONIZATION AND INTERNATIONAL LAW 104–21 (1990). Naturalists believe that all peoples of the world share certain inalienable rights. Id. at 104. Positivists, on the other hand, deny this claim, based on the argument that force is the basis of all law. Id. at 104, 108.

138 This debate rages in South Africa among those pondering the contents of a Consti-
democracy must decide for themselves, preferably in consultation with the populace, which generation or generations of rights will be recognized in their society. In the long run, that choice—grounded as it must be in the society's political history, struggles, and aspirations—will affect the extent of legitimacy the people of that nation-state confer on the new regime.

In a democracy, legitimate legal orders derive their force from authority given over by the people, whose compliance with the law obviates the need for coercion from some external authority. In such societies, the people adhere to the laws because they have taken part in the drafting of laws. In addition, the citizens feel that the legal system is truly their own because it responds to their wishes regarding the future direction the country is to take and offers them recourse when they are aggrieved.\textsuperscript{139} Indeed, the psychological aspect of legitimacy is especially important because as long as people believe in the sanctity of the institutions or in their effectiveness—real or imagined—the country will not be thrown into chaos.

Once democratic transitions occur, many within the society who suffered at the hands of the previous rulers may make demands for the prosecution of their former leaders and their agents who persecuted civilians. These aggrieved individuals may equate the swift action of the new regime against those who committed atrocities as a measure of its democratic sincerity. Failure of the new regime to take quick, decisive steps may irreparably harm its quest for popular legitimacy. This fact, however, must be tempered by the realization that many transitions to democracy do not represent a complete break from the past.\textsuperscript{140} In some cases, for example, members of security forces responsible for heinous behavior under the old order remain in influential positions. Indeed, their continued influence, especially in the form of the threat they represent for the disruption of the new order, may be so great as to induce the new leaders to grant them immunity from prosecution.\textsuperscript{141} Recognition of these realities, which may render prosecution...
impractical,\textsuperscript{142} forms a significant component of arguments against prosecution. Critics of prosecution also often express the fear that new and fragile democracies are vulnerable to social animosities created by prosecutions.\textsuperscript{143} Additionally, there is the trepidation that prosecutions that begin as well-intentioned efforts to bring the most flagrant violators of human rights to justice may deteriorate into witch-hunts and create a pervasive atmosphere of recrimination, thereby destroying the newly developing social fabric.

These valid concerns are countered by the argument that failure to prosecute may be even more counterproductive. For example, the granting of amnesty may not encourage national reconciliation, but only increase tension.\textsuperscript{144} Thus, the “restoration of the universality of democratic institutions restores to citizens full membership in society. Criminal justice suppresses the differences between those who had control over other persons' lives and those whose existence was at their mercy.”\textsuperscript{145} Moreover, such prosecutions may help bolster the legitimacy of the new regime by increasing people’s belief in the ability of the new democratic institutions to render justice.\textsuperscript{146}

Prosecutions also diminish the feeling that certain individuals or groups are above the law, a transformation in perception necessary for democratic institutions to acquire widespread legitimacy and to deter disruptions in the social order by perpetrators of state violence. To do less than prosecute may prove catastrophic for the long-term viability of the polity’s new democratic institutions. Whether new democratic regimes opt for prosecution for reasons of retribution or deterrence or both, an appeal to international law will make prosecution easier by allowing fragile democratic regimes to justify their actions as necessary for full acceptance by the international community.

\textsuperscript{142} Argentina and Uruguay provide two examples. Regarding Argentina, see Jose Zalakquett, \textit{Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints}, in \textit{STATE CRIMES}, supra note 141, at 43–44, 48–58. The Uruguayan situation is also described. \textit{Id.} at 58–64.

\textsuperscript{143} See generally \textit{id.}


\textsuperscript{145} \textit{Id.} at 81.

\textsuperscript{146} \textit{Id.} “Institutional disapproval of official policies that resulted in the violation of human rights underlines the discontinuity between the previous regime and the transitional government. Where transgressions were connected to the highest levels of governmental spheres, the criminal sentence dilutes any suspicion of continuity.” \textit{Id.}
IV. INTERNATIONAL HUMAN RIGHTS STANDARDS: INDIVIDUAL RESPONSIBILITY

A. Individual Rights and Obligations in International Law

While there has been growth in the rights of the individual under international law, there has been a concomitant rise in the duties of the individual. This has manifested itself in terms of the individual's relation to the community and to other individuals: each individual owes the community duties, and only in the community can the individual achieve his or her freest and fullest development. This development makes possible the prosecution of human rights violators from predecessor regimes.

Given the multiplicity of political beliefs that espouse human rights and duties, it is not surprising that the question of individual duties and responsibilities under international law is one of the most vexing and controversial issues of our time. Traditional international law furnishes a system of rules governing relationships among states; it also provides resolution to the majority of international disputes, even though some cases may not be resolvable through the application of legal rules. According to the positivist doctrine

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147 See generally Carl Aage Norgaard, The Position of the Individual in International Law (1962). Among the Romans, the individual was believed to have three duties towards other individuals: "to live honestly, not to injure another, and to give to each one that which belongs to him." The Enactments of Justinian: The Institutes, in II The Civil Law 5 (S.P. Scott trans., AMS Press 1973) (1932). By the nineteenth century, the concept of duties found expression in the works of socialist theory. See, e.g., Karl Marx & Frederick Engels, Manifesto of the Communist Party (Samuel Moore trans., 1948). Socialist theory maintained that the class struggle eventually would yield a state and society replete with the unity of rights and duties. Hence, the main theoretical underpinning of the socialist theory of citizens' rights, in accord with the achievements of the class struggle and the new socioeconomic order, is the unity of citizen's rights and duties. Such rights reflect neither the relationship between the individual and society nor between an abstract "individual" and the state. Instead, the relationship derives from society organized in a state and the rights mirror the relationship between the state and its citizens.

Capitalist-influenced theories also conceived of some linkage of rights and duties. The American Declaration of the Rights and Duties of Man of 1948 indicated that although human duties do not have the status of human rights, duties of a legal nature presuppose others of a moral nature that support them in principle and constitute their basis. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 9th Int'l Conf. of Am. States, Bogota, Supp. No. 43, at 133 (1949), in 6 Actas y Documentas 297–302 (1955). Thus, the legal duty to promote respect for human rights includes the legal duty to respect them. In the United States, duty is the correlative of right. Hence, whenever one person has a right, there is a corresponding duty on another person or upon the community.

148 Norgaard, supra note 147, at 79–98 (individual as subject of duties and subject of rights), 173–303 (individual as subject of responsibility and subject of proceeding).

149 Id.
underpinning the nation-state system, because international law was not based on the consent of individuals but on that of states, the latter were the sole subject of international law. Hence, international law dealt almost exclusively with the conduct of states rather than their citizens. This meant that the individual is never directly a subject of international law. It follows that if an individual is not the subject of international law, the individual is the object of it.

Further, for the positivists, the individual had rights and obligations in his or her own country or within the country of residence. There the individual could sue and be sued, and commit crimes and be punished. Such behavior would be regulated by the provisions of public and private domestic law. Although private international law regulated relations with individuals from foreign states, it also was thought to be a part of national law. Following this logic, on an international plane, only the actions of states could be prosecuted rather than the actions of individuals, for the individual could not commit international crimes but the state that did not restrain the individual from criminal actions could sometimes be held liable for damages. Hence, the sphere of international law was deemed to be entirely separate from that of national law.

In some instances, however, the individual does have a duty under international law, either conventional or customary, to perform or refrain from performing various acts. Although under international law individual rights that imply the duties of states are a relatively late development in jurisprudence, certain individual duties have existed for centuries. International crimes were punishable long before notions of human rights enjoyed their present popularity; piracy, for example, has long been seen as a crime against international law, punishable by any state in which the offender is seized. Individuals who are members of the armed forces of belligerent states are criminally liable for violations of the

151 See Norgaard, supra note 147, at 34–41.
152 See id. at 35, 39–41.
153 See id.
154 Id. at 41.
155 Id.
international law of war and may be punished by other belligerents. A state having custody of the offenders may impose sanctions by the exercise of the state’s jurisdiction rather than by any international procedure.

More recently, there has been an increase in the number of international criminal offenses for which there is individual liability. At the very end of World War II, the governments of the Soviet Union, France, Great Britain, and the United States signed an agreement that provided for the prosecution and punishment of the major Axis war criminals whose offenses had no singular geographic location. According to the Charter of the International Military Tribunal, a document annexed to the agreement, the jurisdiction of the Tribunal extended to individuals responsible for crimes against peace, war crimes, and crimes against humanity, whether or not they violated the domestic law of the country in which they occurred and regardless of the proffered defense of obedience to superior orders. In view of these international instruments, the Nuremberg Tribunal’s judgment of October 1, 1946,

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157 See generally Michael Berner et al., The Law of War (Richard I. Miller ed., 1975); Julius Stone, Legal Controls of International Conflict (2d ed. 1959).
158 The indictment of German Emperor Wilhelm II in the Peace Treaty of Versailles began a move toward a wider concept of international responsibility. The Emperor was arraigned not on the grounds that he was responsible for war crimes committed on orders by members of the German forces, but for an offense against international morality and the sanctity of treaties. However, the Netherlands refused to surrender the Emperor to whom it had granted asylum. No trial occurred. See generally Treaty of Versailles, June 28, 1919, 225 Consol. T.S. 188, arts. 227–47.
160 Yoram Dinstein, The Defence of “Obedience to Superior Orders” in International Laws 109–19 (1965). The defendants had argued that international law was linked to the action of sovereign states and provided no punishment for individuals. They also maintained that where the act in question was an act of the state, those who performed it had no personal responsibility and were shielded by the doctrine of state sovereignty. The Tribunal rejected these arguments, maintaining that “international law imposes duties and liabilities upon individuals as well as upon states. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” International Military Tribunal (Nuremberg), Judgment and Sentences, reprinted in 41 Am. J. Int’l L. 172, 220–21 (1947) [hereinafter Nuremberg Judgment].

The trial of major Japanese war criminals was conducted upon the same principles. The tribunal at Tokyo, whose jurisdiction was similar to that of the Nuremberg Tribunal, rendered its judgment on November 12, 1948, based upon the principles of the Nuremberg judgment. The functioning of the tribunals is examined in War and Neutrality, 15 Ann. Dig. 356 (Int’l Military Tribunal for the Far East 1948) (Japan).
rocked the foundations of positivist doctrine when it recognized individual responsibility for crimes against international law.\footnote{See generally Nuremberg Judgment, supra note 160; see also John A. Appleman, Military Tribunals and International Crimes (1954); Robert K. Woetzel, The Nuremberg Trials in International Law (1962).}

The implications of this departure from positivist orthodoxy were profound. International law had begun to recognize the individual as an independent jural entity who would not only be liable as an individual for his or her actions, but also would have rights, derived from natural law, that existed independently of the state or states under whose jurisdiction he or she lived.\footnote{Norgaard, supra note 147, at 174.} The individual would be capable of asserting those rights, when necessary, directly against states other than his or her own and without having to use his or her own as an intermediary. Lastly, an individual would be able to appeal directly to an international agency for protection and administration of justice, thus gaining international protection even against the individual's own state. The aim of this development was to make international law applicable \textit{ex proprio vigore} to individuals directly, and not only through the ordinary activity of states.

\section*{B. Codification of International Human Rights}

\subsection*{1. United Nations Documents}

Cold War frictions made the creation of a permanent international criminal court an impracticality. Nevertheless, the concept of direct responsibility of the individual for certain crimes under international law was affirmed by the United Nations General Assembly on December 11, 1946.\footnote{Benjamin B. Ferencz, Current Developments: The Draft Code of Offences Against the Peace and Security of Mankind, 75 Am. J. Int'l L. 674, 674 & n.2 (1981).} The General Assembly also declared genocide a crime under international law for which the perpetrators were punishable.\footnote{Id. at 674.} Following this vein, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948,\footnote{Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].} which passed in the same year as the non-binding Universal Declaration of Human Rights,\footnote{Universal Declaration of Human Rights, supra note 135.} indicates that those committing offenses under it "shall be punished, whether they are constitutionally responsible
rulers, public officials or private individuals. The four Geneva Conventions of 1949 conceive of criminal prosecutions, before national courts, of individuals accused of violations. Indeed, universal jurisdiction—the concept that human rights violations committed in one country are the legitimate concern of other states—has grown considerably since Nuremberg. The United Nations has also defined, as offenses against peace and security of mankind, various other acts, including acts of aggression, which were crimes under international law.

United Nations instruments also established the duties of the individual under international law. The reaffirmation of faith in the dignity and worth of the human person contained in the U.N. Charter also appeared in the Universal Declaration of Human Rights. Articles 2 and 6 of that Declaration not only recognize the right of the individual to be granted the dignity of the human being, but also give the individual the fundamental duty of treating others likewise. Article 29 of the Declaration also contains a provision explicitly establishing duties for the individual, noting that "[e]veryone has duties to the community." The obligations of the individual are manifested both in the International Covenants on Human Rights and the Optional Protocol to the International

167 See Genocide Convention, supra note 165, art. 4.
170 International crimes, unlike other crimes, are also an exception to the rule that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (quoting American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909)). Domestic prosecutorial discretion or amnesty laws used by new governments to avoid prosecuting members of past regimes violate the country's international legal obligations. See Yoram Dinstein, International Criminal Law, 20 Israel L. Rev. 206, 225 (1985).
171 See generally U.N. Charter; see also supra note 134.
172 Id.
173 See Universal Declaration of Human Rights, supra note 135.
174 Id. arts. 2, 6.
175 Id. art. 29.
Covenant on Civil and Political Rights. These developments show a trend in international law of increasing obligations imposed on individuals under international law even though the prosecution of international criminals continues to be the responsibility of states in the absence of an international criminal court. With both rights and duties under international law, individuals have a legal personality that flows partly from agreements between and among states that is sometimes capable of being exercised against states. This, however, is not a functional personality because it does not empower the individual to perform certain tasks assigned by states. Instead, the legal personality appears to derive from human needs and the social obligations of people to one another.

The positivist formula that states are subjects and individuals are objects of international law no longer corresponds to the present state of affairs. In reality, an international law of wider scope is necessary in order to serve new needs. At the present stage of the development of international law, however, individuals lack procedural capacity to lay their claims before international courts or tribunals. Moreover, such claims can be entertained only at the instance of the state of which the individual is a national or, in certain circumstances, by the international institution of which he or she is a servant. Although there is a trend toward the granting of procedural capacity to the individual for certain well-defined rights, the enforcement of human rights and duties will occur in the legal and political systems of the state in which the individual resides. Absent effective ways of enforcing both international human rights and obligations in the international arena, the task remains to those who urge their domestic governments both to honor these rights and to obtain redress for violations committed by those who once governed them, to promote human rights. In so doing, domestic courts may be able to justify prosecutions by relying on obligations found in international instruments to which the state is a party.
2. International Treaties

A number of international treaties, dealing with a particular human right, require state parties to criminalize certain behavior; some treaties demand punishment of offenders.\textsuperscript{179} A number of more modern treaties, however, go so far as to stipulate the means of domestic enforcement of specific human rights provisions. For example, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,\textsuperscript{180} enumerates required legal steps for the suppression of such practices.\textsuperscript{181} These provisions go far beyond the mere proscriptions of torture contained in the 1948 Universal Declaration of Human Rights\textsuperscript{182} and the 1966 International Covenant on Civil and Political Rights.\textsuperscript{183} Breaking with pure reliance upon criminal legal sanctions, the Convention also requires states to provide civil remedies for torture victims.\textsuperscript{184}

In contrast to the duty to punish, so clearly expressed in these specialized international instruments, various general human rights treaties on both the international and regional level do not demand that state parties punish those who violate the rights enumerated in the conventions. Instead, they give state parties discretion to

practices of apartheid and racial discrimination are violations of the \textit{jus cogens}—basic, fundamental, imperative, or overriding rules of international law, peremptory norms that "cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." \textcite{IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (4th ed. 1990).}


\textsuperscript{181} However, even states not party to the Convention may have a duty to act, deriving from customary international law. \textcite{See BROWNLIE, \textit{supra} note 178, at 513.}

\textsuperscript{182} Universal Declaration of Human Rights, \textit{supra} note 135.

\textsuperscript{183} Political Rights, \textit{supra} note 176.

\textsuperscript{184} Torture Convention, \textit{supra} note 180, art. 14. The Convention also provides for universal jurisdiction so that if the government of the state in which the offense occurred does not abide by its duty to prosecute, other states can take over the prosecution. \textit{Id.} art. 5(2). Universal jurisdiction thus functions as a link between the jurisdiction exerted by an international tribunal, as furnished by the Nuremberg model, and the jurisdiction of domestic courts over human rights offenders. However, domestic jurisdiction exercised by courts of newly democratized states over human rights offenders from previous regimes should be of paramount concern to these new governments and their citizens.
decide how to enforce the rights at the domestic level. In the international sphere, the *travaux preparatoires* for the International Covenant on Civil and Political Rights appear to have given considerable freedom to states in enforcing their treaty obligations. Yet, the text of the Convention can be construed by the designated international monitoring organization as requiring state parties to safeguard some rights through criminal sanctions. More important is the behavior of the Human Rights Committee, established to monitor compliance with the Covenant. The Committee has called on state parties to investigate, punish, and compensate in cases of serious violations of physical integrity—including torture, disappearances, and summary executions.

A regional instrument relevant for South Africa is the African Charter on Human and Peoples’ Rights, which has language requiring state parties to pledge not to violate human rights and to ensure that individuals in their countries are able to exercise their human rights fully. The African Charter provides that state parties “shall recognize the rights, duties and freedoms enshrined in [the] Charter and shall undertake to adopt legislative or other measures to give effect to them.” Moreover, it insists that every person “shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the . . . Charter . . .” and “shall have the right to an appeal to competent national organs against acts violating his fundamental rights.” As with the International Covenant on Civil and Political Rights, a duty to punish persons who interfere with the exercise of the human rights of others de-

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191 *Id.* art. 2.
192 *Id.* art. 7(1)(a).
rives from the requirement that state parties "ensure" such rights by effectively implementing protection provided by domestic law. 193

Given the preceding interpretation of international instruments, it is the obligation of governments to prosecute human rights violators. Therefore, new governments, like the one to be created in South Africa, that do not prosecute human rights violators from previous regimes risk being ostracized both politically and economically by other members of the international community who find it expedient to demand that human rights offenders be brought to justice. 194

V. CURRENT SOUTH AFRICAN AMNESTY LEGISLATION/PROSECUTION GUIDELINES

President De Klerk's hurried passage of the Further Indemnity Act over the objections of his own Parliament does not display a willingness on his part to subject those suspected of nefarious activities to standards of international law. 195 The Act has three especially glaring shortcomings. First, the aura of secrecy that surrounds the entire process creates the impression that the government will use the process to name only a few token perpetrators while concealing the extent of government-sanctioned or officially-orchestrated abuses of human rights of the type revealed in fora such as the Goldstone Commission hearings. Second, the provision forbidding criminal penalties evinces the government's unwillingness to bring the guilty to justice. Third, the language barring civil suits indicates a lack of empathy for victims and their families who may have been

193 See supra note 176 and accompanying text.
194 See, e.g., AHMAD M. KHALIFA, ADVERSE CONSEQUENCES FOR THE ENJOYMENT OF HUMAN RIGHTS OF POLITICAL, MILITARY, ECONOMIC AND OTHER FORMS OF ASSISTANCE GIVEN TO THE RACIST AND COLONIALIST REGIME OF SOUTH AFRICA 3–11 (1987). To achieve this end, new governments may even exercise their duty under international jurisdiction. Indeed, such a duty on the part of the state derives from international instruments' explicit language to the effect that the upholding of democratic values within the state is essential to international cooperation and harmony. In terms of European law, the Preamble to the European Convention refers to the existence of political democracy and a common observance of human rights as the most effective means of safeguarding "those Fundamental Freedoms which are the foundation of justice and peace." European Convention, supra note 189, at Preamble.

As the Cold War was coming to an end in 1990, the Charter of Paris for a New Europe heralded a future of intra-European relations "founded on respect and cooperation" and affirmed a desire to "consolidate and strengthen democracy as the only system of government of our nations." Summit in Europe: Excerpts from the Charter of Paris for a New Europe as Signed Yesterday, N.Y. TIMES, Nov. 22, 1990, at A16. See generally Dinah Shelton, REPRESENTATIVE DEMOCRACY AND HUMAN RIGHTS IN THE WESTERN HEMISPHERE, 12 HUM. RTS. L.J. 353 (1991).

195 See supra notes 92–106 and accompanying text.
irreparably harmed—physically, psychologically, financially, or otherwise—by their experiences. Thus, it seems that the passage of the legislation, rather than representing a symbol of the government's desire for reconciliation, may have heightened suspicions in the black community that the government takes the behavior of its agents lightly and has little interest in the creation of a legal system marked by equality for all under the law.

In contrast to the government's position, the ANC's stance on the issue of prosecutions seems to indicate acceptance of international legal standards. In late 1992, the organization maintained that

[i]t is not a question of victors punishing the vanquished, or of anyone losing or saving face, but of joint responsibility undertaken by all South Africans to affirm norms and standards of accountability that become part and parcel of the new democratic society and bind all future governments. People in positions of power, now and in the future, must know that they will be held accountable for abuses of the law and violations of human rights not only by history but by the agencies of law. 196

Although the desiderata expressed are laudable, if the organization wishes to take the moral high road it must eschew the statement's nebulous language in favor of detailed guidelines on the proposed treatment of human rights offenders both within its own ranks and in the white government. Although arriving at such guidelines requires considerable time, the organization should issue interim guidelines to which it will adhere in framing future procedures. 197 Those guidelines should have the following seven major elements:

First, the ANC must stress its intention to ratify major international human rights instruments. The ANC can then appeal to these instruments in justifying the need for prosecutions.

Second, punishable offenses must be specified. They should include the commission of torture, 198 deaths in detention, 199 and

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197 Such guidelines should be used by the ANC in accordance with its pledge to bring human rights offenders within the organization to justice. Later, after transition to a democratic order, the guidelines can be used by the ANC if it dominates the new government or as a basis for negotiating on the issue of prosecution if it rules in coalition with the NP or other groups.

198 South African pathologist Dr. Jonathan Gluckman reported in July 1992 that 90% of a sample group of 200 persons on whom he had performed autopsies had been tortured to death. Bill Keller, South Africa Police Said to Kill Captives, N.Y. TIMES, July 27, 1992, at A5.

extra-legal killings. These were among the most brutal actions perpetrated by the authorities under the apartheid regime and the actions for which there is the best evidence of direct culpability.

Third, as with cases of prosecuting human rights violators elsewhere in the world, the question of who should be punishable for atrocities—those who gave orders, those who followed them, or both—must be resolved. A starting point for further debate would be to hold responsible those who created the heinous policies or practices, those who carried them out, and those who assisted in their implementation.

Fourth, the investigations must be conducted by neutral parties whose own conduct with regard to human rights matters is beyond reproach. While at present it may be sufficient for the ANC to choose well-known individuals from inside the country, prosecutions in a new governmental order should be carried out by mutually agreed-upon members of the international community, ideally drawn from the United Nations or the international human rights bar. This would have the effect of creating the impression that the body is as impartial as possible and would also lend the imprimatur of international law to the government's efforts.

Fifth, the commission of inquiry must have full investigative powers, including the authority to subpoena witnesses and documents. By its own admission, the ANC's commission found that its work was hindered because it lacked this power. Typically, NP government-appointed commissions have also lacked this broad mandate.

Sixth, the proceedings must be accompanied by full disclosure of the identity of those responsible for human rights violations, the

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200 A number of these are subjects of the Goldstone Commission hearings. See supra note 26 and accompanying text. In 1990 a government-appointed commission under Justice Louis Harms, known as the Harms Commission, considered the issue of state-sponsored violence via hit squads and state operatives of the Civil Cooperation Bureau and other organizations. *Amnesty Bill*, supra note 92, at 3. It emerged that "hit men" were used to assassinate government enemies. *Id.* The Commission's report recommended that those responsible be brought to justice, but De Klerk never acted on it. *Id.*

201 Perhaps the most famous example of a case in which the identity of those responsible is known is that of anti-apartheid activist Steve Biko who died in police custody in 1978. The case is discussed in detail in Lynn Berat, *Doctors, Detainees, and Torture: Medical Ethics v. the Law in South Africa*, 25 STAN. J. INT'L L. 499 (1989).

202 The ANC commission of inquiry felt that its own composition created the impression of pro-ANC bias, particularly among former detainees of whom only a fraction testified. See supra notes 107–115 and accompanying text.

203 See supra notes 107–115 and accompanying text.

204 See supra notes 74–76 and accompanying text.
nature of their offenses, and the identity of their victims. The NP Minister of Justice has argued, with regard to the Further Indemnity bill, that secrecy is necessary "to encourage prospective applicants to submit their applications with confidence."205 The ANC commission heard evidence in camera because many of the accused were unable to rebut the serious allegations made against them and because many former detainees were afraid of those who had mistreated them. Amnesty International, however, was present. Although the ANC's reasons for secrecy have some merit, such concerns can be obviated by allowing for full legal representation206 of those who appear before the commission and by providing police protection for the accused, the accusers, and witnesses.207

Seventh, guidelines must permit criminal and civil proceedings so as to underscore the seriousness with which the government regards the past behavior. As for criminal proceedings, procedure must specify the range of possible punishments—from amnesty208 to public censure, from pardon to imprisonment (including life terms)—as well as issue sentencing guidelines. Civil suits must also be available to victims who, if they cannot afford the legal costs, should be provided with an attorney. Only if both types of suits are allowed will there be a clear message that those who acted with impunity, or who might be tempted to do so, will be treated accordingly.

VI. CONCLUSION

As the world witnesses an ever-growing number of transitions to democracy, the issues of whether and how to address the human rights abuses perpetrated by the old regime are among the most anguish subjects confronting newly democratized societies. In the South African case, as elsewhere, the difficulty of moving from

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205 Amnesty Bill, supra note 92, at 2.
206 Those who cannot afford lawyers should have them provided. Indeed, the availability of legal aid has been a difficult problem in South Africa. On legal aid, see generally Lynn Berat, Legal Aid and the Indigent Accused in South Africa: A Proposal for Reform, 18 GA. J. INT’L & COMP. L. 239 (1988).
207 One disturbing aspect of the ANC Commission’s behavior is that it released to Nelson Mandela the names of those it held responsible for atrocities but did not include them in the report. Horror Camps Report, supra note 109, at 3. If, after the ANC conducts its promised further investigations, the names are still not released, the ANC will lose much of its moral credibility on the issue of prosecutions.
208 Amnesty, the forgetting of an offense, must be distinguished from pardon, the foregoing of imposing a penalty.
a situation of widespread abuse of human rights to a just legal and political order is complicated by the fact that the moral credibility of the new government or elements within it may be suspect. For example, if a new government takes the form of a pact between the NP and the ANC, there is little hope that the NP will be prepared to expose those who have served it. Similarly, any failure of the ANC to punish those of its members who abused human rights in various ANC refugee camps will taint that organization's ability to take the moral high road in ferreting out guilty members of the old regime. If the new South African government includes Inkatha, the behavior of its members in violent incidents throughout the country also will call its moral *bona fides* into question on the issue of prosecutions.

Nevertheless, in order to achieve the moral renewal of society essential to the survival of a democratic ethic, a new South African government can enhance its own legitimacy—both domestic and international—by appealing to international human rights standards that require prosecution of human rights offenders. Before any action is taken, however, a coherent and comprehensive set of guidelines, building upon those suggested here, must be devised so as to maximize the consistency and effectiveness of the government's policy on the prosecution of human rights offenders.