

Impunity And Gross Human Rights Violations in South Africa

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Barrister, South Africa

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Introduction My discussion of the topic is limited to the South African context. I expressed the views below to the learned judges of the International Court of Justice from my own perspective as a human rights activist and with the deepest deference to the Chief Justice, the President of the Constitutional Court and other Judges of the High Court of South Africa who have attended these proceedings. I may respectfully disagree with their judgements, but without their human rights activism and precedent I would neither have had the courage (nor possibly even the liberty) to express my views. The Meaning of Gross Human Rights Violations and Impunity in South Africa Within the South African context the expression "gross violation of human rights" is defined by Section 1 of the Promotion of National Unity and Reconciliation Act, No. 34 of 1995 (the Act). Section 1 defines the gross violation of human rights as: "The violation of human rights through -

(a) the killing, abduction, torture or severe ill treatment of any person or

(b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a)

[Any violation of human rights] which emanated from conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date (10 May 1994) within or outside the Republic and the commission [of the violation] was carried out, advised, planned, directed, commanded or ordered by any person acting with a political motive.

'Amnesty' means the immunity granted by the Act. This takes the form of immunity from criminal and civil liability for certain acts, omissions and offences. Amnesty may be granted by the South African Amnesty Committee of the Truth and Reconciliation Commission (the TRC) to any person who appears before the Committee and satisfies it that his or her application complies with the requirements of the Act and that the act, omission or offence to which the application relates is an act associated with a political objective which was committed in the course of the conflicts of the past (in accordance with certain further defined criteria). The applicant must make a full disclosure of all the relevant facts. The Focus on Torture South Africa signed the Convention against Torture in 1993[1] and my focus is on torture because it best illustrates the legal and practical difficulties of effectively implementing an amnesty regime within a domestic jurisdiction while simultaneously attempting to comply with international obligations. En passant I should add that my criticism is not levelled at the Truth and Reconciliation process, but rather at certain contradictions in its implementation which might impede that process and which may still be capable of resolution. The Policy and Purpose of South African Law In addressing a Reception for members of the International Court of Justice held in Cape Town on 5 February 1998 the Minister of Justice, Dr Dullah Omar, asserted that South Africa intended to uphold the rule of law "in our domestic and foreign relations". Two nights previously during the second Bram Fischer Memorial lecture, the late Chief Justice Mohammed had told us that "whatever be the eventual content of law, its objective must always be consistent with justice. Law does not constitute its own justification. Law cannot be built on law. It must be built on justice." How do these statements then accord with South Africa's amnesty laws? In so far as the treatment of torture is concerned, I shall submit that South Africa is in danger of neither upholding the rule of law in its foreign relations nor of building its domestic law on a foundation of justice tested on an objective basis. The Contradiction Inherent in the Topic

As the impunity of the perpetrator deprives the victim of effective remedies, the first question relates to how the granting of impunity for gross human rights violations could ever be built on justice. The short answer is that such impunity, as is provided for in Section 20(7) of the Act, cannot be just. How then do the facts and law in South Africa purportedly sustain the legitimacy of the power, vested in the Amnesty Committee of the TRC, to grant amnesty for gross violations of human rights whenever the violations were "associated with a political objective committed in the course of the conflicts of the past" and "the applicant has made a full disclosure of all relevant facts" (as provided for in Section 20(1) of the Act)? Resolution of the Contradiction by the Constitutional Court In the matter of Azapo & Others v President of the Republic of South Africa 1996(4) SA 671 (CC), Deputy President of the Constitutional Court Mohammed gave the following explanation. By the 1980's it was clear that South Africa "was on a disaster course" unless the conflict within it was reversed. This realisation rescued the country in the early 1990's when those who controlled State power negotiated with those who had formerly resisted such power. The negotiators appreciated that the task of building a new democratic order would not be achieved without a commitment to reconciliation and national unity within an Interim Constitution and that the past could not be fully reversed. An Interim Constitution (The Constitution of the Republic of South Africa Act 200 of 1993) was negotiated and enacted. It was characterised by compromise and reconciliation, expressed in its Epilogue. It stated that the Constitution: "provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The Epilogue also provided that "in order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law... The "law" enacted was the Act in question, which came into force on 1 December 1995. When the amnesty provisions in the Act were eventually challenged before the Constitutional Court, the first basis of the challenge was that the provisions were inconsistent with the constitutional right vested by Section 22 of the Interim Constitution, which was to have justiciable disputes settled by a court of law. In dealing with the question of amnesty in respect of criminal

liability the Court recognised that for a successfully negotiated transition the terms of the transition required not only the agreement of those victimised by abuse, but also those threatened by the transition to a democratic society. For this reason the negotiators of the Constitution deliberately chose to prefer 'understanding over vengeance, reparation over retaliation, ubuntu over victimisation'. For present purposes the object of the Act, expressed in its Preamble, is to provide for the investigation and establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed between 1 March 1960 and the cut off date, emanating from conflicts of the past. The focus of the Act is on: the fate or whereabouts of the victims of such violations; the granting of amnesty; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at granting of reparation to and the rehabilitation and restoration of the human and civil dignity of victims. The Court stated that the compensatory benefit to the victims of the amnesty provision is that the perpetrators are required to make a full disclosure of all the relevant facts (Section 21(c) of the Act). Accordingly, the circumstances which victims often seek desperately to know are more likely to be forthcoming if those responsible are encouraged not only by the incentive of amnesty but by the knowledge that to obtain it they will have to disclose the whole truth. The alternative to granting immunity is criminal and civil prosecution and the inevitable obfuscation of the truth which arises in adversary proceedings.

Commentary on the Act

Before proceeding further certain comments may be apposite. Firstly, the Act was not victor's law (which is the criticism often levelled at the Nuremberg and Tokyo Judgements) but the outcome of negotiation to avoid a terminal war of attrition in South Africa. However, the validity of a law to be applied at the conclusion of any conflict in respect of alleged crimes committed during the conflict should be consistent with international standards of justice. Therefore the outcome of the conflict cannot be relied upon either as a criticism or an excuse. Secondly, though the Epilogue to the Interim Constitution (which was the supreme law at the time) specifically authorised a law conferring amnesty in the circumstances referred to above, it contemplated 'a future founded on the recognition of human rights'. Because the Epilogue was intended 'to advance reconciliation and reconstruction' it could hardly have contemplated that South Africa should embark on a course which involved at its outset the removal of every remedy for every victim of every offence, no matter how egregious. Not only would such a step directly fly in the face of the future contemplated in the Epilogue, but it might also bring South Africa into direct conflict with the international community. For example it could hardly have been contemplated that amnesty would be given for acts outlawed in contemporary international law which are the concern of all states and where because of the importance of the rights, obligations erga omnes rest upon South Africa, inter alia, acts of aggression against neighbouring states, genocide and slavery (see *Barcelona Traction Light & Power Co Ltd*, Judgement of the ICJ 5 February [1970] ICJ Reports 1, at 32). For reasons which I shall set out below, torture should be added to this list.

Clearly limits had to be placed not only on the prohibited acts for which amnesty could be granted, but also on the circumstances in which they were perpetrated. The relevant Act fails in the former respect. The latter situation being governed by various criteria - including the Nergaard Principles - which determine whether an act is associated with a political objective, has been better calculated to restore the dignity of the victims.

Problems with the Justification for Immunity in the Case of Torture

The compensatory benefit derived from confession by the perpetrators is of little or no application to the victims of torture who invariably know the identity of the persons who put sacks over their heads or applied the electric shocks, as well as the details of the torture. What the victim does not know and what may not be a relevant fact in terms of Section 20(1)(c) of the Act, is the identity of the applicants' 'superiors' who gave the order to torture, who authorised the system (which is admitted by the Security Forces to have been endemic to the interrogation of detainees) and how high up in government circles the systematic use of torture was known, accepted, authorised and relied on.

Many former members of the liberation movement have been integrated into the present defence force and police force. They need to know these details in order to allow them peace of mind arising from the certainty that the 'superiors' do not still hold power over them in their daily work. Furthermore, the securocrats of the former National Security Management System (possibly still in possession of the residue of slush funds, weapons, sources of information, technology and logistic capability which previously nurtured them) did not simply disappear off the face of South Africa when it became a democracy. Besides the invisible 'third force' private security systems - many of them controlled or staffed by former securocrats - have openly embrace the heartland of middle class residential areas, as well as the commercial, industrial and farming areas of South Africa where many South Africans spend most of their daily lives.

The disclosure of the identities of the superiors is essential to make the reconciliation process work. Not only so as to provide a bridge between a society divided by strife and conflict and a future founded on peaceful co-existence, but also for the fundamental reason that in the transition to democracy the people of South Africa must at last be able to exercise control of their country. It is unlikely that 'full disclosure' to the Amnesty Committee of the involvement of superiors is a defined prerequisite for amnesty. Certainly the application form issued by the Committee does not require such disclosure. It is even doubtful whether the Committee, within the short period of its mandate, could ever permit the necessary cross-examination of applicants which is essential to establish such facts.

The Desultory Challenge and Outcome Based On International Law in the Azapo Case

The Court was faced, inter alia, with an argument that the State is obliged by international law to prosecute those responsible for gross human rights violations. The provisions of Section 20(7) of the Act, which authorise amnesty for such offenders, constitute a breach of the requirements of the four Geneva Conventions of 1949 on the law of armed conflict. These Conventions require State parties to enact legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed grave breaches of the provisions of the Conventions. In response to this argument the Court held that the issue to be determined was whether Section 20(7) of the Act was inconsistent with the Constitution and that the enquiry as to whether or not international law prescribed a different duty was irrelevant to that determination. These last observations, inter alia, were supported by the direct provisions of the Constitution itself referring to international law and international agreements, in particular Section 231(1) and Section 231(4). Section 231(1) expressly provides that an act of parliament could override any contrary rights or

obligations under international agreements entered into before the commencement of the Constitution. Section 231(4) provides that "the rules of customary international law binding on the Republic shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic". International law and the content of international treaties to which South Africa may or may not be a party, were regarded by the Court as being relevant only in the interpretation of the Constitution itself. As has already been argued above, because the prohibition against torture constitutes an international crime, upon a proper interpretation of the words "acts, omissions and offences" (for which amnesty may be granted) in the Epilogue to the Interim Constitution, torture stands to be excluded. Accordingly, torture should also be excluded from the amnesty provision of the act whose validity was derived from the Epilogue. Legal impunity for torture cannot be based on justice because the Constitution can not provide a bridge between the past and the future if it is to be interpreted in favour of the perpetrators of the inexcusable international crimes of the past, which South Africa independently has no authority to excuse. Unless this view is taken, the Interim Constitution may be perceived as having changed nothing.

The former regime systematically implemented the emerging international crime of apartheid through domestic laws in direct violation of its obligation to all states to protect human persons from racial discrimination (see the Barcelona Traction Case). At the same time it assiduously asserted an alleged immunity (in terms of Section 2(7) of the UN Charter) against intervention in matters which it claimed were "within the domestic jurisdiction". The Interim Constitution is now being called upon to justify impunity for all gross human rights violations committed during that time by any applicant offender who meets the requirements of the Act regardless of South Africa's international obligations. A constitutional challenge to the provision in the Act authorising amnesty for torture and any other international crime implicit in the amnesty provisions of the Act would have been desirable. Such a challenge, based on interpretation of the Epilogue read in the light of international law, does not appear to have been raised before the Court.

Had the Act not expressly referred to torture within the definition of gross violations, i.e. as a violation for which amnesty may be granted, the last criticism could have been avoided upon interpreting the Act. To qualify for amnesty an applicant must show that his or her offence was "an act associated with a political objective". This must be identified in terms of Section 20(3)(f) of the Act with reference, inter alia, to the relationship between the Act and the political objective, as well as to the directness and proximity of the relationship and the proportionality of the Act to the objective pursued. Therefore one might have concluded that a gross human rights violation such as torture, which is internationally proscribed, could never have resulted in impunity because proportionality could never exist.

Unfortunately the blend of legalistic angst above, mixed with the gut feel of victims that nothing has changed and that justice has not been done, creates a volatile cocktail which poses a potential threat to the legitimacy of the Constitution and a nascent human rights culture in South Africa. It is therefore most unfortunate that the attack on the constitutionality of the Act was limited to the tensions between the provisions of Section 20(7) of the Act on the one hand, and the right of access protected by Section 22 of the Interim Constitution and South Africa's international obligations under the Geneva Conventions of 1949 on the other.

Torture and South Africa's International Obligations

The constitutional validity of granting amnesty for torture remains unchallenged and unassailed. As a result applicants can and do apply to the Amnesty Committee for amnesty for torture per se and the Committee is empowered by the Act, and appears to be empowered by the Constitution, to grant impunity for torture. Paradoxically, by way of justification the applicants rely on the past existence of an armed conflict between the national liberation forces and the South African Security Forces, both beyond South African borders and within it. The armed conflict, so they allege, justified the abandonment of the principles of minimum violence, "an acceptable policing culture" and torture. This attitude appears, inter alia, from a submission to the TRC on 21 October 1996 by General J J Van der Merwe, the retired Commissioner of Police, who also served as commanding officer of the Security Branch of the South African Police (SAP) for the period 1 January 1986 to 30 September 1988 and a statement by retired Major-General J L Griebenauw of the SAP which was put before the Amnesty Committee by an applicant who has applied for an amnesty for the torture of political detainees. (Affidavits to similar effect had previously been deposed on behalf of the South African Defence Force e.g. Lieutenant-General Van Loggerenberg, Chief of Staff, Operations in the SADF in the case of *End Conscription Campaign v Minister Of Defence* 1980(2) SA 180 (CPD) prior to the emergence of a constitutional democracy in South Africa.)

From the amnesty hearings it has become apparent that the vesting of a power in the Committee to grant impunity to perpetrators of torture not only flies directly in the face of South Africa's legal obligations, but that the justification raised by the applicants turns the law of armed conflict on its head. It is the very existence of the armed conflict and its regulation by law which prohibits the use of torture.

In any event, the granting of amnesty for torture is prohibited by the international treaty law binding South Africa. In 1993 South Africa signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Though it had not ratified the Convention by the time the amnesty hearings took place, South Africa had an obligation to act in good faith and in accordance with the obligations resting upon it in terms of the customary law codified by the Vienna Convention on the Law of Treaties. That is, after South Africa signed the Convention, it was obliged to refrain from acts which would defeat the object and purpose of the treaty subject to ratification until such time as it had made its intention clear not to become a party to the treaty. In any event, estoppel is a general principle of law recognised by civilised nations and South Africa must be regarded as being estopped from defeating the objects of the treaty.

Official torture has been held by an American Court to be prohibited by the Law of Nations. (See *Filartiga v Pena Arila*, US COURT OF APPEAL, 2ND CIRCUIT 1980 ILM 966 where the jurisdiction of a United States Domestic Court was exercised in respect of a claim by a peregrinus plaintiff against a peregrinus defendant in respect of torture committed in Paraguay. Jurisdiction was founded on the basis of the alleged commission of the international crime of torture by a State official of Paraguay within Paraguay's borders).

A plethora of academic authority also supports the view that according to international criminal law an exemption from punishment for the international crime of torture is inadmissible. (e.g. see "Impunity in International Criminal Law", a Case Study on Colombia, Peru, Bolivia, Chile and Argentina by Kai

Ambos, Freiburg, Human Rights Law Journal, 29 August 1997, Vol 18, Nos. 1 - 4 at pp 9 - 10.) In such a case (according to the author of the Article) the law presumes the manifest illegality of a superior order and the infliction of torture as a result of a superior order constitutes an avoidable error for which the subordinate must face a personal reproach. In so far as the law of armed conflict is concerned the argument presented to the Constitutional Court and the judgement itself appear to make no reference whatsoever to Common Article 3 of the 1949 Conventions, which have been ratified by 186 States including South Africa. The Conventions are a codification of the international customary law and specifically provide that:

 In the case of armed conflict not of an international character occurring in the territory of one of high contracting parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by...detention or any other cause shall in all circumstances be treated humanely... Common Article 3 further provides that to this end cruel treatment and torture shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons. South Africa's former Security Forces were therefore bound not to torture detainees during the armed conflict described by the generals. The ANC's military wing, UMKHONTO WE SIZWE, bore a reciprocal obligation. By the relevant time the ANC had signed the 1977 Protocol 1 additional to the Geneva Conventions of 1949. Article 75(2) of the Geneva Protocol 1 prohibited torture in identical terms to Common Article 3 above. The protocol was directed at applying the above rules and prohibitions to armed conflict in which peoples were fighting against racist regimes in the exercise of their rights of self determination (in the armed conflict described by Generals Van der Merwe, Griebenauw and Van Loggerenberg). In signing the Protocol the ANC recognised its obligations as an organisation involved in the armed conflict referred to by the generals above. In customary international law the doctrine of "recognition of belligerency" by the parties involved in armed conflict imposed a duty on each of them to apply the laws of armed conflict. Not only was the prohibition against torture in non-international armed conflict part of international customary law, but the Nuremberg Principles (which are also part of international customary law) had in Principle VI(c), created individual responsibility for crimes against humanity including inhuman acts carried out during armed conflict. Unquestionably torture was outlawed under international law and attracted liability to perpetrators during the liberation struggle. In relation to international armed conflict the following commonly worded Articles of the Geneva Conventions were raised in the Azapo case. Article 49 of the First Convention, Article 50 of the Second, Article 129 of the Third and Article 146 of the Fourth Geneva Convention all provide that "the high contracting parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, ordering to be committed, any of the grave breaches...". Inevitably, the Court held that the Conventions of 1949 (and the sections referred to) applied only to cases of "declared war or...any armed conflict which may arise between two or more of the high contracting parties" and that Additional Protocol 1 was not binding on South Africa. The nature of the internal armed conflict and good faith of the parties to the conflict who had signed international instruments and recognised the belligerency were not dealt with at all.[3]

 The Amnesty Committee will directly violate South Africa's international obligation by granting impunity for torture. The State's obligation to prosecute those who commit torture will not be directly in issue. The Constitutional Court has concluded that there was no obligation on the part of a state party to the Geneva Conventions to prosecute those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights. However, the Court was not asked to take a quantum leap and to deal with the real issue - the situation where domestic law sanctions an amnesty for international criminals. (Which in turn raises the absurd question of whether the Amnesty Committee could incur accessory liability by coming into the picture after the crime has been completed and helping the perpetrators to escape justice). Conclusion Ultimately it remains arguable that the Amnesty Committee has no more international competence to grant amnesty to torturers than was vested by the Constitutions of Germany and Japan to afford impunity to the Nuremberg and Tokyo trialists. During at least one high profile treason trial which took place in South Africa during the 1980's, (The State v Yengeni and Others) the accused, who as detainees had been the victims of torture by the Security Police expressly placed on record before their torturer testified against them that charges had been laid against him abroad and that he would be prosecuted for the international crime of torture should he ever leave the borders of apartheid South Africa[4]. While such justice for the victims[4] may still be obtained in foreign jurisdictions, despite the good intentions of our democratic government to uphold the rule of law in our foreign relations and the best intention of our Courts to build our law on justice, South Africa may provide the only sanctuary on earth where perpetrators of the international crime of torture are constitutionally protected. In the circumstances the establishment of the ICJ as a Court of Constitutional Review (as has been suggested by Mr Justice C Fleischhauer of the ICJ) might prove to be a Godsend. Notes [1] (South Africa has since ratified the Convention on 9 December 1999.) [2] A force of former security officials who are believed to be responsible for many bombings and murders since 1994. [3] Because material but relevant principles of International Law were honoured in the breach by South Africa during the apartheid era the subject was not taken seriously at its law schools. The pithy challenge, in the AZAPO case affected its outcome. Its outcome has already adversely affected the reconciliation process. [4] Annexed are copies of the affidavits of Tony Yengeni (presently the head of South Africa's Parliamentary Select Committee on Defence) and Gary Kruser (presently a senior officer in South Africa's Security Forces) under cover of the letter which requested the assistance of the anti-apartheid movement in the prosecution.

About the Author