Volume **SIX** • Section **FIVE** • Chapter **TWO**

Findings and Recommendations

HOLDING THE STATE ACCOUNTABLE

Holding the State Accountable

1. In its five-volume Final Report, the Truth and Reconciliation Commission (the Commission) was guided by Section 4 of its enabling Act[21] in evaluating the role played by those who were involved in the conflicts of the past. The relevant sections read as follows:

   The functions of the Commission shall be to achieve its objectives, and to that end it shall –

   (a) Facilitate and where necessary initiate or co-ordinate, enquiries into….

      (iii) The identity of all persons, authorities, institutions and organizations involved in gross violations of human rights;

      (iv) The question whether such violations were the result of deliberate planning on the part of the State or a former state or any of their organs or of any political organization, liberation movement or other -group or individual; and

      (v) Accountability, political or otherwise, for any such violations.

2. Describing how findings were made, the Commission stated:

   … the Commission is of the view that gross violations of human rights were perpetrated in the conflicts of the mandate era. These include:

   The state and its security, intelligence and law-enforcement agencies, the SAP, the SADF and the NIS …[22]

3. The Commission wishes to restate its position in its Final Report that, whilst it has made adverse findings on the basis of the evidence it received, it remains a commission of inquiry and, as such, is not bound by the same rules of evidence as a court of law. The Commission based its findings on a balance of probabilities and its conclusions should not be interpreted as judicial findings of guilt but rather as findings of responsibility within the context of its enabling Act.

4. In making these findings, the Commission was guided in its deliberations by international humanitarian law and the Geneva Conventions. The Commission

21 The Promotion of National Unity and Reconciliation Act No. 34 of 1995.

22 Volume Five, Chapter Six, p. 209.

also endorsed the internationally accepted position that apartheid was a crime against humanity.

5. Whilst the Commission was obliged by its enabling act to evaluate the conduct of all those responsible for committing gross human rights violations, the Commission did not hold that all parties were equally responsible for the violations committed in the mandate period. Indeed, the evidence before the Commission has revealed that the former state was the major violator.

6. The Commission wishes to restate that a legally constituted and elected government is expected to act lawfully and in accordance with accepted international principles of humanitarian law. A state must be held to a higher standard of moral and political conduct than any other role player in a violent conflict. After all, a state has at its command powers, resources, privileges, obligations and responsibilities that liberation movements and other role players do not.

7. The Commission's primary finding in its previous report was that:[23]

The predominant portion of gross violations of human rights was committed by the Former State through its security and law-enforcement agencies.

Moreover, the South African State in the period from the late 1970's to early 1990's became involved in activities of a criminal nature when, amongst other things, it knowingly planned, undertook, condoned and covered up the commission of unlawful acts, including the extra-judicial killings of political opponents and others, inside and outside South Africa.

In pursuit of these unlawful activities, the State acted in collusion with certain other political groupings, most notably the Inkatha Freedom party (IFP).

8. The Commission made its findings at a time when the amnesty process had not yet been completed. The amnesty process is now complete and the Amnesty Committee has completed its report.[24] This chapter will show that amnesty decisions have tended to support the original findings of the Commission. In dealing with the findings and an analysis of the amnesty process, it is necessary to review how international humanitarian law has evolved to deal with conflicts and gross human rights violations.

23 Volume Five, Chapter Six, p. 212.
24 See Section One of this volume.

THE APPLICATION OF INTERNATIONAL LAW TO THE SOUTH AFRICAN SITUATION

Introduction

9. The Commission made findings against the South African government and its security forces based on the information it received. These included statements from victims, submissions by organs of civil society, political parties, international human rights groups, local non-governmental organisations (NGOs) and community-based organisations (CBOs), confessions made by amnesty applicants and many other interested parties.

10. It was, however, the statements made by individual victims and perpetrators to the Commission that presented the most compelling picture of the reign of terror conducted by the organs and agencies of the former state. Overwhelmingly, these statements revealed a picture of the gross human rights violations that were perpetrated by the state. These included the widespread use of torture, the use of excessive and indiscriminate force in public order policing, the abduction and disappearance of activists and the extrajudicial killing of political opponents and activists.

11. The Commission was able to investigate a number of cases thoroughly and also used its section 29 powers to hold subpoena hearings which effectively compelled many perpetrators to apply for amnesty.

12. In order to ensure the integrity of the information that it received, the Commission applied a policy of low-level corroboration to each case before declaring a person to have been a victim. Many have criticised this policy. However the Commission did not have the capacity to conduct a full-scale investigation into each case. Therefore, it selected cases and conducted strategic investigations. The Commission acknowledges the fact that more thorough investigations may have yielded more information about particular individuals and incidents. However, it is the Commission's view that it is unlikely that this would have impacted on its view of the role that the former state played in the commission of gross human rights violations, nor on its view that the former state acted in a criminal manner.

13. It is indeed the Commission's opinion that more information would simply have strengthened the patterns that had already emerged.

14. The Commission recorded the fact that patterns of abuse manifested themselves throughout South Africa in much the same way. These were not isolated incidents or the work of mavericks or 'bad apples'; they were the product of a carefully orchestrated policy, designed to subjugate and kill the opponents of the state. In any event, the Commission's findings are supported by the submissions made by many victims to various human rights organisations during the apartheid period.

15. The Commission has also been criticised for making findings without having completed the amnesty process. It should be noted, however, that the Commission did take cognisance of the information contained in many applications. Further, the Commission did not make findings in respect of specific incidents where applications had not been heard or where the Amnesty Committee had not yet made a decision.

FINDINGS OF THE COMMISSION IN RESPECT OF THE FORMER STATE AND ITS ORGANS

Categories of gross human rights violations defined in the Act

State responsibility for torture

16. The Commission found in its five-volume Final Report that torture was systematic and widespread in the ranks of the South African Police (SAP) and that it was the norm for the Security Branch of the SAP during the Commission's mandate period.

17. The Commission also found that the South African government condoned the practice of torture. The Commission held that the Minister of Police and Law and Order, the Commissioners of Police and Commanding Officers of the Security Branch at national, divisional and local levels were directly accountable for the use of torture against detainees and that Cabinet was indirectly responsible.

18. The Human rights instruments that are pertinent to the question of torture include:
    a. The International Covenant on Civil and Political Rights;
    b. The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, and
    c. The International Convention on the Elimination of All Forms of Racial Discrimination.

19. These Conventions require that no one shall be arbitrarily deprived of life and that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

20. The Convention Against Torture requires that each State Party 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'. The Convention allows no exception to this, and for that reason it is important to note the following:

No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency may be invoked as a justification for torture.

21. The Commission made its findings on torture based on evidence received from victims through the human rights violations process, perpetrators in amnesty applications and evidence given before the Commission by senior politicians and security force officials of the former government. In addition, local and international human rights groups made a number of submissions to the Commission, based on the studies they had carried out during the apartheid period.

22. The Commission received over 22 000 statements from victims alleging that they had been tortured. In most instances, the torture had been at the instance of members of the security forces.

23. The Commission received a number of applications from amnesty applicants applying for more than ninety-eight incidents of torture and severe assaults.

24. It is important to note that, although the Commission received over 22 000 statements from victims and only very few amnesty applications for torture, many human rights groups estimated that more that 73 000 detentions took place in the country between 1960 and 1990. It was established practice for torture to accompany a detention. Detention, arrest and incarceration without formal charges were commonplace in South Africa at that time. Whilst a plethora of laws existed to silence political dissent, the notorious section 29 of the Internal Security Act 74 was used to detain people indefinitely, without access to a lawyer, family member, priest or physician. Section 29 also permitted the state to hold a detainee in solitary confinement.

25. It is accepted now that detention without trial allowed for the abuse of those held in custody, that torture and maltreatment were widespread and that, whilst officials of the former state were aware of what was happening, they did nothing about it.

26. The torture techniques that have been identified through these cases are the following: assault; various forms of suffocation, including the 'wet bag' or 'tubing' method; enforced posture; electric shocks; sexual torture; forms of psychological torture, and solitary confinement.

27. A submission made to the Commission based on a study released by doctors between September 1987 and March 1990[25] found that 94 per cent of detainees in the study claimed either physical or mental abuse. The study found that the beating of detainees was widespread and that half of those alleging physical abuse still showed evidence of the abuse on physical examination. On assessment of their psychological status, 48 per cent of the former detainees were found to be psychologically dysfunctional.

28. Deaths in detention were also commonplace and were the result of the treatment meted out to persons in custody.

29. The Commission found that a considerable number of deaths in detention were a direct or indirect consequence of torture, including those cases where detainees had taken their own lives. The Commission declared those deaths to be induced.

30. In its Final Report, the Commission found that 'little effective action was taken by the state to prohibit or even limit [the use of torture] and that, to the contrary, legislation was enacted with the specific intent of preventing intervention by the Judiciary'.[26] The Commission found that the South African government condoned the use of torture as official practice.[27]

25 Affiliated to NAMDA practicing at a clinic near the centre of Durban.

26 Volume Two, Chapter Three, p. 220.

27 Ibid.

31. Whilst the Commission received thousands of statements alleging torture, few amnesty applications were received specifically for torture. Those received were from applicants Andries Johannes van Heerden [AM3763/96]; Willem Johannes Momberg [AM4159/96]; Stephanus Adriaan Oosthuizen [AM3760/96]; PJ Cornelius Loots [AM5462/97]; Jacques Hechter [AM2776/96]; Christo Nel [AM6609/97]; Lieutenant Colonel Antonie Heystek [AM4145/97]; Colonel Anton Pretorius [AM4389/96]; Helm 'Timol' Coetzee [AM4032/96]; Johannes Jacobus Strijdom [AM5464/97]; Paul van Vuuren [AM6528/97]; Roelof Venter [AM2774/96]; Eric Goosen [AM4158/96]; Marius Greyling [AM8027/97]; Karl Durr [AM8029/97]; Frans Bothma [AM8030/97]; Andy Taylor [AM4077/96]; WCC Smith [AM5469/97]; Jeffrey Benzien [AM5314/97], and Gert Cornelius Hugo [AM3833/96].[28]

32. It is clear that it was the norm for agents of the state to carry out various torture practices on those who were in their custody or incarcerated. In dealing with questions of accountability, one needs to establish whether the state was aware of the torture taking place and whether it took any action to prevent it happening. In other words, did the state take any action against its agents for the commission of torture and, once it knew that torture was widespread, did it do anything to prevent its repetition?

33. The former government conceded that torture occurred, but claimed that it represented the actions of a few renegade policemen. Former President FW de Klerk stated in his submission to the Commission that:

The National Party is prepared to accept responsibility for the policies that it adopted and for the actions taken by its office bearers in the implementation of those policies. It is however not prepared to accept responsibility for the criminal actions of a handful of operatives of the security forces of which the Party was not aware and which it never would have condoned.[29]

34. Contrary to Mr de Klerk's claim of ignorance of the practice, Mr Leon Wessels, the National Party's former deputy Minister of Police, conceded that it was not possible to deny knowledge of torture. Mr Wessels testified at a special hearing on the role of the State Security Council that:

it was foreseen that under those circumstances people would be detained, people would be tortured, everybody in the country knew that people were tortured.[30]

28 For details see Volume Two, Chapter Three, pp. 214–18. See also section on Torture and Death in Custody, pp 187–214.

29 Second submission by the National Party, 14 May 1997, p. 10.

30 Johannesburg hearing, 14 October 1997.

35. The principles that have been enunciated earlier in this chapter can be summarised as follows:
    a The state is held strictly responsible for the conduct of its agents who commit gross violations of human rights.
    b State responsibility may be invoked even where the identity of the agent is unknown.
    c The state has the evidentiary burden to explain its action in the face of credible allegations of abuse by state agents.
    d States are also held responsible for 'lack of due diligence to prevent the violation or to respond to it' (official tolerance).

36. A key factor here is proving that the human rights violation took place with the support or tolerance of public authority or that the state allowed the violation to go unpunished.

37. The Commission noted in its Final Report that victim statements and amnesty applicants implicated a number of senior officers for having had knowledge of or having covered up incidents of torture. In the case of Mr Stanza Bopape, the then Commissioner of Police covered up the actions of the officers responsible for Bopape's death. Condonation of torture by superior officers was further evidenced by the fact that most well-known torturers were promoted to higher positions.

38. The Commission also noted that no prosecutions resulted from allegations of torture, even though the use of torture emerged in most political trials. The cases of Ahmed Timol, Neil Aggett and Lindy Mogale are pertinent.

39. Magistrates and judges seldom protected detainees or ruled in their favour, even though a pattern of abuse was familiar.

40. In a number of cases, the families of victims or detainees themselves laid charges against the state, resulting in out-of-court settlements.

41. More distressing is the fact that many judges and magistrates continued to accept the testimony of detainees, despite the fact that most of them knew that the testimony had been obtained under interrogation and torture whilst in detention. In this way, the judiciary and the magistracy indirectly sanctioned this practice and, together with the leadership of the former apartheid state, must be held accountable for its actions.

42. A number of human rights bodies made representations to the state about the treatment of detainees and persons in custody. In April 1982, the Detainees Parents Support Committee met with the Minister of Law and Order and the Minister of Justice to submit a dossier that included seventy-six statements alleging torture. The dossier named ninety-five individuals as perpetrators and covered the period 1978 to 1982. The ninety-five individuals were all members of the Security Branch and came from eighteen different branch offices. Of the eighteen offices detailed, John Vorster Square, Protea police station and the office in Sanlam building in Port Elizabeth headed the list. A report was subsequently made to parliament, which was informed that forty-three of these cases had been investigated and that eleven of the claims were unfounded. Presumably the remaining thirty-one were found to be of substance, yet no action was taken.

43. In May 1983, the Ad Hoc Committee of the Medical Association of South Africa (MASA) published a report as a supplement to the South African Medical Journal in which it stated that:[31]

there are insufficient safeguards in the existing legislation to ensure that that maltreatment of detainees does not occur. Persuasive evidence has been put before the Committee that where harsh methods are employed in the detention and interrogation of detainees, this may have extremely serious and possibly permanent effects on the physical and mental health of the detainee...

44. The only response from government was a set of directives issued by the Minister of Law and Order in December 1982 as safeguards for those detained under Section 29 of the Terrorist Act. Paragraph 15 stated that:

A detainee shall at all time be treated in a humane manner with proper regard to the rules of decency and shall not in any way be assaulted or other wise ill-treated or subjected to any form of torture or inhuman or degrading treatment.

45. The state did not bother to ensure that the directives were explained and no system was put in place to monitor whether detainees were being treated properly or that their human rights were being safeguarded.

46. The case of Mr Stanza Bopape implicates a number of superior officers in the cover-up and tolerance of torture.

31 This followed the study done by NAMDA referred to earlier.

47. Given the statements of victims, their families, the testimony of amnesty applicants such as Messrs Charles Zeelie, Jeffrey Benzien, Andy Taylor and Paul van Vuuren, and Generals Loggerenberg, Van der Merwe and others on the practice of torture and the condonation and cover up by superior officers when cases went horribly wrong, there can be no doubt that torture was widespread, well known and tolerated.

48. Although aware of the opprobrium being directed at them for this practice, the state continued to do nothing to end it. The state also did nothing about the violators or the agency that harboured them, the Security Branch. No mechanisms were put in place to monitor whether torture was still happening, nor to prevent it from happening. Neither the superior officers nor the officers carrying out the torture were sanctioned in any way. The attitude of the former state can only be described as one that 'tolerated and officially condoned' the practice of torture and the actions of their agents.

49. The Commission therefore confirms the findings it previously made, based on the further evidence it has received that the former state and its agents were responsible for the torture of those they regarded as opponents; and that the state perpetuated a state of impunity by tolerating and sanctioning the practice of torture, the legacy of which still exists today.

Abductions

50. The Commission received fifty-seven amnesty applications for eighty incidents of abduction. The fifty-seven applications included the abduction of thirty-five Umkhonto we Sizwe (MK) operatives, eighteen of whom were abducted inside the country and seventeen outside South Africa.

51. Of the fifty-seven abductions, more than twenty-seven resulted in the death of the victim. This raises the possibility that targeted assassinations may have been the perpetrators' intention from the outset.

52. The Commission also received more than 1500 statements dealing with disappearances, including enforced disappearances.

53. The Commission stated in its Final Report that the former state's primary purpose in carrying out abductions was to obtain information. Abductees were often killed in a bid to protect the information that had been received.

54. The victims of these abductions either belonged to MK or supported the movement internally. Amnesty applicants testified that they found it preferable to abduct rather than detain officially. Once the information was obtained, the abducted person would be killed. In many other instances, applicants testified that they attempted to 'turn' or 'recruit' individuals into working for the state. The Commission also learnt that, where the attempt to turn the abductee failed, killing the individual became necessary – although many amnesty applicants denied this. However, in terms of international law, families merely have to prove that the abductee was last seen alive in the hands of an agent of the state for the obligation or onus to explain the deceased's whereabouts to fall on the state.

55. The Commission also stated in its Final Report that this *modus operandi* allowed for greater freedom to torture without fear of consequences. The testimony of many *askaris* at amnesty hearings was at odds with that of white members in their particular units. In their testimony, *askaris* highlighted the brutality of the torture and abuse that many abductees were subjected to. The cases of Nokuthula Simelane[32] and Moses Morodu[33] offer examples of this.

56. It is also possible that operatives lost all sense of reality when dealing with abductees and became totally enmeshed in the brutality of the moment. Had the abductee been released or the body found, the heinous behaviour of the abductors and torturers would have been revealed. This was possibly an even more powerful motive to conceal the truth.

57. In its findings on extrajudicial killings, the Commission noted that a particular pattern was established: that is, political opponents were abducted, interrogated and then killed. In evidence that emerged through the amnesty process, another pattern emerged: that of abduction followed by torture or undue pressure to inform and/or become an informer or *askaris*. Those who did not succumb in this way were killed. Information was then leaked to MK that those who had been captured had been turned and had become *askaris*. The most devastating effect of this practice was that those who were abducted did not come home and that families had to live with the political stigma that their loved ones were perceived to be traitors.

32 Amnesty hearings, Pretoria, 28–30 June 1999 and 29–30 May 2000; AC/2001/185.
33 Amnesty hearing, 26 October 1999; AC/2000/010.

58. These abductions must be distinguished from those incidents where the intention of the perpetrators at the outset was to assassinate political opponents. In such operations, the abduction itself was merely a means to capturing the person, and the interrogation and torture that followed were secondary to the intention to kill.

59. Thus the cases of Griffiths Mxenge, Topsy Madaka and Siphiwe Mthimkulu, the 'Pebco Three', the 'Cradock Four' and the Ribeiros should be classified as political assassinations rather than abductions. Here the intention of the perpetrators was to eliminate the individuals concerned and to silence them forever.

60. In the KwaNdebele group of cases, abduction was followed by interrogation, torture and beatings and the abductee was then returned. The intention of these abductions was to intimidate and silence opposition.

61. The principle of customary international law is to hold the state responsible in instances such as these on a strict liability basis. Thus, the former state must be held strictly responsible for the abductions, disappearances and deaths of the abductees. The state is held responsible even in those instances where the perpetrator may not have intended that the final consequence of the abduction would be the death of the abductee. The intention of the perpetrator is irrelevant; the fact of the matter is that death ensued.

62. In those instances where the purpose of the abduction was killing, the state incurs responsibility for both the killing and the abduction. In terms of the accepted principle, even where the perpetrator responsible for the abduction or the disappearance has not been identified, it simply needs to be established that forced disappearance was committed by a police agent. In such an instance, the state is held responsible for accounting for the disappearance.

63. International human rights law places the burden on the state to account for the actions of its agents. Thus it is not sufficient for the state to allege (as it did in the cases of Nokuthula Simelane[34] and the four MK members abducted from Lesotho (namely Nomasonto Mashiya, Joyce Keokanyetswe 'Betty' Boom, Tax Sejamane and Mbulelo Ngono)[35] that they recruited or turned these agents and that were returned to exile in order to infiltrate the movement.

34 Amnesty hearings, Pretoria, 28–30 June 1999 and 29–30 May 2000. See also AC/2001/185.

35 See amnesty hearings, Johannesburg, 10–13 October 2000 and Bloemfontein 13–15 November 2000.

64. In all of these cases, using the strict liability test, it is likely that the state would be held criminally liable for their disappearances. In the case of Kurt v Turkey, the European court of human rights held that, once the applicant was in the custody of the security forces, the responsibility to account for the victim's subsequent fate shifted to the authorities.

65. In terms of international law and a state's responsibility to guarantee human rights, a state can be held responsible for failing to prevent or respond to a violation. As early as the 1980s, the former state was aware of the fact that disappearances were taking place. Allegations were mounting against the security forces as being responsible.

66. The question is: what did the state do to investigate the allegations being made or what action did the state take against those alleged to be involved in such practices?

67. Although it has been shown that agents in the employ of the state were responsible for the abductions of many political activists, that a pattern had been established and that this had become part of an orchestrated grand plan, the leadership of the former state continued to deny its responsibility for these gross human rights violations. Indeed, in the light of the above, Mr de Klerk might want to reconsider his theory of 'bad apples and mavericks'[36]. There is no doubt that the apartheid state must be held responsible for the actions and deeds of its agents and that the state's failure to investigate or to take action created a climate of impunity and criminality in the security forces.

68. A key factor when deciding whether a state is responsible is whether the violation has taken place with the support or tolerance of the authority or the state has allowed the violation to go unpunished. In this instance, the state allowed the death squads to act with impunity and abduct, interrogate, torture and kill. Nothing was done to stop them, even when the disappearances became public.

69. Instead the state continued to claim innocence and chose rather to sully the reputations of those who had been abducted and killed. As a result, the minds and memories of family members and loved ones have been haunted by uncertainty, suspicion and mistrust as they continue to wonder whether the loved one was a spy and why the loved one has not returned home.

36 Evidence by Mr FW de Klerk on behalf of the National Party to the TRC, 14 May 1997.

70. The amnesty cases and the evidence of the victims before the Commission have been sufficient to establish a pattern and an assumption that these victims must have died at the hands of the forces that abducted them. In this regard, efforts must be made to restore their dignity and true reputations as patriots who paid the price and were killed in the violence of the past.

71. The law must also take its course in dealing with those who came forward with half-truths and lies. Efforts must be made to integrate and ease the lot of those who became *askaris*. In most instances, their testimony was at considerable variance with that of their white colleagues and superiors. We may never know what pressure was placed on them to 'turn'. What we do know is that, in those instances where they did not succumb or refused to do so, they were killed horribly. The cases of Simelane and Masiya are examples of this.

State responsibility for extrajudicial killings

72. The Commission noted in its Final Report that, as the levels of conflict intensified in the country, the security forces came to believe that it was far preferable to kill people extrajudicially than to rely on the legal process. Many amnesty applicants testified to this in their applications. Deaths in detention began in the 1960s and were attributed to suicides, accidents and natural causes. [37]

73. Thereafter came the clandestine killings and the death squads. A factor that may account for the rise in extrajudicial deaths and the setting up of death squads was the law that required an inquest in the case of an unnatural death. In order to have an inquest, a body must be produced and examined. While the dead cannot speak for themselves, a forensically examined body could and often did.

74. Inquests are the judicial arena in which the magistracy has shown blind and obdurate loyalty to the former state over the rule of law. In most inquest hearings, despite evidence to the contrary, the word of the police and particular members of the Security Branch was accepted almost unquestioningly, often leaving families and those who defended them astonished.

75. The value of the inquest proceedings was that, in many instances, families of victims were represented by lawyers, who did their utmost to uncover the truth and used the law to do it. This is where the reputation of the former government

37 See Volume Two, Chapter Three, pp. 205–15.

came unstuck. The apartheid government was obsessed with rule by law, and laws were created to cover almost every illegitimate act they could get away with. However, it was legal proceedings in inquest matters that stripped away the veneer of legitimacy and revealed the venality of the agents of the state. The adverse publicity that the government attracted abroad as a result of these deaths in detention forced the state to go underground and look for other mechanisms to deal with persons perceived to be political opponents.

76. Brigadier Jack Cronje [AM2773/96], one of the first officers to appear before the Amnesty Committee, testified that the Security Branch was given orders in 1986 to drop all restraint when dealing with the enemies of the state.

It didn't matter what was done or how we did it, as long as the floodtide of destabilization, unrest and violence was stopped.

77. This, in effect, gave the security forces *carte blanche* to maim and kill, allowing the former apartheid state to move even further into the criminal arena. This was particularly so in the case of its internal operations, where it had to operate at a covert and clandestine level so that no operation was traceable to the state. It was this that led directly to the setting up of various death squads in the country – such as the Civil Co-operation Bureau (CCB) and Vlakplaas – and the training of surrogate forces such as the hit squads in KwaZulu and Natal.

78. In its quest for legality, the former state tried to draw a veil of legitimacy over its operations in the neighbouring states. Even today the military argues that its operations were legitimate, authorised and thus legal. Raids were increasingly openly acknowledged. These raids remain questionable in international law.

79. The fact that our amnesties may not be valid across our borders has meant that there have been almost no applications for amnesty from members of the military.

80. A factor that the state also relied on was that assassinations could be blamed on the liberation movements and, where people disappeared, the police often claimed that those involved had gone into exile. The fact that there was nobody to draw attention to the actions of the state meant that there was no call for an inquiry or inquest, thus creating a further level of impunity for agents of the state. As time went on, the deeds became more daring and more grisly. This is, of course, the problem with license and impunity, where political actions become increasingly blurred and descend into total criminality. It accounts for

why people like Colonel Eugene de Kock and some amnesty applicants will remain in custody. Some of their actions were acts of sheer criminality.

81. The Commission relied on a preliminary analysis of amnesty applications. Three years later, now that the amnesty process is complete, it is clear that the information that emerged from the amnesty hearings confirms the patterns and classifications made in the Final Report.

82. The archive of the Commission has been considerably enriched by the detail that has emerged through the amnesty hearings.

83. Amnesty applications can be categorised as follows:
    a abductions followed by killing (discussed earlier);
    b assassinations of persons considered to have a high political profile both inside and outside the country;
    c assassinations of individual MK and Azanian People's Liberation Army (APLA) personnel both inside and outside the country, and
    d cross-border raids.

84. Again, if one examines the picture that emerges from the amnesty process, it is clear that authorisation for individual assassinations took place at different levels. Agents believed that they had a general mandate to kill political opponents whom they believed to be contributing towards the instability of the state. Evidence in the 'Pebco Three' hearing confirms that there had been an instruction from the Minister of Law and Order to 'destabilise the Eastern Cape'. The testimony in amnesty hearings supports the view that, as far as external operations were concerned, approval was usually sought from Security Branch headquarters.

85. TREWITS[38], which was set up in 1986, probably represented the state's attempt to collect and share intelligence between all structures, with the intention of operating in a more co-ordinated manner and planning joint operations. Given the fact that both National and Military Intelligence sat on this structure, the state cannot deny that intelligence was used to identify and then eliminate those regarded as political opponents.

86. It is the entrapment operations of the state that really engender a sense of revulsion and horror because they targeted not trained military cadres, but callow township youth who were perceived to be threats to the state because of their

38 See Volume Two, Chapter Three, pp. 275–98 for a discussion on the establishment of TREWITS and target development.

political beliefs. The operations involved mainly youth and school activists who were perceived to be potential MK recruits. The nature of the different operations reveals real evil in their planning and execution. The incident of the 'Nietverdiend Ten'[39] and the KwaNdebele youth[40] highlight the grisly machinations of state agents.

87. The supply of defective hand grenades to the Duduza youths by the Soweto security structure defies all rules of justice.[41] What kind of state targets its own youth in this way? How can a politician fail to ask questions after hearing about these incidents?

88. The decision to grant amnesty in this instance raised some serious questions for the Commission. Did we not take reconciliation too far? Surely the killing of youths cannot be justified as political, and raises questions about the proportionality factor.

89. The amnesty applicants have confirmed their own role in the extrajudicial killings of political opponents. In terms of their actions, they have breached the provisions of the Geneva Conventions and the principles enshrined in international humanitarian law. They have also contravened South Africa's own domestic law. In confirming that they acted as members of the security forces, their actions create a problem for the former state, which must shoulder the responsibility for their actions. There can be little doubt that, in setting up these covert death squads, the former state could have had no misunderstanding about the intention of these units, and indeed intended that those identified as political opponents would be identified, targeted for assassination and ultimately killed. When a state resorts to acting or causing its agents to act outside the boundaries of the law, it acts criminally and must be seen as a criminal state. In the Commission's opinion, the former state must be held responsible for the killings of political opponents in that it knowingly planned, authorised, sanctioned, condoned and covered up the commission of these unlawful acts. It acted extrajudicially and criminally, thus leading the Commission to conclude that it ultimately became a criminal state.

90. The findings of the Amnesty Committee support that view.

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39 Amnesty hearings, Johannesburg, 21–31 October 1996; Pretoria, 24 February–13 March 1997 & 6–8 April 1999; AC/1999/30, AC/1999/31, AC/1999/188, AC/1999/190, AC/1999/192, AC/1999/193, AC/1999/194, AC/1999/197; Final Report, Volume Two, Chapter Three, pp. 264–5.

40 Amnesty hearings, Johannesburg, 21–31 October 1996; Pretoria, 24 February–13 March 1997 & 13 April 1999; AC/1999/30; AC/1999/33, AC/1999/189, AC/1999/191;AC/1999/248; Final Report, Volume Two, Chapter Three, p. 264.

41 Volume Two, Chapter Three, pp. 259–398; Volume Three, Chapter Six, pp. 628–631; Amnesty hearings, Pretoria, 2–5 August 1999; AC/2000/58.

COMMAND RESPONSIBILITY

Introduction

91. In dealing with the question of Command responsibility, a key case that has come to embody the contradictions in modern International law is that of General Tomayuki Yamashita.[42] General Yamashita was tried by a United States Military Commission at the end of the Second World War for atrocities committed by Japanese forces in the Philippines – which included murder, rape and pillage. On the 6 February 1946, General Douglas MacArthur affirmed the death sentence imposed on General Yamashita.

92. Yamashita appealed to the United States Supreme Court, arguing that he had neither committed the crimes for which he had been found responsible nor ordered that they be committed. Writing the judgment for the Appeal Court, Chief Justice Harlan Fiske Stone rejected Yamashita's appeal and stated:

[T] his overlooks the fact that the gist of the charge is an unlawful breach of duty by an army commander to control the extensive and widespread atrocities specified …It is evident that the conduct of military operations by troops whose excesses are unrestrained by the order or efforts of their commander would almost certainly result in violations…Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

93. Justices Wiley B Rutledge and Frank Murphy dissented. Judge Murphy wrote:

Nowhere was it alleged that that [Yamashita] personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command.

94. These conflicting views raised in the Yamashita case represents the two main schools of thought on the question of command responsibility. On the one hand, General MacArthur, Chief Justice Stone and the military commission considered it to be a dereliction of duty for a Commander not to control the behaviour of his troops. The approach embodies a 'should have known or must have known' approach. Justice Murphy's dissent represents the other view, namely that prosecutors must prove that a commander knew about the commission of

42 Yamashita v. Styer, Commanding General, U.S. Army Forces, Western Pacific, US Supreme Court 327 U.S. 1 (1946).

widespread crimes by his troops before his failure to take action against such conduct makes him criminally liable.

95. Not surprisingly, the second is the approach that is followed today. Article 86 of Protocol I of 1977 (additional to the Geneva Convention of 1949 regarding the duty of the parties to an international armed conflict to act against grave breaches) provides that 'if they knew, or had information which should have enabled them to conclude in the circumstances at the time' such crimes were taking place, they are required to 'take all feasible measures within their power to prevent or repress their commission'.

96. One of the most important statements made in modern history is that made by the prosecution in its summation at Nuremberg in the High Command case:

Somewhere, there is unmitigated responsibility for these atrocities. It is to be borne by the troop? Is it to be borne primarily by the hundreds of subordinates who played a minor role in this pattern of crime? We think it is clear that it is not where the deepest responsibility lies. Men in the mass, particularly when organized and disciplined in armies, must be expected to yield to prestige and authority, the power of example…Mitigation should be reserved for those upon whom superior orders are pressed down, and who lack the means to influence general standard of behavior. It is not, we submit, available to the commander who participates in bringing the criminal pressures to bear, and whose responsibility it is to ensure the preservation of honorable military traditions.[43]

97. Yet the Nuremberg Military Tribunal refused to apply this 'almost strict liability' standard. Instead, it established that in order to hold a superior responsible for the criminal acts of his subordinates:

there must be a personal dereliction that can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence.

98. In the United States v Leeb[44], the tribunal found that the commander must have had knowledge of an order or have acquiesced in its implementation.

43 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 to 1 October 1946 (Sessions 187 and 188, 26–27 July 1946).

44 Von Leeb (High Command Case), Trials of the Major War Criminals before the International Military Tribunal under Control Council Law, Nuremberg, No. 10 (1951).

99. The statute adopted by the Security Council for the operations of the tribunal for the former Yugoslavia follow the standard of Protocol I and the dissenting view of Justice Murphy in the Yamashita case.

100. In essence, this view provides that commanders are culpable only if they knew about crimes that were being committed by their forces and did not do what they could to stop them.

101. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of Celebici, concluded that Protocol I was customary international law.

102. The international tribunals set up for the former Yugoslavia and Rwanda have made rulings on the question of command responsibility. Their rulings are pertinent to understanding international customary law on this point, with particular reference to two categories of individual responsibility for commanders or other superiors. They examine their potential responsibility, which may arise because of their role either in planning, instigating or assisting perpetrators of the violations, and that which they incur for the actions of their subordinates. In both instances, the legal implication of the omissions on the part of state authorities is also canvassed.

Responsibility for complicity

103. In dealing with the atrocities of the past, the search for justice and accountability has meant that it is important to go beyond those who commit the crimes – the trigger-pullers – and to identify those who are complicit in the violations because they planned and conceptualised them.

104. In international law this concept has been formulated in various legal instruments. At Nuremberg, Council Control Law No. 10 singled out accessories, consenting participants, those connected with plans to commit crimes, and members of organisations associated with the crime. Likewise, Article 111 of the Genocide Convention criminalised conspiracy, incitement and complicity in the commission of genocide. The International Law Commission included complicity in its elaboration of the Nuremberg principles. Article 7 (1) of the ICTY statute provides that:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

105. In a further legal development, the Rome Statute of the International Criminal Court criminalises a range of associated acts, such as ordering, soliciting, inducing, aiding, abetting or assisting in the commission of the crime in a detailed scheme that conditions guilt on specific acts or mental state.

106. The tribunals have interpreted each of the elements of Article 7(1). In terms of the Blaskic case[45], an 'order' does not need to be in writing or in any particular form. It can be explicit or implicit and can be proved through leading evidence of a circumstantial nature. Nor does it require that the superior give the order directly to the perpetrator. In the Akayesu[46] case, the court held that it was the *mens rea* of the superior that was important, not the *animus* of the perpetrator – that is, the subordinate who executes the order. If one applies this principle to the occasion when Minister le Grange instructed General Petrus Johannes Coetzee to assemble a team to strike at the offices of the ANC in London in 1982, it becomes clear that he took part in the crime. Minister le Grange is deceased but, had be been alive, he would no doubt have needed to apply for amnesty for this act to escape potential prosecution. In this instance, General Coetzee applied for amnesty for his role in the London bombing.

107. General Mike Geldenhuys, the then Commissioner of Police, expressed his opposition to the fact that serving policemen were to be used. He appears thereafter to have played no role beyond remaining silent. Minister le Grange instructed General Coetzee that, notwithstanding his objections: 'the government had decided to that the operation would need to go ahead'. Commissioner Geldenhuys could in all probability be held responsible for his omission in that he knew of the intention to commit a crime in another country and did nothing about it.

108. In the Tadic[47] case, the trial chamber of the ICTY elaborated on the meaning of 'accomplice' liability and concluded that the accomplice is guilty if 'his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident' and that he 'had knowledge of the underlying act'. This test was not challenged and has been adopted by other chambers of the ICTY. In the Akayesu case, the ICTR defined 'planning' to mean 'one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases'.

45 Appeals Chamber, ICTY, paras 281–2 citing The Prosecutor v Jean Paul Akayesu, Judgement of ICTR Trial Chamber, 2 September 98.

46 Appeals Chamber, ICTY, paras 281–2 citing The Prosecutor v Jean Paul Akayesu, Judgment of ICTR Trial Chamber, 2 September 98.

47 Prosecution v Dusko Tadic, Judgment of the Trial Chamber II, 7 May 1997, ICTY.

109. 'Instigating' was defined as 'prompting another to commit an offense with a causal connection between the instigation and the perpetration of the crime'. The ICTY held that whilst 'a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated (i.e. that the contribution of the accused has an effect on the commission of the crime), it is not necessary to prove that the crime would not have been perpetrated without the accused's involvement'.

110. If one applies these principles to our situation, Minister le Grange would have been held responsible for the 1985 incident known as Operation Zero Zero. In terms of testimony before the Amnesty Committee, Le Grange authorised a plan that provided for the issue of defective hand grenades to a number of young Congress of South African Students (COSAS) activists on the East Rand. The hand grenades were to be used in operations against the state. However, the timing devices had been tampered with, which resulted in seven youths being killed and eight severely injured. In addition, a young woman who was suspected of being an informer was 'necklaced'[48], making her one of the first necklace victims in the country. Whilst Minister le Grange might not have known that Ms Maake Skosana would be killed, there is a causal link between her death and the hand grenade incident.

111. In 1987, the then Minister of Law and Order Adriaan Vlok [AM4399/96] authorised the destruction of Cosatu House[49] in central Johannesburg on the night of 3 May 1987. A team from Vlakplaas, assisted by the Witswatersrand Security Branch and including its technical and explosives sections, undertook the operation. Although nobody was killed, there were approximately twenty people in the building at the time. The building itself was extensively damaged. Minister Vlok could technically have been charged for attempted murder.

112. In July 1988, Minister Vlok authorised the placing of dummy explosives in several cinemas around South Africa to provide a pretext for the seizure and banning of the film, *Cry Freedom*, which details the death of detainee Steve Biko at the hands of the Port Elizabeth Security Branch. This action followed a number of unsuccessful attempts to exert pressure on the Publications Control Board to ban the film. In giving reasons for his actions before the Commission, Minister Vlok expressed the view that he had tried the legal route and failed,

48 Burnt to death using petrol and a tyre placed around the victim.

49 Headquarters of the Congress of South African Trade Unions (COSATU).

and had therefore resorted to illegality as he had judged 'that this film would have been a risk as it was inciteful'.

113. In August 1988, Minister Vlok was allegedly ordered by then State President PW Botha to render Khotso House 'unusable', but to do so without loss of life. Khotso House was the headquarters of the South African Council of Churches, considered to be an opponent of the former state. Numerous anti-apartheid organisations, including the United Democratic Front, also had offices in the building. This case provides an interesting study as, in his evidence before the Amnesty Committee, Minister Vlok testified that, although he had not been given specific instructions to bomb Khotso House, he could not think of a legal way to carry out the State President's injunction. He also testified that, since President Botha had said that 'it should involve no loss of life', he was led to believe that that Mr Botha had been suggesting unlawful means. This operation, which was also conducted by Vlakplaas with assistance from the Witwatersrand security Branch and the explosives section at security Branch Headquarters, took place on the night of 31 August 1988. Given the legal principles enunciated above, there can be little doubt that Mr PW Botha remains liable for these operations.

114. All of these operations indicate that there was direct political authorisation for these unlawful activities, which involved loss of life and/or the potential for loss of life and damage to property.

115. The pattern that was followed by successive apartheid governments was to pass to laws to legitimise their conduct. When that failed, they did not hesitate to act outside of the law and resort to criminality.

116. In the Blaskic case[50], aiding and abetting was defined as providing practical assistance, encouragement or moral support with a substantial effect on the perpetration of the crime. In terms of the Blaskic decision, an omission may constitute aiding and abetting as long as the 'failure to act had a decisive effect on the commission of the crime'. The *mens rea* in such a case consists of 'knowledge that his acts assist the commission of the crime' and the accused must have 'intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct'. The Blaskic judgment notes that: 'it is sufficient that the aider and abettor knows that one of a number of crimes will be committed'.

50 Appeals Chamber, ICTY, paras 281–2 citing The Prosecutor v Jean Paul Akayesu, Judgement of ICTR Trial Chamber, 2 September 98.

117. In the Foca case[51], the trial chamber described 'aiding and abetting' as a contribution which may take the form of 'practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime. In this instance, the assistance need not have a causal connection to the act of the principal and it may involve an act or omission and take place before, during or after the commission of the crime'. In order for an individual to be held responsible for aiding and abetting, s/he must know that the acts assist in the commission of a specific crime by the principal. While the individual is not required to share the principal's *mens rea*, 'he must know of the essential elements of the crime (including the perpetrator's *mens rea)* and take the conscious decisions to act in the knowledge that he thereby supports the commission of the crime.'

Command responsibility (omissions)

118. Under international law, an individual may be held responsible for omissions by the doctrine of superior or command responsibility. As set out earlier in this section, this doctrine is ancient in origin and emerged as an important principle particularly after World War II. It has also been a subject of considerable importance for international tribunals, which have recognised command responsibility as a principle firmly established in international law.

119. Article 7(3) of the ICTY statute reflects this rule:

The fact that any of the acts was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

120. The command responsibility principle is also present in Article 86(2) of the First Additional Protocol to the Geneva Conventions of 1949, which provides that:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

51 Appeals Chamber, ICTY, para 391 citing The Prosecutor v Furandzija supra paras 235 and 249.

121. Command responsibility requires three elements following proof of the crime itself:
    a a superior–subordinate relationship between the accused and the perpetrator of the crime;
    b that the accused knew or had reason to know that the crime was about to be or had been committed; and
    c that the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator.

122. The same principle has been applied in dealing with civil responsibility under the Alien Tort Claims Act in the United States. In the case of Paul v April[52], a federal court held that Prosper Avril, a Haitian military dictator, was personally responsible for a systematic pattern of egregious abuses, since the perpetrators acted under his instructions and within the scope of the authority granted by him. The court heard evidence that he had known that the torture was being committed.

123. In the case of Forti v Suarez-Mason,[53] the court noted that:

    under International law, responsibility for torture, summary execution or disappearances extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.

124. Using this principle, all former heads of the apartheid state could be held responsible for the commission of gross human rights violations committed by their agents.

125. The meaning of each of the elements of command responsibility require some discussion.

Superior–subordinate relationship

126. Jurisprudence on this point envisions that the principle of superior responsibility encompasses heads of state, political leaders and other civilian superiors in positions of authority.

52 901 F. Supp. 339 (SD FLA 1994).
53 672 F. Supp. 1531, 1537-8 (N.D. CAL.1987).

127. In clarifying this issue, it is important to note the following:
    a The commander may be at any level.
    b The commander, even if in an *ad hoc* command position, is responsible for the acts of men operating under him.
    c Control may be direct or indirect.
    d Control may be *de facto* as well as *de jure*.

128. The Foca[54] case clarifies that a superior–subordinate relationship cannot be determined by reference to formal status alone. What must be established is whether the superior had the material ability to exercise his powers to prevent and punish the commission of the subordinates' offences.

129. It is clear that those superiors (either *de jure* or *de facto*, military or civilian) who are clearly part of a direct or indirect chain of command and who have the power to control or punish the acts of subordinates incur criminal responsibility.

130. The tribunals have not interpreted 'chain of command' literally but have held rather that as long as the fundamental requirement of an effective power to control the subordinate, in the sense of preventing or punishing criminal conduct is satisfied, the principle will hold.

Knowledge

131. Knowledge has been elaborated in international law to include: 'knew or had information which should have enabled them to conclude in the circumstances at the time'; 'knew or had reason to know'; 'either knew or, owing to the circumstances at the time should have known', and 'either knew, or consciously disregarded information which clearly indicated that subordinates have or are about to commit international crimes'. International law takes into account the law as elaborated after the World War II trials and the terms of Additional Protocol I to the Geneva Conventions, which was written in 1977.

132. The ICTY interpreted customary international law in the Celebic case to be that a superior cannot be held responsible unless:

    He effectively knows, through direct or circumstantial evidence at his disposal, that his subordinates have committed or are about to commit the crimes; or

    He has reason to believe that they have or are about to commit such crimes.

54 Appeals Chamber, ICTY.

133. The Celebic case draws a distinction between military commanders and civilian superiors, suggesting that a higher standard of proof will be required in the case of civilian superiors.

134. In the Blaskic case, the trial chamber restated the Celebic decision and then conducted its own review of the war crimes case from World War II. The trial chamber concluded that:

after World War II, a standard was established according to which a commander may be liable for crimes by his subordinates if he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction.

135. After turning to the Additional Protocol, the trial chamber in this judgment found that:

if a commander has exercised due diligence in the fulfilment of his duties lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defense where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.

136. This standard does not mean that the superior must have information on subordinate offences in his actual possession in order for liability to attach. It is sufficient that the superior has some general information in his possession that, 'would put him on notice of possible unlawful acts by his subordinates'. The information may be written or oral and does not need to be in the form of reports submitted pursuant to a monitoring system; nor does it have to provide specific information about unlawful acts. In the Celebic case, the Appeals Chamber posits, for example, that if a military commander has received information that some of the soldiers under his command have a violent or unstable character or have been drinking prior to going out on a mission, this may be considered as meeting the knowledge requirement. In this regard, the fact that the state used individuals like Eugene de Kock, Ferdi Barnard and others like them may attach liability to those who appointed them to carry out these deeds. They should indeed have expected them to do so because of the identification of quirks in their character.

Reasonable and necessary measures

137. The question of whether a commander took appropriate steps to prevent atrocities is a factual issue and is dependent on the circumstances of each case. International law is clear that, whilst a superior cannot do the impossible, he can be held responsible for failing to take measures within his real capacity. The ICTY has also held that punishing a perpetrator after the event does not satisfy this obligation if the commander had reason to know beforehand that crimes might be committed. It is not necessary that there should be a causal link between the superior's omission and the violation.

138. The Kordic and Cerkez[55] cases deal with the twin obligations of preventing and punishing.

the duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned or when he has reasonable grounds to suspect subordinate crimes. The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This dirty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself. Civilian superiors would be under a similar obligation, depending upon the effective powers exercised and whether they include an ability to require the competent authorities to take action.

139. If one applies this test to some of the cross-border operations, a number of people could find themselves facing criminal action, given the fact that hardly anybody applied for amnesty for these operations.

140. General Coetzee testified as to his involvement in the Maseru raid and the raid on Gaborone. It is known that these raids were authorised by the former government, despite the fact that no minuted decision can be found in either the records of the State Security Council or Cabinet. Many high-ranking individuals, including Minister Vlok, have argued that, if such unlawful activity had been authorised , such authorisation would be reflected in minutes. The fact that these two raids were not reflected in minutes negates this argument.

141. It is clear that the Commission has no reason to change its findings. In addition, were the state to pursue a vigorous prosecution policy, many high-ranking politicians could find themselves sitting behind bars. (...p642)

55 Trial Chamber, ICTY.