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Abstract

Both violence and international norms on human rights have become globalized. Formerly rigid systems of sovereignty become porous as the enemies and the friends of the rule of law show equal and opposite disregard for State boundaries. Judges in national courts are obliged to put aside their usual textbooks and cases, and open their eyes to legal scholars and commentators like Brownlie and Cassese. Four cases in the ten-year history of South Africa's Constitutional Court have exemplified these points. In each the Court was under pressure because of time–in three because events were unfolding so rapidly, and in one because the proceedings had dragged on for so long. All were about the law's response to extreme forms of organized violence. In Azanian Peoples Organisation ("AZAPO") v. President of The Republic of South Africa, the violence was by past State officials against their own citizens, and the issue was whether in the light of international law norms, amnesty could now be granted to the perpetrators. In State v. Basson, the charge was past violence by South African official against nationals of a neighboring country, and the question raised was whether the international duty of the State to prosecute war crimes had a bearing on the decisions made at the trial and on appeal. In Mohamed v. President of the Republic of South Africa, the violence had been committed against the U.S. embassy in Tanzania, and the issue was whether a suspect found on South African soil could be handed over to the U.S. Federal Bureau of Investigation ("FBI") without access to a lawyer, and without the U.S. authorities giving a prior assurance that the suspect would not be subjected to capital punishment. Finally, Kaunda v. President of the Republic of South Africa, turned on whether South African mercenaries, who had been captured in a neighboring State and threatened with prosecution and capital punishment after an unfair trial in a third State, could claim the right to be extradited back to South Africa and to get diplomatic protection from the South African authorities. I will deal with each case in turn, and do so in a narrative rather than analytical manner. The objective is not to subject the reasoning of the Court to close scrutiny–that will be left to others who were not directly involved in the matters. The purpose is limited to indicating the kinds of international law issues with which a contemporary national court has been engaged. In particular, the extracts from our judgments which appear in the following pages demonstrate the evolution of an intricate and restless interpenetration between international and domestic law that is likely to grow in the years to come.

WAR, VIOLENCE, HUMAN RIGHTS, AND THE OVERLAP BETWEEN NATIONAL AND INTERNATIONAL LAW: FOUR CASES BEFORE THE SOUTH AFRICAN CONSTITUTIONAL COURT

Albie Sachs

National courts as a general rule are not comfortable with international law. The two systems use similar language and concepts, but operate within different matrices. Yet there are times when the overlap between national and international law becomes unavoidable. Both violence and international norms on human rights have become globalized. Formerly rigid systems of sovereignty become porous as the enemies and the friends of the rule of law show equal and opposite disregard for State boundaries. Judges in national courts are obliged to put aside their usual textbooks and cases, and open their eyes to legal scholars and commentators like Brownlie and Cassese.[1]

Four cases in the ten-year history of South Africa's Constitutional Court have exemplified these points.[2] They all dealt with matters of great human drama. In each the Court was under pressure because of time — in three because events were unfolding so rapidly,[3] and in one because the proceedings had dragged on for so long.[4] All were about the law's response to extreme forms of organized violence.

In *Azanian Peoples Organisation ("AZAPO") v. President of The Republic of South Africa*,[5] the violence was by past State officials against their own citizens, and the issue was whether in the light of international law norms, amnesty could now be granted to the perpetrators.[6] In *State v. Basson*,[7] the charge was past violence by

1. *See infra* notes 62, 117 and accompanying text.

2. *See infra* notes 5-12 and accompanying text.

3. *See infra* notes 13, 75, and 96 and accompanying text.

4. *See infra* note 36 and accompanying text.

5. Azanian Peoples Organisation ("AZAPO") v. President of the Republic of S. Afr., 1996 (8) BCLR 1015 (CC), *available at* http://www.concourt.gov.za/files/azapo/azapo.pdf (last visited Jan. 30, 2005).

6. *See infra* notes 13-35 and accompanying text.

7. State v. Basson, 2004 (6) BCLR 620 (CC), *available at* http://www.concourt.gov.za/files/CCT3003/CCT3003.pdf (last visited Jan. 30, 2005).

a South African official against nationals of a neighboring country, and the question raised was whether the international duty of the State to prosecute war crimes had a bearing on the decisions made at the trial and on appeal.[8] In *Mohamed v. President of the Republic of South Africa*,[9] the violence had been committed against the U.S. embassy in Tanzania, and the issue was whether a suspect found on South African soil could be handed over to the U.S. Federal Bureau of Investigation ("FBI") without access to a lawyer, and without the U.S. authorities giving a prior assurance that the suspect would not be subjected to capital punishment.[10] Finally, *Kaunda v. President of the Republic of South Africa*,[11] turned on whether South African mercenaries, who had been captured in a neighboring State and threatened with prosecution and capital punishment after an unfair trial in a third State, could claim the right to be extradited back to South Africa and to get diplomatic protection from the South African authorities.[12]

I will deal with each case in turn, and do so in a narrative rather than analytical manner. The objective is not to subject the reasoning of the Court to close scrutiny — that will be left to others who were not directly involved in the matters. The purpose is limited to indicating the kinds of international law issues with which a contemporary national court has been engaged. In particular, the extracts from our judgments which appear in the following pages demonstrate the evolution of an intricate and restless interpenetration between international and domestic law that is likely to grow in the years to come.

I. *AZAPO*

When reading draft judgments of my colleagues for the first time, I am frequently filled with admiration by the elegant way in which they express important legal thoughts. We are a new Court creating a new jurisprudence with the aid of a new and

8. *See infra* notes 36-74 and accompanying text.

9. Mohamed v. President of the Republic of S. Afr., 2001 (7) BCLR 685 (CC), *available at* http://www.concourt.gov.za/files/mohamed/mohamed.pdf (last visited Jan. 30, 2005).

10. *See infra* notes 75-89 and accompanying text.

11. Kaunda v. President of Republic of S. Afr., 2004 (10) BCLR 1009 (CC), *available at* http://www.concourt.gov.za/files//kaunda.pdf (last visited Jan. 30, 2005).

12. *See infra* notes 96-141 and accompanying text.

highly respected Constitution. All of my colleagues have had their imaginations honed and their pens sharpened in the hard struggle to achieve justice in our country. But only once have I jumped out of my seat and rushed to my colleague's Chambers to communicate my enthusiasm. Ismail Mahomed, then Deputy President of the Constitutional Court, and later Chief Justice of South Africa, looked up at me startled and embarrassed. In a case that produced deep emotion throughout the country as well as in the Court, he had found exquisite language to capture both the gravity of profound human issues and the delicacy of the competing considerations. In words of rare sensibility he established the historic setting of transformation in which the Court was created. South Africa's Truth and Reconciliation Commission has aroused considerable international interest. Nowhere has its reason for being been better captured than in the *AZAPO*[13] judgment:

> For decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the [S]tate and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance. The conflict deepened with the increased sophistication of the economy, the rapid acceleration of knowledge and education and the ever increasing hostility of an international community steadily outraged by the inconsistency which had become manifest between its own articulated ideals after the Second World War and the official practices which had become institutionalised in South Africa through laws enacted to give them sanction and teeth by a Parliament elected only by a privileged minority. The result was a debilitating war of internal political dissension and confrontation, massive expressions of labour militancy, perennial student unrest, punishing international economic isolation, widespread dislocation in crucial areas of national endeavour, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the

13. Azanian Peoples Organisation ("AZAPO") v. President of the Republic of S. Afr., 1996 (8) BCLR 1015 (CC).

country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire [N]ation.

During the eighties it became manifest to all that our country with all its natural wealth, physical beauty and human resources was on a disaster course unless that conflict was reversed. It was this realisation which mercifully rescued us in the early nineties as those who controlled the levers of [S]tate power began to negotiate a different future with those who had been imprisoned, silenced, or driven into exile in consequence of their resistance to that control and its consequences. Those negotiations resulted in an interim Constitution[14] committed to a transition towards a more just, defensible and democratic political order based on the protection of fundamental human rights. It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past.

This fundamental philosophy is eloquently expressed in the epilogue to the Constitution which reads as follows:

> "*National Unity and Reconciliation*
>
> This 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 pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which

14. CONST. OF THE REPUBLIC OF S. AFR., ACT 200 OF 1993 [hereinafter INTERIM CONST.]. The judgment thereafter refers to the Interim Constitution simply as "the Constitution."

> generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu[15] but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
>
> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country."

Pursuant to the provisions of the epilogue, Parliament enacted during 1995 what is colloquially referred to as the

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15. The term *ubuntu* is not defined in the South African Constitution. *See* State v. Makwanyane, 1995 (6) BCLR 665, ¶ 223 (CC). *Ubuntu* is an African cultural value that is difficult to define precisely. Desmond Tutu said *ubuntu* "speaks about the essence of being human: that my humanity is caught up in your humanity because we say a person is a person through other persons . . . forgiveness is absolutely necessary for continued human existence." Lorna McGregor, *Individual Accountability in South Africa: Cultural Optimism or Political Façade?*, 95 AM. J. INT'L L. 32, 38 (2001) (quoting Desmond Tutu, *Without Forgiveness There Is No Future*, *in* EXPLORING FORGIVENESS xiii (Robert Enright & Joanna North eds., 1998). In *Makwanyane*, Justice Langa explained that "an outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to the concept." *Makwanyane*, 1995 (6) BCLR 665, ¶ 225. *Ubuntu* has been described as an African world-view and "a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources." Justice Yvonne Mokgoro, *Ubuntu and the Law in South Africa*, 4 BUFF. HUM. RTS. L. REV. 15 (1998). In *Makwanyane*, Justice Madala stated that the reformative theory of justice, wherein punishment is a means to rehabilitating criminals, "accords fully with *ubuntu*," in contrast to the death penalty. *Makwanyane*, 1995 (6) BCLR 665, ¶¶ 242-43.

Truth and Reconciliation[16] Act.[17]

The judgment provided a summary of AZAPO's claim that a specific section of the Truth and Reconciliation Act ("the Act")[18] was not compatible with the Interim Constitution ("the Constitution"):

> The applicants sought in this court to attack the constitutionality of section 20(7) on the grounds that its consequences are not authorised by the Constitution. They aver that various agents of the [S]tate, acting within the scope and in the course of their employment, have unlawfully murdered and maimed leading activists during the conflict against the racial policies of the previous administration and that the applicants have a clear right to insist that such wrongdoers should properly be prosecuted and punished, that they should be ordered by the ordinary courts of the land to pay adequate civil compensation to the victims or dependants of the victims and further to require the [S]tate to make good to such victims or dependants the serious losses which they have suffered in consequence of the criminal and delictual acts of the employees of the [S]tate. . . . [AZAPO] contended that Section 20(7) was inconsistent with Section 22[19] of the Constitution which provides that: "[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum."[20]

Justice Mohamed then observed that providing an amnesty to the perpetrators of crimes would necessarily impact upon the victims' fundamental rights:

> All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right to respect for and protection of dignity and their right not to be subject to torture of any kind. When those rights are invaded those aggrieved by such invasion have the right to obtain redress in the ordinary courts of law and those guilty of perpetrating

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16. Its proper name is the Promotion of National Unity and Reconciliation Act 34 of 1995. *See* The Promotion of National Unity and Reconciliation Act of 1995, No. 24 (1995) [hereinafter "Truth and Reconciliation Act"].

17. Azanian Peoples Organisation ("AZAPO") v. President of the Republic of S. Afr., 1996 (8) BCLR 1015, ¶¶ 1-3 (CC).

18. Truth and Reconciliation Act § 20(7).

19. INTERIM CONST. ch. 3, § 22.

20. *AZAPO*, 1996 (8) BCLR 1015, ¶ 8.

such violations are answerable before such courts, both civilly and criminally. An amnesty to the wrongdoer effectively obliterates such rights.

There would therefore be very considerable force in the submission that [the impugned section of the Truth and Reconciliation Act] constitutes a violation of section 22 of the Constitution, if there was nothing in the Constitution itself which permitted or authorised such violation. The crucial issue, therefore, which needs to be determined, is whether the Constitution, indeed, permits such a course. . . .

. . . .

I understand perfectly why the applicants would want to insist that those wrongdoers who abused their authority and wrongfully murdered, maimed or tortured very much loved members of their families who had, in their view, been engaged in a noble struggle to confront the inhumanity of apartheid, should vigorously be prosecuted and effectively be punished for their callous and inhuman conduct in violation of the criminal law. I can therefore also understand why they are emotionally unable to identify themselves with the consequences of the legal concession made by [their counsel] . . . .

Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated. Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effec-

> tively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The [Truth and Reconciliation Act] seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new [N]ation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the "reconciliation and reconstruction" which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.[21]

The idea of healing the wounds of the past frames the argument for amnesty in terms of restorative justice.[22] Restorative justice seeks to remedy harm and injury through reparation and reconciliation that can lead to social progress.[23] Arguably, however, the families devastated by the crimes committed through-

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21. *Id.* ¶¶ 9-10, 16-17.

22. *See* Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389, 411-12 (1999).

23. *See id.* at 412.

out the apartheid era will want more than a new social order: they will want the perpetrators of these horrors to be punished.[24]

But those seeking a remedy should not limit their understanding of South Africa's method of granting amnesty to the idea that restorative justice must work alone if the Nation wishes to recover and move forward.[25] Retributive justice works in South Africa's amnesty scheme in that the immunity proceedings parallel one scenario typical of traditional criminal justice — someone comes forward, confesses to a crime, and then arranges a plea bargain.[26] In South Africa's particularized amnesty program, in order to receive immunity, the perpetrator must first step forward and confess the crime, allowing the victim and/or his or her family to hear the truth.[27] If the perpetrator does not confess, or tries to evade detection, if caught he or she will still face criminal prosecution and liability.[28]

Knowing that punishment in the traditional sense of criminal law will only come into play in the absence of a confession may leave victims and their families with lingering dissatisfaction in the amnesty system. Justice Mohamed goes on, however, to explain why amnesty is the best and most workable alternative:

> The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependants of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and correspondingly to allow the culprits of such deeds to remain perhaps physically free but inhibited in their

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24. *See id.* at 403 (quoting Churchill Mxenge, a brother of a murdered anti-apartheid attorney, as saying "unless justice is done, it is difficult for any person to think of forgiving"); *see also id.* at 422 (referring to Mxenge's critique that "without public punishment of the perpetrator, there will be no reconciliation between the victim's family and the [S]tate").

25. *See id.* at 436 (outlining the role of retributivism in South Africa's particularized amnesty).

26. *See id.* at 436-37.

27. *See id.* at 437; *see also infra* note 33 and accompanying text. "The Amnesty Committee may grant amnesty in respect of the relevant offence only if the perpetrator of the misdeed makes a full disclosure of all relevant facts." Azanian Peoples Organisation ("AZAPO") v. President of the Republic of S. Afr., 1996 (8) BCLR 1015, ¶ 20 (CC).

28. *See* Markel, *supra* note 22, at 437.

capacity to become active, full and creative members of the new order by a menacing combination of confused fear, guilt, uncertainty and sometimes even trepidation. Both the victims and the culprits who walk on the "historic bridge" described by the epilogue will hobble more than walk to the future with heavy and dragged steps delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge, which is the vision which informs the epilogue.

Even more crucially, but for a mechanism providing for amnesty, the "historic bridge" itself might never have been erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a "democratic society based on freedom and equality".[29] If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, *ubuntu*[30] over victimisation.

Is [the impugned section], to the extent to which it immunizes wrongdoers from criminal prosecution, nevertheless objectionable on the grounds that amnesty might be provided in circumstances where the victims, or the dependants of the victims, have not had the compensatory benefit of discovering the truth at last or in circumstances where those whose misdeeds are so obscenely excessive as to justify punishment, even if they were perpetrated with a political objective during the course of conflict in the past? Some answers to such difficulties are provided [elsewhere in the Act]. The Amnesty Committee may grant amnesty in respect of the relevant offence only if the perpetrator of the misdeed makes a full disclosure of all relevant facts. If the offender does not, and in consequence thereof the victim or his or her family is not able to discover the truth, the application for amnesty will fail. Moreover, it will not suffice for the offender merely to say that his or her act was associated with a political objective. That issue must independently be determined by the Am-

29. INTERIM CONST. §§ 33(1)(a)(ii) & 35(1).

30. *See supra* note 15 and accompanying text.

nesty Committee pursuant to the criteria set out in [another section of the Act] including the relationship between the offence committed and the political objective pursued and the directness and proximity of the relationship and the proportionality of the offence to the objective pursued.

The result, at all levels, is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new. It is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations. It is an act calling for a judgment falling substantially within the domain of those entrusted with lawmaking in the era preceding and during the transition period. The results may well often be imperfect and the pursuit of the act might inherently support the message of Kant that "out of the crooked timber of humanity no straight thing was ever made."[31] There can be legitimate debate about the methods and the mechanisms chosen by the lawmaker to give effect to the difficult duty entrusted upon it in terms of the epilogue. We are not concerned with that debate or the wisdom of its choice of mechanisms but only with its constitutionality. That, for us, is the only relevant standard. Applying that standard, I am not satisfied that in providing for amnesty for those guilty of serious offences associated with political objectives and in defining the mechanisms through which and the manner in which such amnesty may be secured by such offenders, the lawmaker, in [the impugned section], has offended any of the express or implied limitations on its powers in terms of the Constitution.

South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have in modern times been confronted with a similar need. Although the mechanisms adopted to facilitate that process have differed from country to country and from time to time,

31. Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 170 (1969) (paraphrasing Immanuel Kant).

the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries.

. . . .

What emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule, is that there is no single or uniform international practice in relation to amnesty. Decisions of [S]tates in transition, taken with a view to assisting such transition, are quite different from acts of a [S]tate covering up its own crimes by granting itself immunity. In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses.

. . . .

The need for this distinction is obvious. It is one thing to allow the officers of a hostile power which has invaded a foreign [S]tate to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same [S]tate in respect of the permissible political direction which that [S]tate should take with regard to the structures of the [S]tate and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatised by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the [S]tate concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction. That is a difficult exercise which the [N]ation within such a [S]tate has to perform by having regard to its own peculiar history, its complexities, even its contradictions and its emotional and institutional traditions. What role punishment should play in respect of erstwhile acts of criminality in such a situation is part of the complexity. . . . The agonies of a [N]ation seeking to reconcile the tensions

> between justice for those wronged during conflict, on the one hand, and the consolidation of the transition to a nascent democracy, on the other, has also been appreciated by other international commentators. . . .
>
> . . . The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purposes of effecting a constructive transition towards a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past. That objective has to be evaluated having regard to the careful criteria listed in section 20(3) of the Act, including the very important relationship which the act perpetrated bears in proportion to the object pursued.[32]

The next issue was whether the amnesty as contemplated by the Constitution should be read as extending to liability by the perpetrators to pay civil damages to the victims, as well as the vicarious responsibility of the State to compensate victims of violence and torture inflicted by State officials. The judgment stated that as far as the former was concerned, one of the main objectives of the epilogue was to encourage perpetrators to come forward and reveal the truth, and this would be frustrated if they were to be held liable for civil damages. In relation to civil liability by the State for criminal conduct by its officials during the previous era, the Court observed:

> The families of those whose fundamental human rights were invaded by torture and abuse are not the only victims who have endured "untold suffering and injustice" in consequence of the crass inhumanity of apartheid which so many have had to endure for so long. Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many. The country has neither the resources nor the skills to reverse fully these massive wrongs. It will take many years of strong commitment, sensitivity and labour to "reconstruct our

32. Azanian Peoples Organisation ("AZAPO") v. President of the Republic of S. Afr., 1996 (8) BCLR 1015, ¶¶ 18-22, 24, 31-32 (CC) (some citations omitted).

society" so as to fulfill the legitimate dreams of new generations exposed to real opportunities for advancement denied to preceding generations initially by the execution of apartheid itself and for a long time after its formal demise, by its relentless consequences. The resources of the [S]tate have to be deployed imaginatively, wisely, efficiently and equitably, to facilitate the reconstruction process in a manner which best brings relief and hope to the widest sections of the community, developing for the benefit of the entire [N]ation the latent human potential and resources of every person who has directly or indirectly been burdened with the heritage of the shame and the pain of our racist past.

Those negotiators of the Constitution and leaders of the [N]ation who were required to address themselves to these agonising problems must have been compelled to make hard choices. They could have chosen to direct that the limited resources of the [S]tate be spent by giving preference to the formidable delictual claims of those who had suffered from acts of murder, torture or assault perpetrated by servants of the [S]tate, diverting to that extent, desperately needed funds in the crucial areas of education, housing and primary health care. They were entitled to permit a different choice to be made between competing demands inherent in the problem. They could have chosen to direct that the potential liability of the [S]tate be limited in respect of any civil claims by differentiating between those against whom prescription could have been pleaded as a defence and those whose claims were of such recent origin that a defence of prescription would have failed. They were entitled to reject such a choice on the grounds that it was irrational. They could have chosen to saddle the [S]tate with liability for claims made by insurance companies which had compensated institutions for delictual acts performed by the servants of the [S]tate and to that extent again divert funds otherwise desperately needed to provide food for the hungry, roofs for the homeless and black boards and desks for those struggling to obtain admission to desperately overcrowded schools. They were entitled to permit the claims of such school children and the poor and the homeless to be preferred.

The election made by the makers of the Constitution was to permit Parliament to favour "the reconstruction of society" involving in the process a wider concept of "reparation", which would allow the [S]tate to take into account the competing claims on its resources but, at the same time, to have

> regard to the "untold suffering" of individuals and families whose fundamental human rights had been invaded during the conflict of the past. In some cases such a family may best be assisted by a reparation which allows the young in this family to maximise their potential through bursaries and scholarships; in other cases the most effective reparation might take the form of occupational training and rehabilitation; in still other cases complex surgical interventions and medical help may be facilitated; still others might need subsidies to prevent eviction from homes they can no longer maintain and in suitable cases the deep grief of the traumatised may most effectively be assuaged by facilitating the erection of a tombstone on the grave of a departed one with a public acknowledgement of his or her valour and nobility. There might have to be differentiation between the form and quality of the reparations made to two persons who have suffered exactly the same damage in consequence of the same unlawful act but where one person now enjoys lucrative employment from the [S]tate and the other lives in penury.
>
> All these examples illustrate, in my view, that it is much too simplistic to say that the objectives of the Constitution could only properly be achieved by saddling the [S]tate with the formal liability to pay, in full, the provable delictual claims of those who have suffered patrimonial loss in consequence of the delicts perpetrated with political objectives by servants of the [S]tate during the conflicts of the past. There was a permissible alternative, perhaps even a more imaginative and more fundamental route to the "reconstruction of society", which could legitimately have been followed. This is the route which appears to have been chosen by Parliament through the mechanism of amnesty and nuanced and individualised reparations in the Act. I am quite unpersuaded that this is not a route authorised by the epilogue to the Constitution.[33]

The judgment went on to point out that the legislation did provide for reparations to be paid, even though not necessarily on the scale that civil damages would be awarded through litigation:[34]

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33. *Id.* ¶¶ 43-46.

34. *See* JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 62-64 (2d ed. 2000). The *AZAPO* judgment has not escaped criticism. While all commentators express admiration for its eloquence and sensibility, and although there is not much challenge to the outcome, some have criticized the manner in which the judg-

> In the result, I am satisfied that the epilogue to the Constitution authorised and contemplated an "amnesty" in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future. Parliament was, therefore, entitled to enact the Act in the terms which it did. This involved more choices apart from the choices I have previously identified. They could have chosen to insist that a comprehensive amnesty manifestly involved an inequality of sacrifice between the victims and the perpetrators of invasions into the fundamental rights of such victims and their families, and that, for this reason, the terms of the amnesty should leave intact the claims which some of these victims might have been able to pursue against those responsible for authorising, permitting or colluding in such acts, or they could have decided that this course would impede the pace, effectiveness and objectives of the transition with consequences substantially prejudicial for the people of a country facing, for the first time, the real prospect of enjoying, in the future, some of the human rights so unfairly denied to the generations which preceded them. They were entitled to choose the second course. They could conceivably have chosen to differentiate between the wrongful acts committed in defence of the old order and those committed in the resistance of it, or they could have chosen a comprehensive form of amnesty which did not make this distinction. Again they were entitled to make the latter choice. The choice of alternatives legitimately fell within the judgment of the lawmakers. The exercise of that choice does not, in my view, impact on its constitutionality. It follows from these reasons that [the impugned] section is authorised by the Constitution itself . . . .[35]

Eight years have passed since this judgment was delivered.

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ment deals with international law, including its technical treatment of State obligations under the Geneva Conventions. As I understand it, the critique runs as follows: the judgment indicates that if there is a conflict between the principles of international law and the Constitution, then the Constitution must prevail. The proper approach, is that the Constitution itself must be interpreted in the light of South Africa's international law obligations. Only if there is no way in which the Constitution can be read so as to be compatible with such obligations can it be said that the Constitution must prevail over international law. Thus, the *doyen* of South African teachers and practitioners of international law, Professor John Dugard, stated that while the judgment was probably correct in its conclusion, it had misappreciated the manner in which the Constitution itself was to be interpreted in the light of international law. *See id.*

35. *AZAPO*, 1996 (8) BCLR 1015, ¶ 50.

Wherever I address legal audiences, in any part of the world, I am bombarded with questions about South Africa's Truth and Reconciliation Commission. Invariably I refer them to the remarkable *AZAPO* judgment with which I felt honored to be associated.

II. *BASSON*

At the time of writing, the *Basson*[36] case is still proceeding. An unusually long period of six days has been set down for oral argument. One of the major issues is whether or not international law imposes a duty on States to prosecute war crimes, and if so, whether such duty has constitutional significance in relation to the criminal proceedings undertaken against the accused in this matter.[37]

Several years ago the State indicted Dr. Wouter Basson on sixty-four charges.[38] They all arose out of his role as a medical scientist allegedly involved with counter-insurgency operations by the South African State during the apartheid era.[39] Many of the charges related to alleged misappropriation of funds given to him for the conduct of secret operations.[40] Others alleged that he had developed toxic chemical and bacterial agents for purposes of eliminating opponents of the South African government in neighboring countries.[41] The trial judge acquitted Dr. Basson on all the charges relating to misappropriation of funds.[42] The State then alleged that the judge had shown bias against the State and that the judge should have recused himself.[43] The charges relating to chemical and bacterial elimination of opponents beyond South Africa's borders were incorporated in allegations of conspiracies undertaken on South African

36. State v. Basson, 2004 (6) BCLR 620 (CC).

37. *See id.* ¶ 16.

38. *See id.* ¶ 2.

39. *See, e.g.*, STEPHEN BURGESS & HELEN PURKITT, THE ROLLBACK OF SOUTH AFRICA'S CHEMICAL AND BIOLOGICAL WARFARE PROGRAM (2001), *available at* www.au.af.mil/au/awc/awcgate/cpc-pubs/southafrica.pdf (last visited Jan. 30, 2005); Chandré Gould & Marlene Burger, *Trial Report: Fifteen*, Mar. 6 – Mar. 9, 2000, *at* http://ccr-web.ccr.uct.ac.za/archive/cbw/cbw_index.html (last visited Jan. 30, 2005).

40. *See* BURGESS & PURKITT, *supra* note 39, at 34-38.

41. *See id.* at 17-25.

42. *See* State v. Basson, 2004 (6) BCLR 620, ¶ 7 (CC).

43. *See id.* ¶ 6.

soil.[44] The judge quashed these indictments on the basis that the statute which criminalized conspiracies should be read restrictively so as not to cover conspiracies beyond South Africa's borders.[45] The State appealed to the Supreme Court of Appeal ("SCA") against both the acquittal and the quashing of charges.[46] The appeal was rejected on a combination of procedural and substantive grounds.[47]

The State then applied to the Constitutional Court for leave to appeal against the decision of the SCA.[48] The trial record ran to ten thousand pages, and the questions raised were varied and complex. The Constitutional Court decided that it must have a preliminary hearing as to whether these issues were of a constitutional nature or connected with a constitutional matter.[49] If they were not, the Constitutional Court would not have jurisdiction to hear them.[50]

The Court decided after the preliminary hearing that there were four issues that were indeed of a constitutional nature.[51] The first related to the refusal of the trial judge to allow the accused to be cross-examined on the basis of statements made during bail proceedings.[52] The second concerned the refusal of the judge to recuse himself on the grounds of his alleged bias.[53] The third related to the question of double jeopardy, that is, whether it would be unfair to try the accused a second time for the offenses on which he had been acquitted.[54] The fourth dealt with the quashing of the charges and the possible relevance of their being concerned with war crimes.[55]

The Court gave three separate judgments.[56] All were of a preliminary nature. The majority opinion held that the State

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44. *See id.* ¶ 5.
45. *See id.*
46. *See id.* ¶¶ 8-11.
47. *See id.* ¶ 12.
48. *See id.* ¶¶ 13-14.
49. *See id.* ¶¶ 15-16.
50. *See id.* ¶ 17.
51. *See id.*
52. *See id.* ¶ 27.
53. *See id.* ¶ 23.
54. *See id.* ¶ 61.
55. *See id.* ¶ 31.
56. *See id.*, 2004 (6) BCLR 620, ¶¶ 1-82 (separate opinion of Ackermann, J.); *see also id.*, 2004 (6) BCLR 620, ¶¶ 83-109 (separate opinion of Chaskalson, J.); *Id.*, 2004 (6) BCLR 620, ¶¶ 110-126 (separate opinion of Sachs, J.).

had a general duty to prosecute crimes involving violation of the right to protection of life and bodily integrity.[57] This duty would be especially strong if crimes against humanity or war crimes were involved; a decision to quash charges of conspiracy to murder accordingly raised a constitutional question.[58] The minority judgment did not accept that questions in relation to the general duty of the State to prosecute crimes involving the right to life and bodily integrity were of a constitutional nature. It held, however, that questions relating to the powers of a court on appeal were constitutional questions; the quashing of the charges was a matter connected with these constitutional questions, and as such could be heard by the Court.[59] It left open the possible relevance of war crimes.[60] In a separate judgment I ventured a little further than my colleagues had done.[61] Dealing with the potential legal significance of the conduct alleged to constitute a war crime, I supported the majority judgment, and stated that

> The questions before us have to be determined in the complex historical and jurisprudential situation in which the South African State had moved from perpetrating grave breaches of international humanitarian law to providing constitutional protection against them. Issues which in another context might appear to be purely technical concerning the interpretation of a statute or the powers of a court on appeal, took on profoundly constitutional dimensions in the context of war crimes.
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> Nothing shows greater disrespect for the principles of equality, human dignity and freedom than the clandestine use of [S]tate power to murder and dispose of opponents. It follows that any exercise of judicial power which has the effect of directly inhibiting the capacity of the [S]tate subsequently to secure accountability for such conduct goes to the heart of South Africa's new constitutional order. When the depredations complained of are of such a dimension as to transgress the frontier between ordinary [S]tate-inspired criminal violence and war crimes, the engagement with the core of the Constitution becomes even more intense.
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> It is in this context that the interim Constitution pro-

57. *See id.* ¶¶ 31-33.
58. *See id.* ¶ 37.
59. *See id.* ¶¶ 109-12.
60. *See id.* ¶ 84.
61. *See id.* ¶¶ 110-26.

vided for the establishment of the Truth and Reconciliation Commission (the TRC). Its objective was to build a bridge between the past and the present and enable an appropriate balance to be achieved between all the public and private interests involved. The respondent has not chosen to have recourse to the TRC process. We are accordingly left to deal with this matter on the basis of applying the ordinary principles of law and statutory interpretation as viewed and developed in the light of the Constitution.

The very enormity and intricacy of the legal issues requires that the analysis be undertaken with the utmost rigour and dispassion. The need for objectivity is eloquently highlighted by Cassese in the Preface to his seminal work on international criminal law:[62]

> "[O]ne should never forget that this body of law, more than any other, results from a myriad of small or great tragedies. Each crime is a tragedy, for the victims and their relatives, the witnesses, the community to which they belong, and even the perpetrator, who, when brought to trial, will endure the ordeal of criminal proceedings and, if found guilty, may suffer greatly, in the form of deprivation of life, at worst, or of personal liberty, at best. Law, it is well known, filters and rarefies the halo of horror and suffering surrounding crimes. As a consequence, when one reads a law book or a judgment, one is led almost to forget the violent and cruel origin of criminal law prescriptions. One ought not to become oblivious to it. To recall it may serve as a reminder of the true historical source of criminal law. This branch of law, more than any other, is about human folly, human wickedness, and human aggressiveness. It deals with the darkest side of our nature. It also deals with how society confronts violence and viciousness and seeks to stem them as far as possible so as 'to make gentle the life on this world'. Of course the lawyer can do very little, for he is enjoined by his professional ethics neither to loathe nor to pity human conduct. He is required to remain impassive and simply extract from the chaos of conflicting standards of behaviour those that seem

62. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW xv-xvi (2003).

to him to be imposed by law."[63]

Cassese pointedly notes the tension between the tragedy and suffering that victims of violent crimes and their communities endure and the comparatively sterile legal remedies judicial systems impose. Cassese's views are especially instructive in this case. In a different historical context this case would raise solely technical questions of whether the statute criminalizing conspiracies covers extraterritorial conspiracies. However, while remaining cognizant of the necessity for objectivity in legal analysis, the detrimental impact that the trial court's decision would have on the legal system the Constitution foresaw could not be overlooked. I continued:

> In the present case our country's relatively rapid transformation from predator [S]tate to protector [S]tate has intensified "the chaos of conflicting standards" to which Cassese refers. The resolution of the conceptual tensions involved can only be found in the Constitution and its values and in the duty imposed on the [S]tate to protect those values. In a fraught area like this it is particularly important to avoid forms of consequential reasoning which lack a principled foundation. The crucial question is not whether consequences influence reasoning but the nature of the consequences which may be involved. In my view, if the desire to avoid potentially painful consequences results in the filling in of gaps in legal reasoning, or places unacceptable strain on principled legal logic, the integrity of the law is imperilled. But if the consequences at issue relate to the constitutional legal order itself or to rights protected by that order, they become integral to rather than destructive of rigorous legal analysis. In the present case I believe the consequences of the decision of the trial court to quash the charges, and the subsequent refusal of the . . . SCA[ ] to entertain an appeal against that decision, do impact directly on the legal order as envisaged by the Constitution, particularly insofar as war crimes may be involved. They touch on central features of our constitutional democracy. As such they are determinative of the issue before us at this stage, namely whether the questions raised in the application for leave to appeal, are constitutional matters.
>
> I believe that three substantial, sequential and interre-

63. *Basson*, 2004 (6) BCLR 620, ¶¶ 111-14 (some citations omitted).

> lated constitutional questions arise in connection with the quashing of the charges and the refusal of the SCA to entertain an appeal from the trial judge's decision. The first is whether the conduct charged could be characterised as a war crime as understood by international humanitarian law. If the answer is affirmative, the second question is whether and to what extent this could impose a special constitutional responsibility on the [S]tate to prosecute the respondent. The third is whether the quashing of the charges by the trial court followed by the refusal of the SCA to entertain an appeal against this decision, without reference to the fact that the prosecution of war crimes was involved, manifested a failure to give effect to South Africa's international obligations as set out in the Constitution.[64]

The judgment then went on to cite Cassese as stating that war crimes could be perpetrated in the course of international or internal armed conflicts, and identified two particularly serious charges against the accused in the batch that were quashed.[65] The first alleged that to deal with overcrowding of captives in detention facilities in Namibia, the accused had supplied asphyxiating and narcotic agents that had been fatally injected into about two hundred prisoners whose bodies then were cast into the sea from an airplane.[66] The second charge alleged that the accused had furnished cholera bacteria to poison the water supply of a refugee camp in order to manipulate the outcome of elections which were then pending in Namibia.[67]

The judgment then referred to Section 232[68] of the Constitution which states: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."[69]

> The rules of humanitarian law constitute an important ingredient of customary international law. As the International Court of Justice [("the ICJ")] has stated, they are fundamen-

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64. *Id.* ¶¶ 115-16 (citations omitted).

65. *Id.* ¶¶ 117-20.

66. *See* Chandré Gould & Marlene Burger, *Trial Report: Twenty*, May 5 – May 11, 2000, *at* http://ccrweb.ccr.uct.ac.za/archive/cbw/cbw_index.html (last visited Jan. 30, 2005); *see also* Chandré Gould & Peter Folb, *The South African Chemical and Biological Warfare Program: An Overview*, 7 NONPROLIFERATION REV. 10, 18 (2001).

67. *See* Gould & Folb, *supra* note 66, at 21.

68. S. AFR. CONST. ch. 14, § 232.

69. *Basson*, 2004 (6) BCLR 620, ¶ 122.

> tal to the respect of the human person and "elementary considerations of humanity".[70] The rules of humanitarian law in armed conflicts are to be observed by all [S]tates whether or not they have ratified the Conventions that contain them because they constitute intransgressible principles of international customary law. The ICJ has also stressed that the obligation on all governments to respect the Geneva Conventions in all circumstances does not derive from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.[71]
>
> The duty of [S]tates to provide effective penal sanctions today for persons involved in grave breaches of humanitarian law, whenever committed, is captured and expressed in Article 146 of the Fourth Geneva Convention of 1949 (articles 146-147 appear with different numbering in all four conventions). It states: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article." Article 147 of the Geneva Convention goes on to indicate what sort of conduct would constitute grave breaches of international humanitarian law. These include: "(A)ny of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health".[72]

It followed that the Court was entitled to hear the application for leave to appeal against the SCA's decision refusing to entertain the appeal against the quashing of the charges by the trial court, the constitutional issue being whether the SCA failed to give sufficient or any weight to the State's obligations under international law to prosecute war crimes or breaches of international humanitarian law.[73]

The judgment concluded, however, that

> it should be emphasised that none of the above should be taken as suggesting that because war crimes might be in-

70. Legality of the Threat or Use of Nuclear Weapons, [1996] I.C.J. 226, 257, ¶ 79.
71. *See id.*
72. *Basson,* 2004 (6) BCLR 620, ¶¶ 122-23 (citations omitted).
73. *See id.* ¶ 125.

> volved, the rights to a fair trial of the respondent as constitutionally protected are in any way attenuated. When allegations of such serious nature are at issue, and where the exemplary value of constitutionalism as against lawlessness is the very issue at stake, it is particularly important that the judicial and prosecutorial functions be undertaken with rigorous and principled respect for basic constitutional rights. The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom.[74]

III. *MOHAMED*

Mr. Mohamed, a Tanzanian national with refugee status, was working quietly in Cape Town as a pastry chef. Unknown to his employer he was being sought by the United States as a suspect on capital charges.[75] These arose from the bombing in 1998 of the U.S. Embassy in Dar es Salaam, where scores of Tanzanians and Americans were killed.[76] U.S. agents traced him to Cape Town where he was living under an assumed name and using a false passport.[77] South African immigration authorities arrested him as an illegal immigrant and thereafter handed him over to the U.S. agents for immediate removal in a special plane to the United States.[78] His employer sought relief in the Cape High Court. The South African government opposed.

The judgment began with a summary of the claims and procedural posture of the case:

> The crux of the government's contentions, which carried the day in the court below, was that Mohamed was an illegal immigrant whom the immigration authorities had properly decided to deport and whose deportation was mandated by the [relevant] Act. Such deviations as there might have been from the literal prescripts of the Act or the regulations were of no legal consequence. Nor did the collaboration between

74. *Id.* ¶ 126.

75. *See* Mohamed v. President of the Republic of S. Afr., 2001 (7) BCLR 685, ¶ 9 (CC).

76. *See id.*

77. *See id.* ¶ 44.

78. *See id.*

the South African officials and the FBI agents whereby Mohamed was eventually removed to the United States make any difference to his status or his liability to deportation. Moreover, so the court held, on the evidence of the immigration officials, which could not be rejected in motion proceedings, Mohamed had been duly apprised of his rights and had freely elected to accompany the FBI officers without delay to the United States, there to stand trial with his comrades. Finally, so the government contended and the court found, a court had no power to issue the mandamus sought, which would in any event have no efficacy. On 20 April 2001 the High Court delivered its judgment, comprehensively dismissing the contentions advanced on behalf of the applicants and refusing the relief they had sought.

. . . .

As had been the case in the High Court, much of the argument in this appeal was directed to the question whether the removal of Mohamed to the United States was a deportation or a disguised extradition. The distinction was said to be this. If he was deported that would have been a lawful act on the part of the South African government. The fact that Mohamed was to be "deported" to the United States where he would immediately be put on trial for an offence that carried the death penalty was not relevant. There is nothing in our Constitution that precluded the government from deporting an undesirable alien, or that required it to secure an assurance from the United States government that the death sentence would not be imposed on Mohamed if he were to be convicted. If, however, what happened was in substance an extradition, it would have been unlawful because the correct procedures were not followed. Moreover, if the removal had been effected by way of extradition, it might have been necessary to secure an assurance from the United States government as a condition of the extradition that the death sentence would not be imposed.

Deportation and extradition serve different purposes. Deportation is directed to the removal from a [S]tate of an alien who has no permission to be there. Extradition is the handing over by one [S]tate to another [S]tate of a person convicted or accused there of a crime, with the purpose of enabling the receiving [S]tate to deal with such person in accordance with the provisions of its law. The purposes may, however, coincide where an illegal alien is "deported" to another country which wants to put him on trial for having com-

> mitted a criminal offence the prosecution of which falls within the jurisdiction of its courts.
>
> Deportation is usually a unilateral act while extradition is consensual. Different procedures are prescribed for deportation and extradition, and those differences may be material in specific cases, particularly where the legality of the expulsion is challenged. In the circumstances of the present case, however, the distinction is not relevant. The procedure followed in removing Mohamed to the United States of America was unlawful whether it is characterised as a deportation or an extradition. Moreover, an obligation on the South African government to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country cannot depend on whether the removal is by extradition or deportation.[79]

The Court thus rejected the government's argument that it had a right to deport Mohamed, and that any obligations to him ended at his transfer.[80] It continued by holding that while the Government may have a general right to deport undesirable aliens, it was derelict not only in its handling of the deportation procedure, but also in failing to fulfill its obligation to obtain assurance from the United States that Mohamed would not be sentenced to death:

> Mohamed entered South Africa under an assumed name using a false passport. He applied for asylum giving false information in support of his application and was issued with a temporary visa to enable him to remain in South Africa while his application was being considered. Those facts justified the South African government in deporting him. That, however, is only part of the story, for the crucial events are those that happened after Mohamed had secured his temporary visa. Having been identified by the FBI as a suspect for whom an international arrest warrant had been issued in connection with the bombing of the United States embassy in Tanzania, he was apprehended by the South African immigration authorities in a joint operation undertaken in cooperation with the FBI. Within two days of his arrest and contrary to the provisions of the Act he was handed over to the FBI by

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79. *Id.* ¶¶ 6, 41-43.

80. *Id.* ¶ 6 (summarizing the government's contentions, which include that any violation of South African law regarding deportation procedures was of "no legal consequence").

> the South African authorities for the purpose of being taken to the United States to be put on trial there for the bombing of the embassy. On his arrival in the United States he was immediately charged with various offences relating to that bombing and was informed by the court that the death sentence could be imposed on him if he were convicted. That this was likely to happen must have been apparent to the South African authorities as well as to the FBI when the arrangements were made for Mohamed to be removed from South Africa to the United States.
>
> Another suspect, Mr Mahmoud Mahmud Salim, alleged to be a party to the conspiracy to bomb the embassies, was extradited from Germany to the United States. Germany has abolished capital punishment and is also party to the European Convention on Human Rights. The German government sought and secured an assurance from the United States government as a condition of the extradition that if he is convicted, Salim will not be sentenced to death. This is consistent with the practice followed by countries that have abolished the death penalty.[81]

The judgment continued:

> by committing ourselves to a society founded on the recognition of human rights we are required to give particular value to the rights to life and dignity, and that "this must be demonstrated by the State in everything that it does".[82] In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed's right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.[83]

The Court underlined the positive obligation that the Bill of Rights imposed on the State to "protect promote and fulfil the rights in the Bill of Rights."[84] It then proceeded to hold that:

> For the South African government to cooperate with a foreign government to secure the removal of a fugitive from South Africa to a country of which the fugitive is not a national and with which he has no connection other than that

81. *Id.* ¶¶ 44-45.
82. State v. Makwanyane, 1995 (6) BCLR 665, ¶ 144 (CC).
83. *Mohamed,* 2001 (7) BCLR 685, ¶ 49.
84. *Id.* ¶ 59.

he is to be put on trial for his life there, is contrary to the underlying values of our Constitution. It is inconsistent with the government's obligation to protect the right to life of everyone in South Africa, and it ignores the commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment.

. . . .

. . . The handing over of Mohamed to the United States government agents for removal by them to the United States was unlawful.

That is a serious finding. South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the [S]tate lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in Olmstead et al v United States: "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."[85] The warning was given in a distant era but remains as cogent as ever. Indeed, for us in this country, it has a particular relevance: we saw in the past what happens when the [S]tate bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the [S]tate acts unlawfully. Here South African government agents acted inconsistently with the Constitution in handing over Mohamed without an assurance that he would not be executed and in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice. They also acted inconsistently with statute in unduly accelerating deportation and then despatching Mohamed to a country to which they were not authorised to send him.[86]

During the hearing of argument there had been considera-

85. Olmstead v. United States, 277 U.S. 438, 485 (1928).

86. *Mohamed*, 2001 (7) BCLR 685, ¶¶ 59, 68-69.

ble debate as to whether any purpose would be served by the Court making a declaratory order. The Court described the argument and then rejected it:

> In substance the stance was that Mohamed had been irreversibly surrendered to the power of the United States and, in any event, it was not for this Court, or any other, to give instructions to the executive.
>
> We disagree. It would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case. In the first instance, quite apart from the particular interest of the applicants in this case, there are important issues of legality and policy involved and it is necessary that we say plainly what our conclusions as to those issues are. And as far as the particular interests of Mohamed are concerned, we are satisfied that it is desirable that our views to be appropriately conveyed to the trial court. Not only is the learned judge presiding aware of these proceedings,[87] but the very reason why they were instituted by the applicants was said to be that our findings may have a bearing on the case over which he is presiding. On the papers there is a conflict of opinion as between one of the defence lawyers on the one hand and a member of the prosecution team on the other, both of whom have filed affidavits expressing their respective views as to the admissibility and/or cogency in the criminal proceedings of any finding we might make. It is for the presiding judge to determine such issues. For that purpose he may or may not wish to have regard to disputed material such as our findings. It is therefore incumbent on this Court to ensure as best it can that the trial judge is enabled to exercise his judicial powers in relation to the proceedings in this Court; and an appropriate order to that end will be made.
>
> Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of [S]tate in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of [S]tate power as between the executive and the judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of

87. *See infra* note 90 and accompanying text.

> law. The Bill of Rights, which we find to have been infringed, is binding on all organs of [S]tate and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights. On the facts of the present case, however, and bearing in mind the advanced [S]tate of the proceedings in New York, we believe that the most appropriate and effective order is the one that follows below.[88]

The Court in fact instructed its Director to deliver a full text of the judgment to the Federal Court for the Southern District of New York as a matter of urgency.[89]

Postscript

There was apparently considerable debate in the U.S. Federal Court as to whether the jury should be made aware of the judgment.[90] Mr. Mohamed had already been found guilty as charged, and the question was whether anything in our judgment had a bearing on the decision the jury was due to make in a separate hearing on whether the death sentence should be imposed. The defense alleged many mitigating factors during the sentencing process.[91] One was that he was only twenty-five years old when he committed the bombing.[92] To the best of my recollection, seven of the twelve members of the jury voted against the death sentence, citing an unwillingness to make him a martyr.[93] More important to me was another mitigating factor cited by the defense, alleging that it would be unfair to treat Mr. Mohamed in a more serious fashion than his co-accused from Germany, who had been extradited on the United States' agreement that he would not be executed.[94]

This illustrates a broader principle of equal treatment that should apply not only as between individuals but in respect of

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88. *See Mohamed*, 2001 (7) BCLR 685, ¶¶ 70-72 (some citations omitted).

89. *Id.* ¶ 74.

90. *See* United States v. Usama Bin Laden, 156 F. Supp. 2d 359, 361-62 (S.D.N.Y. 2001).

91. Trial Transcript at 7443, United States v. Usama Bin Laden, 156 F. Supp. 2d 359 (S.D.N.Y. 2001) (No. 98-1023).

92. *Id.* at 7444.

93. *See* Benjamin Weiser, *Jury Rejects Death Penalty for Terrorist*, N.Y. TIMES, July 11, 2001, at B1.

94. Trial Transcript at 7443-44, United States v. Usama Bin Laden, 156 F. Supp. 2d 359 (S.D.N.Y. 2001) (No. 98-1023).

Nations. Though social conditions may vary between countries, the principles of the rule of law are the same all over the world. There can be no justification for respecting due process in relation to a country of the North, and not respecting it when dealing with a country of the South. It was disconcerting during argument to hear that officials in the United States had coined the term "informal rendition" to cover the handing over of suspects in certain parts of the world. The law is the law, is the law, is the law. When the very issue at stake is the integrity of the international legal order, it is particularly important that respect for all its principles be maintained.

It may be easy to proclaim the virtues of the rule of law for other countries when your own is not under threat. The true test of a national commitment to a Nation's deepest moral principles only comes when the Nation itself is placed under pressure. I should mention, however, that at the time when the *Mohamed* case was being heard, South Africa was not immune to bomb blasts and death, though now things are quiet.

Undoubtedly, law enforcement agents throughout the world, wherever they are, must be on guard to deal with deeds of orchestrated terrorism, and to act with resolution to capture and punish those responsible. Yet due resolve and due process are not contradictory. The ultimate victory of democracy and the rule of law will be achieved by enlarging, rather than narrowing, the gap between the values and methods of those engaged in terrorist acts and those who defend the rule of law. The difference between the two world views should never be reduced simply to establishing who has the greatest command of physical force or who can shout the loudest. In the words of a great judge, "the law is not silent amidst the clash of arms."[95] It may well have to adapt itself in a principled manner to new experiences, but its voice should always rise clearly and unmistakably above the din.

95. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) and (Libyan Arab Jamahiriya v. United States of America), [1992] I.C.J. 114, 180 (dissenting opinion of Weeramantry, J.) (crediting a judge with modifying Cicero's saying that "[l]aws are silent amidst the clash of arms.").

IV. *KAUNDA*

People plotting coups in other countries do not arrange their affairs to take account of court recesses. Judges read newspapers and watch television, so we could see what came to be known as the "mercenaries" case looming large and about to reach our Court in the middle of our winter break.[96] The matter was clearly urgent.[97]

> The applicants were arrested in Zimbabwe on 7 March 2004. On 9 March 2004, a group of 15 men were arrested in Malabo, the capital of Equatorial Guinea, and accused of being mercenaries and plotting a coup against the President of Equatorial Guinea. The majority of the detainees are South African nationals. The applicants fear that they may be extradited from Zimbabwe to Equatorial Guinea and put on trial with those who have been arrested there. They contend that if this happens they will not get a fair trial and, if convicted, that they stand the risk of being sentenced to death.
>
> . . . .
>
> The applicants primarily aim to avoid being extradited to Equatorial Guinea and being tried in Zimbabwe or Equatorial Guinea. To that end their first claim is to require the South African government to take steps to have them extradited to South Africa so that any trial they may have to face can be conducted here. The other claims are directed to their conditions of detention, and to trial procedures should they be put on trial in Zimbabwe or Equatorial Guinea.
>
> . . . .
>
> A theme that runs through all the claims is a demand that the government should seek assurances from foreign governments concerning prosecutions or contemplated prosecutions in those countries. The applicants assert that they have rights under the Constitution entitling them to make such demands, that the government has failed to comply with their demands and that in failing to do so it has breached their constitutional rights. The relief they claim is in effect a mandamus ordering the government to take action at a diplomatic level to ensure that the rights they claim to have under the South African Constitution are respected by the two foreign governments.

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96. *See* Kaunda v. President of Republic of S. Afr., 2004 (10) BCLR 1009, ¶¶ 7-8 (CC).

97. *See id.*

> The issues raised by the applicants and the amicus curiae involve, on the one hand, the relationship at an international level between South Africa and foreign [S]tates, in this case Zimbabwe and Equatorial Guinea, and on the other, the nature and extent of its obligations to citizens beyond its borders. To answer the questions raised it is necessary to deal both with international law and domestic law.[98]

The case was first heard in the Transvaal High Court, where on June 9, 2004, all the claims were dismissed.[99] Application was then made for leave to appeal to the Constitutional Court, and in view of the urgency, was set down for hearing in the middle of the Court recess.[100] Ten of the eleven members of the Court were able to hear oral argument on July 19-20.[101] Working nights and weekends, we delivered judgment fifteen days later. In fact, we produced four different judgments.[102]

Although all the Judges agreed on the main thrust of the decision, there were some significant differences on particular aspects. Five Judges concurred without qualification in the principal judgment written by the Chief Justice, Arthur Chaskalson. Justice Sandile Ngcobo concurred with substantial amplification[103] and I concurred in a short judgment I wrote.[104] Justice Kate O'Regan wrote a judgment which agreed in large part with that of the Chief Justice, but differed in relation to the order to be made.[105]

A. *The Right to Diplomatic Protection*

The majority judgment began with an analysis of international law principles concerning diplomatic protection. Did international law require the South African government to provide diplomatic protection to the alleged mercenaries? The judgment noted that Section 232 of the Constitution[106] provides that: "Customary international law is law in the Republic unless it is

98. *Id.* ¶¶ 2, 17, 21-22.
99. *See id.* ¶¶ 3-5.
100. *See id.* ¶ 5.
101. A quorum is eight. *See* S. AFR. CONST. ch. 8, § 167(2).
102. *See infra* notes 103-05 and accompanying text.
103. *See Kaunda*, 2004 (10) BCLR 1009, ¶¶ 146-211.
104. *See id.* ¶¶ 272-75.
105. *See id.* ¶¶ 212-71.
106. S. AFR. CONST. ch. 14, § 232. *See supra* note 68 and accompanying text.

inconsistent with the Constitution or an Act of Parliament."[107]

The Court then stated that, traditionally, international law has acknowledged that States had the right to protect their nationals beyond their borders, but were under no obligation to do so.[108] The applicants suggested that the traditional approach to diplomatic protection should be developed to recognize that in certain circumstances where injury is the result of a grave breach of an internationally accepted norm, such as that set out in the *Barcelona Traction*[109] case, the State whose national has been injured should have a legal duty to exercise diplomatic protection on behalf of the injured person.[110] The prevailing view, however, was that diplomatic protection is not recognized by international law as a human right and cannot be enforced as such.[111] To do so may give rise to more problems than it would solve, so diplomatic protection remains the prerogative of the State to be exercised at its discretion. The Court held, therefore, that the applicants could not base their claims on customary international law.[112]

The next question was whether the South African Constitution could be construed as having extraterritorial effect. Did protections offered by the Bill of Rights extend to South Africans in adverse circumstances beyond the country's borders? Section 233 of the Constitution[113] provided: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[114] Section 233 applies equally to the provisions of the Bill of Rights and the Constitution as a whole, therefore, the Constitution requires courts to consider international law when inter-

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107. *Kaunda*, 2004 (10) BCLR 1009, ¶ 23.

108. *See id.*

109. Barcelona Traction Light and Power Company Limited, [1970] I.C.J. 3, 44, ¶ 78. The traditional approach used in the *Barcelona Traction* case is a liberal standard for defining when diplomatic protection should be exercised by a State. In *Barcelona Traction*, the International Court of Justice indicated that a State can exercise diplomatic protection "by whatever means and to whatever extent it sees fit," as long as it acts within the prescribed limits of international law, the rationale being that it is the State's own right that is being exercised. *Id.* ¶ 78.

110. *See Kaunda*, 2004 (10) BCLR 1009, ¶ 28.

111. *See id.* ¶ 29.

112. *See id.*; *see also supra* note 109 and accompanying text.

113. S. AFR. CONST. ch. 14, § 233.

114. *Kaunda*, 2004 (10) BCLR 1009, ¶ 33.

preting the Bill of Rights.[115]

The Court could find no international law granting the rights the applicants claimed:

> A right to diplomatic protection is not referred to in the Universal Declaration of Human Rights, nor is it a right contained in any international agreement of which [the Chief Justice is] aware, including the international human rights' treaties to which South Africa is a party . . . .
>
> . . . .
>
> . . . Foreigners are entitled to require the South African [S]tate to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they lose the benefit of that protection when they move beyond our borders.[116]

B. *Extraterritorial Effect*

Did South Africa's Bill Of Rights have extraterritorial effect?

> It is a general rule of international law that the laws of a [S]tate ordinarily apply only within its own territory.[117] It is recognised, however, that a [S]tate is also entitled, in certain circumstances, to make laws binding on nationals wherever they may be. . . .
>
> . . . .
>
> . . . For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign [S]tate and its officials meet not only the requirements of the foreign [S]tate's own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of [S]tate sovereignty. . . .
>
> During argument hypothetical questions were raised relating to South African officials abroad, to South African companies doing business beyond our borders, to the government itself engaging in commercial ventures through [S]tate owned companies with bases in foreign countries, and to what the [S]tate's obligations might be in such circumstances. There is a difference between an extraterritorial infringe-

115. *See id.*

116. *Id.* ¶¶ 34, 36.

117. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287-89 (6th ed. 2003).

> ment of a constitutional right by an organ of [S]tate . . . in circumstances which do not infringe the sovereignty of a foreign [S]tate, and an obligation on our government to take action in a foreign [S]tate that interferes directly or indirectly with the sovereignty of that [S]tate. Claims that fall in the former category raise problems with which it is not necessary to deal . . . . They may, however, be justiciable in our courts, and nothing in this judgment should be construed as excluding that possibility.[118]

The *Mohamed* case had been extensively debated during the oral argument. The applicants there had contended that because the South African government had supplied the intelligence which led to their arrests, the government had a particular duty to protect them.[119]

> The facts of the present case are entirely different. The applicants were not removed from South Africa by the government, or with the government's assistance. They left South Africa voluntarily and now find themselves in difficulty in Zimbabwe and at risk of being extradited to Equatorial Guinea. Their arrest in Zimbabwe, the criminal charges brought against them there, and the possibility of their being extradited from Zimbabwe to Equatorial Guinea are not the result of any unlawful conduct on the part of the government or of the breach of any duty it owed to them.
>
> . . . .
>
> Police who receive information that a bank robbery is being planned do not commit a wrong by failing to advise the would be robbers of the information that they have, nor do they act illegally by lying in wait at the site of the proposed robbery in order to apprehend the robbers when they arrive at the scene. For a court to hold otherwise would undermine legitimate methods of policing and law enforcement.
>
> . . . .
>
> Even if the intelligence passed on by South Africa to Zimbabwe and Equatorial Guinea led to the arrests in Zimbabwe, the passing on of the intelligence was not a wrongful act. In the times in which we live it is essential that this be done, and comity between [N]ations would be harmed by a failure to do so. No wrong has been done to the applicants by the South African government that has to be remedied,

118. *Kaunda*, 2004 (10) BCLR 1009, ¶¶ 38, 44-45.
119. *See id.* ¶ 46.

> nor is there a consequence of unlawful conduct that has to be ameliorated.
>
> . . . .
>
> In the present case the actors responsible for the action against which the applicants demand protection from the South African government are all actors in the employ of sovereign [S]tates over whom our government has no control. The laws to which objection is taken are the laws of foreign [S]tates who are entitled to demand that they be respected by everyone within their territorial jurisdiction, and also by other [S]tates. The applicants have no right to demand that the government take action to prevent those laws being applied to them.[120]

C. *Rights of the Citizen*

The judgment addressed the issue of whether the government could be forced by its citizens to intercede diplomatically on their behalf by turning to the Constitution:

> This does not mean that our Constitution is silent on [the issue of whether the government could be called upon to act.] Section 3 of the Constitution[121] provides:
>
> "(1) There is a common South African citizenship.
>
> (2) All citizens are—
>
> (a) equally entitled to the rights, privileges and benefits of citizenship; and
>
> (b) equally subject to the duties and responsibilities of citizenship.
>
> (3) National legislation must provide for the acquisition, loss and restoration of citizenship."
>
> . . . .
>
> As a [N]ation we have committed ourselves to uphold and protect fundamental rights which are the cornerstone of our democracy. We recognise a common citizenship and that all citizens are equally entitled to the rights, privileges and benefits of citizenship. Whilst I have held that there is no enforceable right to diplomatic protection, South African citizens are entitled to request South Africa for protection under international law against wrongful acts of a foreign [S]tate.
>
> They are not in a position to invoke international law themselves and are obliged to seek protection through the

120. *Id.* ¶¶ 50-51, 53, 57.

121. S. AFR. CONST. ch. 1, § 3.

> [S]tate of which they are nationals. Whilst the [S]tate is entitled but not obliged under international law to take such action, it invariably acts only if requested by the national to do so.
>
> . . . .
>
> When the request is directed to a material infringement of a human right that forms part of customary international law, one would not expect our government to be passive. Whatever theoretical disputes may still exist about the basis for diplomatic protection, it cannot be doubted that in substance the true beneficiary of the right that is asserted is the individual.
>
> The founding values of our Constitution include human dignity, equality and the advancement of human rights and freedoms. Equality is reflected in the principle of equal citizenship demanded by section 3.
>
> The advancement of human rights and freedoms is central to the Constitution itself. It is a thread that runs throughout the Constitution and informs the manner in which government is required to exercise its powers. *To this extent, the provisions of [the Bill of Rights] are relevant, not as giving our Constitution extraterritorial effect, but as showing that our Constitution contemplates that government will act positively to protect its citizens against human rights abuses.*[122]

The majority judgment went on to hold that if citizens have a right to request the government to provide them with diplomatic protection, then the government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution.[123] There might even be a duty in extreme cases for the government on its own initiative to provide assistance to its nationals against egregious breaches of international human rights which come to its knowledge.[124]

The judgment concludes that:

> There may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear

122. *Kaunda*, 2004 (10) BCLR 1009, ¶¶ 58, 60-61, 64-66 (emphasis added) (some citations omitted).

123. *See id.* ¶ 67.

124. *See id.*

> would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action.[125]

D. *Discretion of Government*

At the same time it was necessary to stress that a decision as to whether — and if so, what — protection should be given was an aspect of external policy which was essentially the function of the executive:

> The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.
>
> This does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection. The exercise of all public power is subject to constitutional control. Thus even decisions by the President to grant a pardon or to appoint a commission of inquiry are justiciable. This also applies to an allegation that government has failed to respond appropriately to a request for diplomatic protection.
>
> For instance if the decision were to be irrational, a court could intervene. This does not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection. . . .
>
> If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. There may possibly be other grounds as well and these illustrations should not be understood as a closed list.

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125. *Id.* ¶ 69.

> What needs to be stressed, however, in the light of some of the submissions made to us in this case, is that government has a broad discretion in such matters which must be respected by our courts.[126]

E. *Capital Punishment*

The majority judgment then turned to the question of the applicants possibly being charged with capital offenses in Equatorial Guinea:

> There can be no doubt that capital punishment is inconsistent with the provisions of our Bill of Rights. But the question whether South African citizens can require our government to take action to protect them against conduct in a foreign country, which would be lawful there, but would infringe their rights if committed in South Africa, raises entirely different issues. Although the abolitionist movement is growing stronger at an international level, capital punishment is not prohibited by the African Charter on Human and Peoples' Rights or the International Covenant on Civil and Political Rights, and is still not impermissible under international law. The execution of the sentence, if imposed, would be by the [S]tate of Equatorial Guinea, which means that attempts to mitigate the sentence would necessarily engage the foreign relations between the two countries.
>
> The government's policy on this issue is that it makes representations concerning the imposition of such punishment only if and when such punishment is imposed on a South African citizen. . . . The applicants are entitled to the benefit of this policy, and if capital punishment were to be imposed on them, then consistently with its policy, government would have to make representations on their behalf. There is no evidence to suggest that this would not happen.[127]

F. *Right to a Fair Trial*

The next question related to the claims by the applicants that they would not receive a fair trial in Equatorial Guinea.[128] The judgment said that grave allegations concerning the justice

126. *Id.* ¶¶ 77-80 (citations omitted).
127. *Id.* ¶¶ 98-99 (citations omitted).
128. *See id.* ¶ 116.

system in that country called for close scrutiny and careful consideration by the Court.[129] They were based on reports of Amnesty International, the International Bar Association and a Special Rapporteur of the United Nations Commission on Human Rights which covered a period from January 1999 to March 2004.[130] The judgment gave details from these reports and stated that the South African government policy was not to comment on the justice systems in other countries.[131] It took the attitude that the reports were not admissible in evidence and that the Court could not make a finding on the efficacy and fairness of the legal and judicial systems of Equatorial Guinea without the benefit of expert evidence.[132]

The majority judgment accepted that it could not and should not make such a finding on the basis only of the reports.[133] Yet it could not ignore the seriousness of allegations made after investigations by reputable international organizations and the Special Rapporteur. If the reports were accurate, there would be serious concern about the fairness of the trial the applicants could face.[134]

The judgment went on to highlight that competing considerations had to be taken into account:

> The history of coups and counter coups in Africa has undermined democracy on the continent. Such practices are the antithesis of the foreign policy principles of the South African government. These principles and the priorities of the Ministry of Foreign Affairs are referred to in the evidence. They include a commitment to justice and international law in the conduct of relations between [N]ations, a commitment to interact with African partners as equals, and a commitment to the promotion of the New Partnership for Africa's Development, described as "a continental instrument to advance people-centred development based on democratic values and principles." It would be a breach of South Africa's duty to Equatorial Guinea, and its international obligations, in particular to other African [S]tates, to frustrate a criminal prosecu-

129. *See id.*
130. *See id.* ¶¶ 117-21.
131. *See id.* ¶ 122.
132. *See id.*
133. *See id.*
134. *See id.* at 124.

tion instituted there simply because the accused persons are South African nationals.

On the other hand, if the allegations by the applicants that they will not get a fair trial in Equatorial Guinea prove to be correct, and they are convicted and sentenced to death, there will have been a grave breach of international law harmful to our government's foreign policy and its aspirations for a democratic Africa. As far as the applicants are concerned the consequences would be catastrophic, and they will have suffered irreparable harm.

The applicants are not in Equatorial Guinea and they have not been put on trial there. No injury has been done to them by that country and no injury will be done unless they are put on trial there; nor will any wrong be done if they are put on trial and the proceedings are conducted fairly. To this extent the claim for protection is premature. It cannot, however, be said that there is not a risk that the consequences that the applicants fear will happen. Should that risk become a reality the government would be obliged to respond positively. Given its stated foreign policy, there is no reason to believe that this will not be done.

. . . .

It is also relevant to have regard to the limited power that the government has under international law to affect decisions of a foreign [S]tate. It is essentially a power of persuasion, and it is for this reason that courts everywhere are reluctant to intervene in such matters, even if, as in Germany, they have the power to do so. . . .

The situation which exists in the present case is one which calls for delicate negotiations to ensure that if reasonably possible the fears that the applicants entertain can be put to rest, and that the trial, if one takes place, is conducted in a way that meets internationally accepted standards. The assessment of the risk, the best way of avoiding it and the timing of action are essentially matters within the domain of government.

. . . .

. . . The applicants have not established that the government breached or threatened to breach any duty it has under the Constitution or international law.[135]

In the summary of its conclusions, the Court referred to the

135. *Id.* ¶¶ 125-27, 130-31, 133 (citations omitted).

fact that stated government policy concerning the conditions of detention and the conduct of trials of nationals in other countries was to ensure that all South African citizens were detained in accordance with international law standards, had access to their lawyers and received a fair trial. This policy adopted by South Africa in its relations with other States was not inconsistent with international law or any obligation that the government has under the Constitution.[136]

Both the judgments of Justice Ngcobo and Justice O'Regan highlighted the importance of evolving principles of international law emphasizing the duty of States to protect fundamental human rights.[137] In my view their main thrust was to give added texture to the majority judgment without contradicting its basic line of argument.[138] Each contained what I regarded as elegantly phrased and powerfully reasoned passages highlighting South Africa's obligation as a State to promote respect for basic human rights at an international level, particularly in relation to guaranteeing respect for the right not to be subjected to torture and to have a fair trial. I did not agree with Justice O'Regan that the government had failed to show sufficient willingness to meet with its international human rights law obligations in respect of the applicants. Save for this one aspect, I found myself in agreement with her judgment as well as the equally eloquent judgment of Justice Ngcobo. I have read few better expositions of the evolution of international human rights law in recent decades, and wished to associate myself with the sentiments they expressed.

In expressing my concurrence in the main judgment and support for the additional texture provided by the separate judgments, I pointed out that the South African Constitution made it clear that one of the principles governing national security was

> "The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation."[139]

Mercenary activities aimed at producing regime-change

136. *See id.* ¶¶ 144(7) & (8).
137. *See supra* notes 103, 105 and accompanying text.
138. *See Kaunda*, 2004 (10) BCLR 1009, ¶ 275.
139. S. AFR. CONST. ch. 11, § 198(b).

> through military coups violated this principle in a most profound way. The government was under a duty to act resolutely to combat them, the more so if they were hatched on South African soil.
>
> At the same time, [the Constitution] provides that: "The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic."[140] This section emphasises that in dealing with even the most serious threats to the [S]tate, a noble end does not justify the use of base means. . . .
>
> The values of our Constitution and the human rights principles enshrined in international law are mutually reinforcing, interrelated and, where they overlap, indivisible. South Africa owes much of its very existence to the rejection of apartheid by the organised international community and the latter's concern for the upholding of fundamental human rights. It would be a strange interpretation of our Constitution that suggested that adherence by the government in any of its activities to the foundational norms that paved the way to its creation was merely an option and not a duty.[141]

G. *Postscript*

At one stage during argument I stated to counsel for the applicants, perhaps incautiously, that people who venture into a lion's den should not be surprised if they find a lion. The press picked up the observation and there was even a cartoon based on it. The exchange with counsel is part of the rough and tumble of legal life and an important way of getting to legal truth. But in the end, we judges are accountable through the judgments we deliver, and not the questions we ask.

It is difficult to analyze the impact that court cases have on actual historical events. It may well be that the public scrutiny of the case, and the evidence and arguments presented in it, had more impact on national life than did the actual decision. Any amount of forensic combat, however bitter and prolonged, is better than a single bullet.

Submitting the harsh conflicts of our times to legal scrutiny

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140. S. AFR. CONST. ch. 11, § 199(5).

141. *Kaunda*, 2004 (10) BCLR 1009, ¶¶ 272-74.

— conducted transparently and in the light of internationally accepted values of fairness and justice — was a telling rebuttal of mercenarism and violence, whether from or against the State. It responded in an instrumental way to the immediate issues, and at the same time it induced governments, judiciaries, and law enforcement agencies in three countries to engage with each other and to carefully consider their powers and responsibilities under international law. It reaffirmed to the South African public that we are living in a constitutional democracy in which all exercises of power are subject to constitutional control. It said something important about the kind of country in which we live and about the importance of principled and reasoned debate. It underlined that we have moved from a culture of authority and submission to the law to one of justification and rights under the law.

Having pronounced as judges as well as we can, we go back to reading the press and watching television, like everybody else. Thus, it was through the media that we learned subsequently that the applicants had been sentenced under Zimbabwean law to terms of imprisonment, if I remember correctly, of about one year each, with their leader getting seven years.[142] At a later date most of the accused on trial in Equatorial Guinea were found guilty of plotting a coup.[143] The prosecution asked for the death sentence in some cases.[144] The stiffest sentence was that of thirty-four years imprisonment.[145]

142. *See Zimbabwe Jails UK Coup Plotter*, BBC NEWS, Sept. 10, 2004, *available at* http://news.bbc.co.uk/2/hi/africa/3643250.stm.

143. *See Coup Plotters Jailed in E Guinea*, BBC NEWS, Nov. 26, 2004, *available at* http://news.bbc.co.uk/2/hi/africa/4044305.stm.

144. *See id.*

145. *See id.*