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For George Bizos - Eminent advocate in the cause of freedom, -  
with great admiration,  
Louis Pollak

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## The Inquest into the Death of Stephen Bantu Biko

A Report to the Lawyers' Committee  
for Civil Rights Under Law

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Prepared for the Southern Africa Project  
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### THE BACKGROUND

In death, Stephen Bantu Biko is even larger than he was in life. In life, he was, at the age of thirty, the head of South Africa's Black Consciousness Movement—and thus one of the emerging leaders of his country. Yet (such is the myopia of apartheid) Biko was little known among his White fellow citizens, the 4 million Afrikaners and "English-speakers" who enjoy total political dominion over 22 million disenfranchised Blacks, Coloreds and "Asians." But if Biko was not well known among South African Whites generally, he was well known to the leaders of the South African regime. In 1976<sup>1</sup> was detained by the security police for many weeks. Moreover, three years

<sup>1</sup>N. Ashford, "World Interest in Case Surprises S. Africans," *New York Times*, November 21, 1977.

prior to his 1976 detention, Biko had achieved the distinction of being "banned"—i.e., consigned to the legal status of isolation from the community, and indeed of virtual nonidentity, which the regime has devised for a select group of citizens perceived as especially formidable antagonists.<sup>7</sup>

Biko was arrested for the last time on August 18, 1977. According to a subsequent affidavit of an officer of the security police, the arrest took place at a roadblock set up when word was received that Biko, in contravention of his banning order, was driving from his hometown (King William's Town) to Cape Town for the purpose, so the security police understood, of distributing "inflammatory pamphlets . . . inciting blacks to cause riots." On the following day, Biko was taken to Port Elizabeth, where he was to remain until September 11, the day before he died.

Biko was not formally charged with a crime. He was detained under

"banning," of course, has analogies in avowedly totalitarian regimes, but it is something of a novelty in legal systems deriving from English and Western European jurisprudence. Its character and impact were tellingly described last fall in *Time* correspondent William McWhirter's report on the banning of Donald Woods, a White newspaper editor who was one of Biko's closest friends (*Time*, November 7, 1977, p. 38):

It was a fateful end to a special friendship between a white and a black. Donald Woods, a fifth-generation English-speaking South African and editor of the feisty *East London Daily Dispatch* (circ. 30,000), is now a "Danned person," as was his friend Steve Biko, who died in jail two months ago. It was, in fact, Woods' crusade over the mystery surrounding Biko's death that probably led to his banning in the government's massive wave of detentions and crackdowns.

As one of Woods' fellow journalists has put it, isolation is a curse—and banning is the most insidious punishment in South Africa. Reserved for an elite destructive public Coventry. For five years, Woods may not meet with more than one other person at a time except for members of his family; he may not write for publication or be quoted—he has become, as a result, a public non-person. On December 31, 1977, Donald and Wendy Woods and their children escaped from South Africa. In early February, Mr. and Mrs. Woods visited the United States; he addressed the Security Council, met the President and Vice-President, and testified before Congressional committees. See the *Washington Post*, February 6, 1978, p. D; see also footnote 21, *ibid.*

While "banning" is a recent innovation in South African jurisprudence, detention of political adversaries of the regime is not new. John Vorster, the current Prime Minister, was detained for seventeen months during World War II, since he was regarded by the government of Field Marshal Jan Smuts as actively opposed to the war against Germany. *New York Times*, November 28, 1977. *Rand Daily Mail*, November 15, 1977, p. 14.

Section 6 of South Africa's Terrorism Act, which authorizes indefinite detention "for interrogation" of any person thought by the security police to be "a terrorist or . . . withholding from the South African Police any information relating to terrorists or offenses under this Act. . . ." Capital offenses defined by the Terrorism Act include "any act in the Republic or elsewhere" committed "with intent to endanger the maintenance of law and order in the Republic. . . ." The requisite intent is presumed on proof that the act committed has, or is likely to have, any of a number of proscribed effects: e.g., "to cause substantial financial loss to any person or the State," "to embarrass the administration of the affairs of the State," or "to cause, encourage or further feelings of hostility between the White and other inhabitants of the Republic."

Detention under Section 6 of the Terrorism Act is communicated: "No person other than the Minister [of Justice], or an officer in the service of the State acting in the performance of his official duties, shall have access to any detainee, or shall be entitled to any official information relating to or obtained from any detainee." Moreover, "No court of law shall pronounce upon the validity of any action taken under this section, or order the release of any detainee."

Biko was in good health when he was arrested on August 18. And so he seems to have remained through September 5—notwithstanding that he (a) was kept in solitary confinement; (b) complained about a diet chiefly of bread, and asked in vain for leave to buy food of his own choice; (c) was not let out of his cell to exercise (in contravention of the regulations governing his custody); and (d) was kept naked most of the time.

On September 6, Biko was taken from his cell to security police headquarters for interrogation. In the course of the interrogation, Biko—according to police testimony given at the inquest—first denied and then admitted involvement in preparation of pamphlets deemed by the police to be "inflammatory." Biko's admission was said to have come about when he was confronted with written ad-

"The effect of the presumption is to place on the accused the burden of proving beyond a reasonable doubt that the act committed was not likely to have or did not have the proscribed effect. See, generally, A. S. Mathews, *Law, Order and Liberty in South Africa* (Juta: Wynberg, 1971), pp. 146-55, 169-84.

missions by associates who were also in secret detention.

According to further police testimony, the interrogation resumed at about 7:15 A.M. on September 7, but was interrupted almost at once by a violent outbreak by Biko, who, with a "wild expression in his eyes," threw a chair at and then assaulted the five-man team of interrogating officers. Restraining Biko took several minutes, and Biko may have hit his head in the course of the melee. Major Snyman, in command of the interrogation team, reported the incident to his superior, Colonel Goosen, at 7:30 A.M. Together, Goosen and Snyman went to the office in which Biko was now shackled securely. Snyman saw that Biko still had a "wild expression" and also had a swelling on his lip. Goosen summoned Dr. Lang, the district surgeon, a prison doctor. Lang, arriving two hours later, was told by Goosen that Biko was unresponsive and might have had a stroke, or be feigning illness. Lang examined Biko and could find no organic injury: Lang was inclined to agree with what he thought to be Goosen's surmise, namely, that Biko was "shamming."

From September 7 to September 11, Biko steadily deteriorated. He had intermittent difficulties of speech and (when not shackled, naked, on a urine-soaked mat) of movement. His behavior was sometimes bizarre—as, for example, sitting clothed in a bathtub. He developed symptoms (e.g., weakness of the left arm and leg, echolalia, the extensor plantar reflex) clearly betokening brain injury. But Lang and the other doctors (Tucker, the senior district surgeon; and Hersch, a private consultant) who examined and tested Biko could not reach a firm diagnosis, although Hersch seems to have suspected Biko had suffered brain injury. On September 11, when Biko was nearly comatose, the doctors concluded that he should be hospitalized for observation. Goosen then ordered Biko shipped to the prison hospital in Pretoria—750 miles, naked, in the back of a Landrover, unaccompanied by a doctor or even by his medical records. On September 12, a few hours after being delivered to the Pretoria prison hospital, Biko died. As S. W. Kentridge, counsel to the Biko family, put it in his summation at the inquest: "He died a miserable and lonely death on a mat on a stone floor in a prison cell."

On September 13, Minister of Justice James T. Kruger issued the following statement:

Mr. Steven [sic] Bantu Biko, previously attached to SASO<sup>1</sup> and BPC,<sup>2</sup> had been restricted to the magisterial district of King William's Town. Mr. Biko and a coloured man were arrested at a road-block near Grahamstown on August 18, after information had been received that Mr. Biko was travelling between Cape Town and King William's Town. He was arrested in connection with activities related to the riots in Port Elizabeth, and *inter alia* for drafting and distributing pamphlets which incited arson and violence. He was detained at the Walmer Police Station in Port Elizabeth since September 5. Mr. Biko refused his meals and threatened a hunger strike. But he was, however, regularly supplied with meals and water which he refused to partake of. The District Surgeon was called in on September 7 after Mr. Biko appeared to be unwell. The doctor certified he could not find anything wrong with Mr. Biko. On September 8, the police arranged that Mr. Biko again be examined by a district surgeon as well as the Chief District Surgeon and, because they could diagnose no physical problem, they recommended that Mr. Biko be sent to the prison hospital for intensive examination. A specialist examined him on the same day. On September 9, Mr. Biko was again examined by a doctor who kept him for observation. On September 11, Mr. Biko was removed from the prison hospital to Walmer Police Station on the recommendation of the District Surgeon. By Sunday Mr. Biko had still not eaten and appeared to be unwell. After consultation with the District Surgeon it was decided to transfer Mr. Biko to Pretoria. He was taken to Pretoria the same night. On September 12, Mr. Biko was again examined and medically treated by a district surgeon in Pretoria. Mr. Biko died the same night. A *post mortem* will be undertaken by the Chief State Pathologist in the presence of a private pathologist appointed by Mr. Biko's relatives. Mr. Biko's mother was informed of his death because his wife, who is separated from him, could not be traced. During his detention a magistrate visited Mr. Biko on September 2 according to law.

The *post mortem* referred to by the Minister on September 13 took place on the same day. It was conducted by the Chief State Pathologist, Dr. J. O. Loubser, in the presence of two other leading pathologists, Professor I. W. Simson and Dr. J. Gluckman, the latter repre-

<sup>1</sup>South African Students Organization.

<sup>2</sup>Black People's Convention.

sending the Biko family. The general autopsy was followed two weeks later by a detailed examination of Biko's brain, conducted (in the presence of Loubser, Simson and Gluckman) by Professor N. S. F. Proctor, an eminent neuropathologist.

On September 14, Minister Kruger "provoke[d] laughter among delegates to the Transvaal Congress of the governing National Party with remarks about the death. 'I am not glad and I am not sorry about Mr. Biko . . . He leaves me cold.' The Minister also agree[d] with a delegate who applaud[ed] him for allowing the black leader his 'democratic right' to 'starve himself to death.'"

The Minister's intimation that Biko had taken his own life by means of a hunger strike was not confirmed by the reports of the pathologists. Proctor's examination of Biko's brain yielded the following "summary and conclusions":

This brain shows several areas of damage where the main pathological features are those of haemorrhage and necrosis. On microscopical examination numerous small perivascular haemorrhages are present throughout much of the brain tissue as well as in the larger lesions visible macroscopically.

The most extensive lesion is in the right parieto-fronto-temporal region in an area opposite to that of the large ecchymosis demonstrated to me by Professor Loubser. This indicates a so-called contre-coup injury of traumatic origin.<sup>1</sup> In this lesion, as in many of the others described above the zones of haemorrhage are superficially situated and are accompanied by bleeding into the subarachnoid space. Necrosis accompanies many of these foci of haemorrhage.

In my opinion therefore the lesions present are clearly indicative of severe traumatic brain contusions and contusional necrosis. The inflammatory infiltrates, the oedema (brain swelling), myelin loss and small vessel fibrin thrombi are secondary phenomena. I would estimate that these contusions are at least of three to five days duration and probably not more than twelve to fifteen days duration.

<sup>1</sup>J. Burns, "Inquest in Pretoria Ready for Testimony on How Black Leader Died," *New York Times*, November 14, 1977.

<sup>2</sup>The term "contre-coup injury," as used by Proctor, signifies that the principal injury to the brain was located in a portion of the head *opposite to* (i.e. "contre") the place of impact of the triggering trauma.

On October 21, Loubser, Simson and Gluckman—after consultation with Proctor and another colleague, Professor L. S. deVilliers—certified to their joint concurrence in findings formulated by Loubser:

(iii) that the most significant post mortem findings in connection with that body were as follows:

Extensive brain injury of the contre-coup type with the absence of coup injuries.

As a result of the nature and extent of this brain injury, centralization of the circulation occurred to such an extent that reduction of the circulation to the organs, [sic] complicated by disseminated intravascular coagulation as well as acute renal failure with uremia.

Some injuries were also present on the left thorax and possibly also on the anterior abdominal wall.

Further injuries were found comprising extensive but trifling superficial abraded skin injuries which—to state only reasonable possibilities—could have arisen from 12 hours to 8 days prior to death. All the aforementioned skin injuries indicate a mechanical origin.

(iv) that, as a result of my observations of which I append a list I have decided

(a) that death took place in the region of 12 hours prior to my examination and

(b) that the cause of death was HEAD INJURIES.

#### THE HEARING

Had Biko not died, and had the cause of and circumstances surrounding his death not been in doubt, there could have been no judicial or quasi-judicial inquiry into the treatment accorded Biko while he was in detention. For, as noted above, Section 6 of the Terrorism Act puts detainees outside the protection of the law. It was Biko's unexplained death which was the jurisdictional predicate of further inquiry. Such inquiry might have taken place in a court had the public prosecutor been persuaded that he had evidence sufficient to warrant a criminal prosecution. Unpersuaded of this, the public prosecutor was obliged by statute to call upon a magistrate (a civil



servant, not a judge) to hold an inquest to determine "the cause or likely cause of death" and "whether the death was brought about by any act or omission involving or amounting to an offence on the part of any person."

Presiding was Pretoria's chief magistrate, M. J. Prins. Assisting him, as lay assessors, were two pathologists of high reputation, Professor I. Gordon and Professor J. A. Olivier. They shared the bench with the chief magistrate, and asked questions, but their role was wholly advisory; they did not participate in the decision.

The inquest began on November 14, 1977, and continued (except for the two intervening weekends) through December 2. It was held in Pretoria, where Biko died. The hearing was conducted in the Old Synagogue—a drab, uncomfortable meeting hall in the center of the city, which had been converted from religious to sporadic judicial use many years ago. The hearing was public, and an audience numbering perhaps two hundred, mostly Black, filled the hall at all times— notwithstanding that (a) much of the testimony was given in Afrikaans, a language not easily understood by many Blacks, and (b) the acoustics were so defective as to make the proceedings almost inaudible beyond the first two rows, which were reserved for the press.<sup>9</sup>

In front of the audience and the press, just inside the bar, were Biko's widow and mother and their interpreter, and one or two close friends; certain medical and other advisers sitting behind counsel; and two foreign lawyers observing the inquest. One of the foreign lawyer-observers—present for all but the first three days of the fifteen-day hearing—was Sir David Napley, past president of the Law Society, who had come at the invitation of the Law Societies of South Africa, and whose remarkably perceptive and succinct appraisal of the inquest was published a week after its conclusion. The other—present from the fifth day through the tenth day—was the author of this report, representing the Lawyers' Committee for Civil Rights Under Law.<sup>10</sup>

<sup>9</sup>The inquest was the subject of continuing coverage by Western European and American newspapers and television: within South Africa, both Afrikaans and English-language newspapers reported the proceedings in detail.

<sup>10</sup>And also representing the Section of Individual Rights and Responsibilities of the

Counsel sat at a horseshoe arrangement of tables in front of the magistrate. Presenting the witnesses for the magistrate was an advocate (barrister, in British parlance) who is Deputy Attorney General for the Transvaal, K. Von Lieres, S.A.<sup>11</sup> The advocate who led for the police was P. R. Van Rooyen, S.A. As noted above, counsel to the Biko family was advocate S. W. Kentridge, S. A., assisted by advocates G. Bizos and E. M. Wentzel; the Biko family's attorney (solicitor, in British parlance) was Shun Chetty. A minor role was played by advocate B. de V. Pickard, representing the doctors.<sup>12</sup>

Van Rooyen and Pickard, while private advocates, were representing state employees. Since Deputy Attorney General Von Lieres concurred in their presentations that their clients were guiltless, and Kentridge sought to show that the police were culpable and the prison doctors their willing instruments, the hearing was in effect an adversary proceeding pitting Kentridge and his co-counsel against Van Rooyen, Von Lieres and Pickard.

Van Rooyen represented the police with vigor and skill. Pickard represented the doctors without vigor and without skill.<sup>13</sup> Von Lieres performed somewhat woodenly in a role which, as Sir David Napley noted in his report, seemed professionally ambiguous, since "on occasions he intervened to support the police and doctors although they were already represented by other counsel,"<sup>14</sup> notwithstanding that, as deputy attorney general, "it was his duty dispassionately to present to, and test, on behalf of the Magistrate, all the relevant available evidence."

Kentridge's representation of the Biko family was exemplary; a lawyer of extraordinary distinction, he dominated the hearing. But

A.B.A., and the Committee on International Human Rights of the Bar Association of the City of New York. The South African authorities declined to issue a visa to Millard Arnold, Esq., Director of the Southern Africa Project of the Lawyers' Committee for Civil Rights Under Law. Also turned down for a visa was Anthony Lewis of the *New York Times*, who wished to cover the inquest.

<sup>11</sup>"S.A." (State's Advocate) is an honorific bestowed on senior advocates, roughly equivalent to the British "Q.C.," identifying barristers who have taken silk.

<sup>12</sup>Advocate W. H. Heath, representing the prison guards, had virtually nothing to do, since it was common ground that his clients' treatment of Biko was correct, within the constraints of the detention system.

<sup>13</sup>On one occasion, Pickard examined one of his clients (Hersch) about an article from a medical journal which the witness had not read for a long time and which Pickard had never read.

Kentridge, and the lawyers for the other parties, were largely tied to the record as made by Von Lieres for the magistrate—tied by the inquest form which gives the magistrate control over the scope of the inquiry; and tied by the fact of a system of secret detention which insures that the only evidence about the operations of the security police and supporting personnel which will be brought to public view is evidence which the senior officers of the security police take measures to uncover and disclose.

Given these constraints, it was hardly surprising that the senior officers in charge of the investigation did not show any interest in asking who or what had led their superior, the Minister of Justice, to give public currency, in the days immediately following Biko's death, to the notion that Biko had "starve[d] himself to death." The magistrate's unwillingness to permit exploration of this question at the inquest did not strengthen the credibility of the proceeding. What would arguably have been a collateral issue had the hearing been a criminal trial could, so it would seem, have been properly explored in the context of an inquest which, as the South African Supreme Court has noted, "follows an informal procedure with less rigid rules"; indeed, the court has specifically admonished magistrates to "guard against conducting an inquest as if it were a criminal trial." *Timol and Another v. Magistrate, Johannesburg* [1972(2)] 281, 291-2.

Of far graver concern than this particular ruling, however, was the general lassitude of the investigation into the activities of those officers and doctors who had been in direct charge of Biko during the crucial days from September 6 to his death. Little wonder that their testimony at the inquest—supplementing the sometimes redundant, sometimes inconsistent and frequently ambiguous affidavits—added up to a partial and unconvincing narrative. Sir David Napley has aptly characterized the police investigation of their own officers as "perfunctory in the extreme. The death of anyone whilst detained in the custody of security police demands rigorous investigation. . . . The inquest revealed . . . that the officers closely concerned with the custody and interrogation of the deceased at the relevant time were questioned by means of [mimeographed] forms, which contained a series of questions with alternative answers. They were required to strike out the reply which they considered inappropriate to their

answers. . . . It is clear that an investigation conducted by experienced police officers with a little of the enthusiasm and vigour with which they customarily appear to question detainees would have elicited the truth from the security police in far less time than was necessary to demonstrate their mendacity in the witness box. . . ."

The term "mendacity" is not a mild one. And yet, as a close reading of Sir David's report makes plain, the distinguished British solicitor chooses his words with care, and with a profound respect for the record. Sir David—present, as I was not, for almost the entire inquest—has embodied in his report an extensive recital of the evidence. Believing his statement to be an admirable one, I will not canvass in detail the ground he has covered so exhaustively. I will simply recapitulate the opposing claims of fact and inference as they bear upon the matters chiefly in issue at the inquest:

1. As already noted, the magistrate's duty was to seek to determine two questions: One was the cause or causes of Biko's death; the other was whether any criminal act or omission had contributed to Biko's death.
2. On the first question, there was no room for doubt. The pathological evidence showed beyond dispute that death resulted from injuries to the brain resulting from external trauma—including at least one major blow to the left forehead, which left a bruise visible on, and photographed at, the autopsy.
3. To resolve the remaining question—whether any of the police officers and doctors who had Biko in charge bore a measure of criminal responsibility for Biko's death—the magistrate needed to make findings as to the circumstances under which Biko suffered the fatal blow or blows.
4. According to the pathologists, Biko suffered the fatal blow or blows no earlier than September 6 (the first day on which Biko was interrogated). And the latest possible time was early on September 7, since it was at 7:30 that morning that Goosen, the officer in command at Port Elizabeth, finding his prisoner incapacitated and unresponsive, called District Surgeon Lang and requested him to examine Biko forthwith.
5. The witnesses presented by Deputy Attorney General Von Lieres described only a single incident in the course of which Biko may have

suffered a blow or blows to the head. This was the incident, referred to above, in which, according to Snyman and other officers, resumption of interrogation at 7:15 A.M. on September 7 was cut off by Biko's throwing a chair at and assaulting his interrogators, an outbreak which led to a "scuffle" of several minutes before Biko was subdued. In the view of Von Lieres and Van Rooyen, this incident most plausibly explained the entire matter.<sup>14</sup>

6. Accepting the "scuffle" as the full explanation posed major difficulties, as Kentridge made plain in his painstaking closing address to the magistrate:

(a) Neither in affidavit nor in testimony did any of the police who participated in the "scuffle" identify with any particularity a massive blow to the forehead. (Snyman, for example, described Biko falling in such a way as to hit the back of his head on the floor; and whether he actually saw, or merely supposed he may have seen, some such medically nonsignificant occurrence was by no means clear.)

(b) How massive the triggering blow or blows must have been was underscored by the consensus of the pathologists that in all likelihood Biko would have been rendered unconscious for a time. Yet no witness described a period of unconsciousness (prior to Goosen's summoning Lang).

(c) It is true that, as Von Lieres and Van Rooyen emphasized in their closing addresses, the pathologists did not assert categorically that it was inconceivable for a person to suffer mortal head injuries without losing consciousness. But they did testify that the overwhelming balance of probability was on the side of unconsciousness. And their testimony was confirmed by the medical literature presented to the magistrate. According to Sir Charles Symonds, acknowledged to be a leading authority in neuropathology, "Loss of consciousness at the onset is the rule in all cases of severe head injury." Moreover, the exceptions to the rule—e.g., "high velocity missiles penetrating the

<sup>14</sup>Speculation that Biko might have deliberately hit his own head against the wall or floor at some point (e.g., the night of September 6) when no guard was in his cell appeared to have no substance at all. The motivation for such an act was obscure. The capacity of a shackled prisoner to hurt himself so massively was doubtful in the extreme. The likelihood that such an act could have taken place unnoticed at the time or promptly thereafter appeared very remote.

brain"—show "that the type of injury which most readily causes unconsciousness is that which subjects the intracranial contents as a whole to sudden displacement."<sup>15</sup> And it was exactly this "type of injury," a blow or blows to one side of the head resulting in contrecoup reaction, which caused Biko's death.

(d) The weight properly owing to Sir Charles' statement of "the rule in all cases of severe head injury" is underscored by his description of a typical clinical scenario for one suffering a "moderate degree of injury"—a scenario strikingly like Biko's clinical picture beginning on September 7:

As our criterion for this degree of injury we may take, of course, in arbitrary fashion, failure to recover consciousness within five minutes of the injury, but with subsequent recovery of consciousness within two or three hours. The initial symptoms are the same as those described for a case of the mild degree. The state of coma, however, lasts longer, probably several minutes, and is followed by one of profound stupor in which, though purposive movements of the protective kind are possible, the patient is totally unaware of his environment and inaccessible. In this state he is at first mute, unresponsive to command, and inert. Later he begins to be restless and, while still mute and stuporous, may become resistive and violent. The first evidence of returning consciousness, as a rule, is a positive response to some simple command, such as "Put out your tongue." Later he will occasionally reply to a question, such as "What is your name?" though the basic state is that of restless confusion with an occasional relapse into stupor. During or after the period of unconsciousness there may be incontinence of urine, and vomiting. After recovery of consciousness the patient remains confused and may exhibit phases of delirium especially at night. In this state of *traumatic delirium* his behavior is unpredictable and often violent. He will frequently try to get out of bed, put on his clothes, or run out of the room, will refuse his medicines, and will fight with those who try to control him. This state of confusion with delirium (sometimes known to surgeons as that of cerebral irritation) may be transient, lasting only an hour or two, or may persist for several days. So long as there is delirium there may be relapse into stupor from time to time.<sup>16</sup>

<sup>15</sup>See Symonds' essay in Feiring, *Brock's Injuries of the Brain and Spinal Cord and Their Coverings* (Springer Pub. Co., Inc.: New York, 1974), pp. 109-110.  
<sup>16</sup>*Id.* at p. 111-112.



In Sir Charles' scenario, the patient with a "moderate degree of injury" recovers. Biko, severely injured, progressed from stupor to death.

(e) On the next-to-last day of testimony, there came to light a document casting further doubt on the contention that Biko's first massive injury was the inadvertent by-product of hitting his head once or a few times during the "scuffle" with Snyman and others at 7:15 A.M. on September 7. The document was a telex<sup>11</sup> sent from Port Elizabeth by Goosen on September 16, describing to his superiors in Pretoria the events leading up to Biko's death. The telex referred to injury "inflicted" on Biko at 7:00 A.M.—injury which the telex associated, furthermore, with Biko's ensuing speech difficulties. Goosen, recalled to the stand, explained "inflicted" as "a play on words."<sup>12</sup>

7. In their final addresses to the magistrate, Von Lieres and Van Rooyen adhered to the position that Biko accidentally hit his head in the course of a "scuffle" he provoked, thereby setting in train the ultimately fatal pathology. Kentridge, for his part, rejected the "scuffle" theory as an adequate explanation: He did not claim to have established that the record showed exactly when and how Biko did receive the injury "inflicted" on him. But concluding that the police testimony was, in the aggregate, unworthy of credit, he argued that "the verdict which we submit is the only one reasonably open to this court is one finding that the death of Mr. Biko was due to a criminal assault upon him by one or more of the eight members of the security police in whose custody he was . . . on the 6th or 7th of September, 1977."<sup>13</sup>

<sup>11</sup>The Telex—never referred to by Goosen in affidavit or in his testimony in the opening days of the inquest—was disclosed to Mr. Kentridge by Brigadier C. F. Zietsman, a senior officer of the security police, at an interview which took place on the tenth day of the inquest, when Mr. Kentridge was permitted by the magistrate privately to question Zietsman and other senior officers about possible sources of the discredited "hunger strike" report and related matters.

<sup>12</sup>*New York Times*, December 1, 1977.  
<sup>13</sup>Mr. Kentridge did not mince words as to the deplorable indifference the doctors—particularly Lang and Tucker—displayed with respect to a visibly deteriorating patient whose direct external injury they never noticed and whose mortal illness they never diagnosed; the most charitable view, he said, was that they turned "a blind eye" to the fate of one in custody of a police apparatus with which they were subserviently cooperative. Mr. Von Lieres argued that, by the time Lang first acquired substantial information on Biko's condition, Biko's injuries were irreversible. On any reading of the record

### THE VERDICT

The taking of testimony was concluded on November 30, 1977—the day of the national elections in which the ruling National Party significantly enlarged its substantial parliamentary majority. On December 1, counsel made their final addresses. On December 2, Magistrate Prins delivered his verdict:

- (a) The identity of the deceased is Stephen Bantu Biko, Black man, approximately 30 years old;
- (b) Date of death: 12th September 1977;
- (c) Cause or likely cause of death: Head injury with associated extensive brain injury, followed by contusion of the blood circulation, disseminated intravascular coagulation as well as renal failure with uraemia. The head injury was probably sustained during the morning of Wednesday, the 7th of September 1977, when the deceased was involved in a scuffle with members of the Security Branch of the South African Police at Port Elizabeth. Date of death: 12th September 1977.

The available evidence does not prove that the death was brought about by any act or omission involving or amounting to an offence on the part of any person. That completes this inquest. The Court will adjourn now.

### ASSESSING THE VERDICT

Most English and American lawyers—even those particularly sensitive to the imperatives of a free press—would tend to look somewhat askance at a judge who granted an interview to a reporter and discussed a case he had recently decided. But Magistrate Prins did exactly this, on the afternoon of the day the inquest ended, and thus managed to deliver one of the very first assessments of the verdict he had just pronounced in the matter of the slain Black leader; "To me,

it is clear that, from September 7 through September 11, Goosen and the doctors arranged to mislead each other and Biko about the condition and the prognosis.



it was just another death. It was a job, like any other."<sup>20</sup>

The remark bespeaks an overwhelming callousness—the more astonishing to one who, sitting in court, had heard the magistrate put to witness and lawyer alike question after question which seemed to reflect a conscientious, if not overly penetrating, resolve to clarify the tangled factual issues confronting him.

The crucial difficulty with the verdict is, of course, that it announced the magistrate's findings without explaining them. The verdict is wholly conclusory. It adopts the Von Lieres-Van Rooyen theory that the "scuffle" was the occasion on which Biko suffered his fatal injuries. But it does not purport to clear away the weighty evidence undercutting the theory. Nor does it offer a syllable of justification for rejecting the opposed Kentridge analysis. As a matter of judicial craftsmanship, the verdict is defective not so much because it is not persuasive as because it does not undertake to persuade. It merely declares a result. Offering no rationale, it can stake no claim to advancing anyone's understanding of the matter at issue. As an aid to determining what happened to Biko, the verdict has no probative significance.<sup>21</sup>

A likely reason for delivering findings unsupported by reasons is that a reasoned opinion would not write—or, to be more exact, would have yielded very different findings. Proper findings, in my judgment, would have been in substance those articulated by Sir David Napley:

<sup>20</sup>*New York Times*, December 3, 1977, p. 2. A few hours before the verdict was announced, security police arrested Biko's brother and cousin, and others, in Soweto. The verdict has, and may be expected to continue to have, some legal significance. It is true that the prosecutor, if unsatisfied with an inquest verdict, is entitled to require a magistrate to reopen the proceedings. But there is no indication that Von Lieres is unhappy with the verdict he sought. (And Van Rooyen, on a recent visit to Washington, tried to present to an impromptu press conference in the Kayburn Building "a laborious description of how Biko was killed in self-defense." *Washington Post*, February 6, 1978, p. B3. The press conference was an attempt to counter Donald Woods' testimony before a House subcommittee. See footnote 2, *supra*.) It appears that the Biko family has initiated a wrongful death action against the police and the government in the South African courts. Presumably the defendants will, *inter alia*, seek to interpose the magistrate's verdict as a bar to further litigation. From an American perspective, one would not expect the verdict to have a *res judicata* effect precluding the civil suit. And, *res judicata* aside, one would like to think that a South African judge would recognize that Magistrate Prins' verdict simply sheds no light at all on the factual issues it was his duty to determine.

It is, in my opinion, reasonable to postulate as follows: The purpose of Mr. Biko's detention was to obtain information concerning alleged terrorist activities. A recognized course for illiciting [sic] information is to condition a person, e.g., by holding him incommunicado for 20 days, subjecting him to hardship and deprivation such as that endured by Mr. Biko. Not long before the interrogation was to be resumed at 0715 hours on the morning of 7th September, he sustained an injury which proved fatal, and that injury was inflicted by one or more persons with a view to rendering him compliant. In summary the following salient facts emerged:

- (1) The dishonesty of the police in stressing to the Doctors that Mr. Biko was shamming illness and the fact that they steadfastly failed even to suggest to the Doctors that he sustained a blow to his head abundantly demonstrates that they had something discreditable to hide.
- (2) The fact that Mr. Biko must have had a period of unconsciousness before 7:15 A.M. on the morning of the 7th September must have pinpointed the onset of the brain damage and the way in which it was sustained.
- (3) The failure by the police to mount and pursue a meaningful and vigorous investigation prior to the Inquest as to the full and true circumstances was, and could only be, attributable to a significant reluctance to uncover the truth.
- (4) The demonstrable pattern of conditioning of the deceased for interrogation renders it improbable, in the face of the callousness involved throughout, that actual violence would have been abhorrent and absent.
- (5) The medical evidence established that the onset of the brain damage was at least as consistent with a blow having been received prior to 0715 hours on the 7th September, as in the "scuffle" at about that time.
- (6) The oral evidence of the police was unconvincing and for the most part probatively unacceptable.
- (7) The police, in whose custody the deceased had been when he was held incommunicado, advanced no explanation as to how he could have sustained a blow to his forehead, consistent with the brain damage subsequently disclosed.

In short, I was left in no doubt that Mr. Biko died as a result of brain injury inflicted on him by one or more unidentified members of the Security Police at some time prior to and reasonably proximate to 0715 hours on the morning of the 7th September, 1977. A blow or blows no doubt intended only to hurt, caused brain damage which resulted in death. If, within the first few hours of sustaining the

injury, the full and true facts had been given to the Doctors, and they had been allowed to place Mr. Biko in a provincial hospital, with all the advantages of the excellent and experienced medical services available in South Africa, Mr. Biko might still be alive. After the first few hours, as the Autopsy and the medical evidence showed, the resultant damage became irreversible.

To the extent that one credits Sir David's findings, one is forced to recognize that there may be terrifying truths lurking in the magistrate's postscript to his verdict, "... it was just another death." Biko was the twentieth person to die in the custody of the security police since March of 1976.<sup>22</sup> Another detainee—eighteen-year old Bonoventura S. Malza—died while Biko's inquest was in progress.<sup>23</sup>

The verdict was widely condemned. Within South Africa, Whites generally may have been relieved, but such major White newspapers as the *Rand Daily Mail* and the *Johannesburg Star* were critical. Outside South Africa, condemnation was the norm; among those voicing shock were the United States Department of State, the House of Commons and Secretary General Waldheim.<sup>24</sup>

But the crucial assessment of the verdict came from Stephen Biko himself. Months earlier, before he was detained for the last time, in an interview with an American businessman, he foretold what was likely to happen:

You are either alive and proud or you are dead, and when you are dead, you can't care anyway. And your method of death can itself be a politicizing thing. So you die in the riots. For a hell of a lot of them, in fact, there's really nothing to lose—almost literally, given the kind of situations that they come from. So if you can overcome the personal fear for death, which is a highly irrational thing, you know, then you're on the way.

<sup>22</sup>*New York Times*, November 29, 1977. For a detailed inventory, see *Deaths in Detention in South Africa* (Lawyers' Committee for Civil Rights Under Law: Washington, 1977) pp. 2-3. There appear to have been no deaths from 1972 to 1975; from 1963 to 1971 there were twenty-two deaths. In a number of instances, no inquests were held.

<sup>23</sup>*Washington Post*, November 19, 1977, p. A16.

<sup>24</sup>*Philadelphia Inquirer*, December 4, 1977.

And in interrogation the same sort of thing applies. I was talking to this policeman, and I told him, "If you want us to make any progress, the best thing is for us to talk. Don't try any form of rough stuff, because it just won't work." And this is absolutely true also. For I just couldn't see what they could do to me which would make me all of a sudden soften to them. If they talk to me, well I'm bound to be affected by them as human beings. But the moment they adopt rough stuff, they are imprinting in my mind that they are police. And I only understand one form of dealing with police, and that's to be as unhelpful as possible. So I button up. And I told them this: "It's up to you." We had a boxing match the first day I was arrested. Some guy tried to clout me with a club. I went into him like a bull. I think he was under instructions to take it so far and no further, and using open hands so that he doesn't leave any marks on the face. And of course he said exactly what you were saying just now: "I will kill you." He meant to intimidate. And my answer was: "How long is it going to take you?" Now of course they were observing my reaction. And they could see that I was completely unbothered. If they beat me up, it's to my advantage. I can use it. They just killed somebody in jail—a friend of mine—about ten days before I was arrested. Now it would have been bloody useful evidence for them to assault me. At least it would indicate what kind of possibilities were there, leading to this guy's death. So, I wanted them to go ahead and do what they could do, so that I could use it. I wasn't really afraid that their violence might lead me to make revelations I didn't want to make, because I had nothing to reveal on this particular issue. I was operating from a very good position, and they were in a very weak position. My attitude is, I'm not going to allow them to carry out their program faithfully. If they want to beat me five times, they can only do so on condition that I allow them to beat me five times. If I react sharply, equally and oppositely, to the first clap, they are not going to be able to systematically count the next four claps, you see. It's a fight. So if they had meant to give me so much of a beating, and not more, my idea is to make them go beyond what they wanted to give me and to give back as much as I can give so that it becomes an uncontrollable thing. You see the one problem this guy had with me: he couldn't really fight with me because it meant he must hit back, like a man. But he was given instructions, you see, on how to hit, and now these instructions were no longer applying because it was a fight. So he had to withdraw and get more instructions. So I said to them, "Listen, if you guys want to do this your way, you have got to handcuff me and

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bind my feet together, so that I can't respond. If you allow me to respond, I'm certainly going to respond. And I'm afraid you may have to kill me in the process even if it's not your intention."<sup>11</sup>

<sup>11</sup>"Biko on Death," *New Republic*, January 7, 1978, p. 12.

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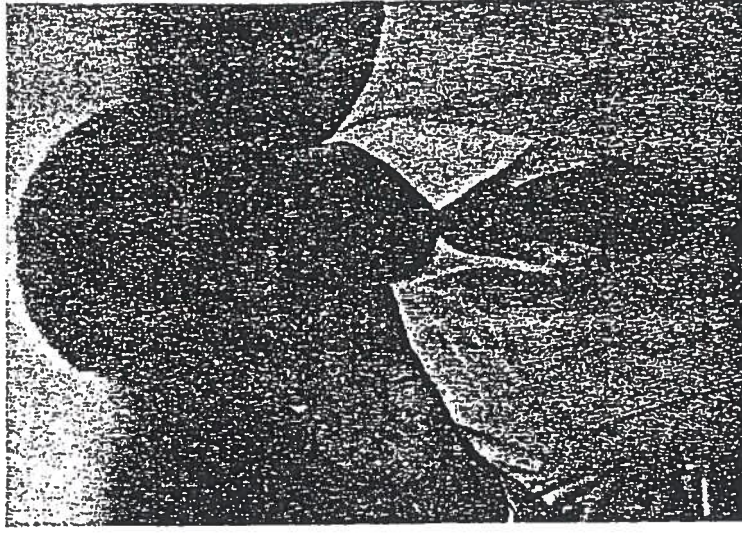


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MILLARD ARNOLD, an American, is a graduate of Howard University and Notre Dame Law School. He is Director of the Southern Africa Project of the Lawyers' Committee for Civil Rights Under Law in Washington, D.C. All money earned by the book is being placed by the Committee in a trust for the Biko family.

plores almost every issue raised in contemporary South Africa: Black attitudes toward Whites and Whites' toward Blacks; education, religion, foreign investments, revolution and violence. Throughout there is a first-person account of the mind and character of Steve Biko, the man who uplifted a mass of downtrodden people and gave them hope, direction and purpose.