Guest Lecture Series of the Office of the Prosecutor

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"Stopping crimes through negotiations: The case of South Africa"

14 March 2006

The Hague

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Guest Lecture Series of the Office of the Prosecutor.

Stopping Crimes through Negotiations: The Case of South Africa

Lecture delivered by Prof. Kader Asmal MP

at the International Criminal Court

14 March, 2006

INTRODUCTION

My topic: 'Stopping Crimes through Negotiations: The Case of South Africa' was chosen for me by you. I thank the ICC for offering me this opportunity to address you.

I normally do not permit myself the pleasure of obtruding my personal views concerning the topic. However, in this case, I would like to express my joy at the establishment of the ICC. Prior to my return to South Africa, I had been teaching international and human rights law for nearly three decades. The ICC therefore remains a beacon of light in a world of unilateral and illegal behaviour where the laws of war are flouted and common democracy demonised.

This is a very important topic, as I hope to show with reference to my own country, because it goes to the heart of a very difficult dilemma encountered time and again in transitions from brutal authoritarianism to democracy, and we hope, justice and freedom. Negotiations leading to a peaceful resolution to conflict are the preferred method internationally for ending crimes against humanity and

terminating the commission of gross violations of human rights. But bringing peace merely by stopping the crime is not enough, for to stop the crime but refrain from seeking accountability for its commission in the first instance is to permit impunity and shrink from the demands of justice, whether of the retributive or restorative variety. The question: Does peace without justice permit the violence of dehumanisation to continue unchecked.

But can you always have peace with justice? This question stimulated spirited debate at a recent seminar in Cape Town that I was privileged to address and where I had the honour of meeting the Chief Prosecutor. The issue, as it was formulated there, pivoted on the suggestion that peace and justice are at odds. Plainly put, the argument goes that the quest for peace conflicts with the urgency of justice and that justice is often sacrificed in the interests of bringing peace. The example usually given is the granting of amnesty to perpetrators of gross human rights violations. Whether amnesty is promised as an incentive to persuade authoritarian governments to release their grip on power, or offered in exchange for a tacit commitment from applicants not to subvert the new order, or whether amnesty is offered in exchange for the truth about crimes committed against individuals, communities, or humanity, as in South Africa, there remains something disconcerting and unsatisfactory about granting amnesty to those guilty, by their own admission, of gross violations of human

rights.[1] And yet, the argument goes, one cannot achieve peace between warring parties if the threat of prosecution hangs over the heads of the those clinging to illegitimate power.

The late Justice Ismael Mohammed of our Constitutional Court captured this dilemma eloquently when he referred in a judgement some years ago to "(t)he agonies of a nation 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...".[2] The applicants in that case sought to have the amnesty provision of the Act establishing our Truth and Reconciliation Commission declared unconstitutional on the grounds that it violated the constitutionally guaranteed rights of victims of human rights violations to seek to have those guilty of committing crimes against them prosecuted in a court of law and punished.[3] Essentially, the applicants argued that to grant amnesty is to permit impunity, a permission that violates the spirit of justice longed for during the preceding years of oppression and now guaranteed by the new and hard-won constitutional order.

The arguments presented in this case are not much different from the arguments of human rights fundamentalists (and, I do not use this to insult) who

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[1] Erik Doxtader, 'Amnesty' in Charles Villa-Vicencio and Erik Doxtader (eds.) *Pieces of the Puzzle: Keywords in Reconciliation and Transitional Justice* (Cape Town: Institute for Justice and Reconciliation, 2004): 39.
[2] Constitutional Court of South Africa, CCT 17/96, p.30
[3] Azanian People's Organisation (AZAPO) vs President of the Republic of South Africa, CCT 17/96 (25 July 1996) [www.concourt.gov.za]

contend that all abusers of human rights should be prosecuted for their crimes, regardless of the contingencies and complexities of the relevant political transition that has recently made prosecution a possibility. Even if the perpetrator's cooperation is vital to the success of the transition, purists argue that "because trials secure pre-eminent rights and values, governments should be expected to assume reasonable risks associated with prosecutions, including risk of military discontent".[4] At the other extreme are the cynical purveyors of realpolitik, the mandarins of statecraft, who counter with: "A legal duty selectively to prosecute human rights violations committed under a previous regime is too blunt an instrument to help successor governments who must struggle with the subtle complexities of re-establishing democracy."[5]

Whatever the subtleties of installing democracy in the place of tyranny, Nino's position is as blunt as Orentlicher's; where Orentlicher prioritises justice above peace, Nino prioritises peace above justice.

Given this fraught dilemma, my topic today begs the question: can negotiations promote justice in the way that human rights fundamentalists demand, and at the same

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[4] D.F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' *Yale Law Journal* 100(1991): 2537, 2548-9.

[5] C.S. Nino, 'Response: The Duty to Prosecute Past Abuses of Human Rights Put in Context' in N.J. Kritz (ed.), *Transitional Justice* (United States Institute of Peace research, 1995): 435. For a fuller discussion of the conflicting perspectives of what I have termed human rights fundamentalists on the one hand and cynical realpolitik on the other and a proposal for a way out of the impasse, see K. Asmal, 'Truth, Reconciliation and Justice: The South African Experience in Perspective', *Modern Law Review* 63(1)(January 2000): 1-24.

time avoid compromising peace, as the mandarins of statecraft demand they must?

Well, the short answer is that it all depends on what we mean by justice. If that sounds like fudging, permit me one more contingency: what we mean by justice must be rooted in the circumstances of the people in whose name it is being dispensed.

Which returns me to my country, South Africa.

THE SPECIAL NATURE OF SOUTH AFRICA'S SITUATION

Apartheid, as everyone knows, was and remains a crime against humanity although, under Article 5 of the Court's jurisdiction, it is designated as a separate crime, separate from crimes against humanity. But apartheid was more than white supremacy maintained through brutal repression, hit squads, attacks on neighbouring states and research into chemical warfare and eugenics, among other barbarisms. What set apartheid apart is that it elevated racial discrimination to a constitutional principle. It was not merely the successive apartheid regimes of Verwoerd, Vorster, Botha and De Klerk that were criminal, but the very structure of the state and the entire edifice on which apartheid was built. The crime of apartheid was not confined to the criminal actions of a few, or even many, individuals. Rather, the crime was woven into the fabric of South African society, into the logic of the economy and wage labour, the management, utilisation and exploitation

of national and human resources, the education curriculum and professional training, intellectual life and so on. The dehumanising violence that underpinned apartheid's racism penetrated every corner of social life to the extent that there remained nowhere that was not contaminated by its depravities. This is what made apartheid so criminal.

Consequently, our struggle against apartheid did not see as our end-goal the removal of the incumbent racist government. Rather, we saw the removal of the reigning government as the first step toward our end goal, which was the dismantling and eradication of the apartheid regime, in the broadest sense of the term. We did not seek merely 'regime change', the fashionable terminology these days for replacing the sitting government. We sought a fundamental change in the social, political and legal order.

These were the thoughts uppermost in our minds as we embarked upon the process of negotiating an end to the crime of apartheid. And these were the thoughts that informed our answer to the most compelling question throughout the negotiation period: what kind of justice would appropriately redress the crime of apartheid?

We argued that justice in our circumstances could not be merely a matter of criminal trials.[6] Justice in our circumstances would have to involve a systematic process

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[6] K. Asmal, L. Asmal, R.S. Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance* 2nd ed. (Oxford: James Currey, 1997):18-22.
See also: K. Asmal *Truth, Reconciliation and Justice: The South African Experience in Perspective, 63 M.L.R (2000)1*

of: acknowledging the illegitimacy of apartheid; acknowledging the need for corrective action to undo apartheid's racially skewed socio-economic legacy; establishing equality before the law, which meant reforming the criminal and justice systems, far from placing them in the driver's seat of transition; placing property rights on a legitimate footing, which means redistribution; facing up to the collective responsibility of the apartheid privileged, the majority of whom put their whites-only ballots behind the system for four decades; and acknowledging the claims of the regional and international communities, including the prevailing norms of international law. By identifying justice for South Africa's traumatised and deprived millions with these demands, we set ourselves a formidable task, but a task from which we dared not shrink.

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HOW JUSTICE IN SOUTH AFRICA WAS ACHIEVED

A narrow view or our transition sees the 1994 elections, our first ever non-racial poll, as the culminating point of the negotiations. But the first sitting of our non-racial Government of National Unity with President Nelson Mandela at its helm was only the halfway mark. Some might have been tempted to think that the hardest part

was behind us – certainly we had a legitimate, democratically elected Constituent Assembly installed and had come a long way from the tyranny of Botha's repression just a few short years before. But the Constituent Assembly's work to draft a new Final Constitution on behalf of all South Africans was just beginning. The certification of the final constitution in 1996 is therefore usually cited as the moment that concluded our negotiations. Amid much celebration and cheer, the final Constitution concluded the negotiated transition from racist autocracy to democracy, ended the crime of apartheid and brought peace to our land. Now we could turn our attention to the far-reaching demands of justice for apartheid's evils.

Our Truth and Reconciliation Commission was the culmination of our negotiated settlement because it placed the seal of accountability on the peace treaty at the heart of the negotiations. True, the TRC's provisions for amnesty in exchange for truth were central to the process of seeking accountability for apartheid's monstrous crimes. But too easily (and, I might add, at our peril), do we, like human rights fundamentalists, condemn amnesty and fail to appreciate the new model of amnesty pioneered by our TRC. Crucially, our amnesty process, while foreclosing criminal prosecution, retained personal accountability. Indeed, personal accountability was central to the success of the amnesty application.

Of course, amnesty without either truth or accountability was a key demand of FW de Klerk and his supporters; as the last custodians of apartheid, they had much to answer for. They wanted a general amnesty – amnesty to undisclosed people, for undisclosed crimes, against undisclosed victims. At the other extreme, there were those who opposed any form of amnesty, as with the case brought before our Constitutional Court or like me, had considered Nuremberg like trails.

To be sure, apartheid was the invention of specific individuals and its brutal enforcement depended on particular individuals' commitment to its racist ideology. Yet the criminality of apartheid derived from the deep penetration of racism into the very fabric of society. Apartheid could not be purged from society by convicting and sentencing key government officials and policemen. How do you choose who to prosecute? Only cabinet ministers and officers of the police force? What of all the police constables who donned riot gear? And all the soldiers who invaded Angola and occupied the townships, most of whom were conscripted? And the civil service? And what of the judiciary who dished out judicial executions lavishly and bestowed on South Africa the distinction of the hanging capital of the world?

Retributive justice would purge our society of people, but not of apartheid. To purge our society of apartheid required, firstly, that the criminality of apartheid be

acknowledged, and secondly, that accountability for this crime be identified.

The TRC was a vehicle tailor-made to meet these most important demands of justice for the crime of apartheid. The Promotion of National Unity and Reconciliation Act that established the TRC required that the Commission establish "as complete a picture as possible of the nature, causes and extent of gross violations of human rights".[7] The TRC chose to interpret this requirement in the widest possible terms and therefore, in addition to the hearings in the Amnesty Committee, held hearings into the roles of the professions and institutions of apartheid, including the media, the medical profession, business, political parties, churches and the judiciary.

This expansive terrain of inquiry afforded our commission and the nation on whose behalf it undertook its labours an opportunity to examine the gradual creep of apartheid's racist ideology into every corner of society until it contaminated the social totality. Totalitarianism, as theorists of totalitarian societies have stressed, refers to more than merely a vertical distribution of power.[8] South Africans of all walks of life heard in riveting detail, not only the gruesome details of torture and assassination committed in the name of 'state security', but also the hard questions put to the judiciary, the media, the medical profession about their complicity in the commission of

[7] Republic of South Africa, Act no. 34 of 1995.

[8] Hannah Arendt's classic text remains as incisive as it was when it first appeared more than a half century ago. See Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace and Govanovich, 1973).

apartheid's crimes. In the end, it was impossible, even for white South Africans who had put their whites-only ballots behind successive apartheid governments, to avoid acknowledging that apartheid was a monstrous crime against humanity.

The expansive terrain of the TRC's investigations also delivered an appropriately complex assessment of accountability for apartheid. Individual accountability was at the centre of the amnesty process, but the investigations into the professions and institutions of apartheid society raised important questions about their accountability too.

Perhaps the most important of these was the hearings into the legal profession. Archbishop Tutu himself suggested that these were the most important within the Commission's mandate, as important as the individual testimonies of victims and perpetrators, as Professor David Dyzenhaus notes in his excellent study of the TRC's hearings into the role of the judiciary in the crime of apartheid.[9] The significance of these hearings stems of course from the fact that apartheid was distinct from other 20th century atrocities because it was underpinned by the legal system – it raised socio-economic pillage based on race to a constitutional principle.

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[9] David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hard, 1988).

[10] There is an enormous amount of literature on the South African TRC, less so on the nature of the transition.

Justice in our unique circumstances demands a fundamental transformation in the social, political and legal order. Social transformation in turn demands an expansive intervention aimed at the very architecture of society, meaning the professions and institutions on whose strength and integrity social equity depends. Accordingly, criminal trials, which were the central ingredient of justice in Latin America, became less central in my country. It is less important to me that P.W. Botha be convicted of crimes against humanity than to see his ideological followers stalled in their quest to perpetuate his socio-economic legacies.

Media attention at the TRC hearings tended to focus on the testimony of victims and perpetrators of human rights violations.[10] Given the horrors forced on so many innocents, this was inevitable and probably appropriate. However, it is unfortunate that this focus tended to eclipse the Commission's hearings into the roles of the professions and institutions of apartheid. The focus on individuals at the amnesty hearings contributed to the distorted notion that the TRC compromised the demands of justice by peddling amnesty for truth, while the relatively less dramatic coverage of the hearings into apartheid's professions and institutions went largely unnoticed outside of professional interest. The consequence of this double movement is that the TRC's pioneering innovations that expanded the scope of culpability and deepened our understanding of

accountability have received less praise than I think is due.

Whatever the received wisdom of many commentators who say the business sector, the media, the medical profession, and so on got of lightly at the TRC, I think too often the significance of those hearings is underestimated. The TRC is rightly celebrated for the way it linked accountability with amnesty and pioneered a new model for placing the testimonies of victims and perpetrators at the centre of the Commission's work. But that is only one facet of its accomplishment. Not only did the TRC succeed in holding many individuals personally accountable for violations of human rights, but the Commission pioneered a model for expanding the scope of moral accountability to include the most important institutions of the state, economy and society. This widening of the purview of accountability, far from blunting its moral edge, has in fact reinforced and strengthened the collective acknowledgement of apartheid's essential criminality, thereby laying the groundwork for the thorough-going programme of social renewal and reconstruction demanded by justice and undertaken by the democratic government over the past decade.

LESSONS

So, what lessons can be drawn from the South African experience?

First, if there is a single lesson that our remarkable transition can demonstrate for the benefit of humanity, it is that the transition from an unjust to a just society succeeds or fails on the strength of its participants' commitment to peace. Where there is a commitment to peace, there is *always* a way. But beware of the corollary: where such commitment is lacking, the process is imperilled.

Secondly, it is vital that negotiators work toward a specific goal. Our vision at the outset of negotiations was to establish a non-racial, multiparty democracy in South Africa. But a vision is not enough. You must identify and work towards substantial and measurable goals. We worked toward holding national, non-racial, democratic elections for a constituent assembly that would draft the final constitution.

Third, negotiations involve give and take. But to know when to give and when to hold firm requires that you remain acutely sensitive to your vision, so that you may modify your objectives as needs be without compromising your vision or end goal. The 'sunset clauses' is a good example of that. We learnt that trust is the outcome, not a precondition for negotiations.

Finally, we underestimated the importance of a strong bilateral thrust between the two major parties. This was probably the most important lesson we drew from the first round of negotiations, which really amounted to discussion's at Codesa. Bilateralism had been downplayed

at Codesa in the interests of inclusivity, particularly because inclusivity went some way toward overcoming the inequality of negotiations between the ruling party and the forces of liberation. Yet even as Codesa was collapsing, a new bilateral initiative was begun, spearheaded by the ANC's Cyril Ramaphosa and the NP's Roelf Meyer. It was this initiative that eventually delivered the Record of Understanding late in 1992 that got negotiations back on track and led to a new multiparty effort. That bilateral initiative became invaluable at the MPNF because it maintained the momentum of the negotiations, while the multiparty forum still ensured that everyone had an opportunity to present their views and make their contribution.

We also learnt that trust cannot be a precondition for negotiations. It is the consequence of good faith negotiations.

Something must also be said about the role of the international community in our transition to democracy. There was enormous interest in the negotiation process in South Africa and a remarkable show of goodwill toward our national effort to reach a peaceful settlement. Yet what was the role of the international community in our transition? It is often noted that both our 1993 and 1996 constitutions as well as the processes of negotiating them were entirely homemade and involved only South Africans. This is sometimes identified as the crucial feature that ensured our success, though I'm not sure I entirely agree.

However, the international community, foreign donor agencies, and the world at large gave us support and courage when we needed it most. The Harare Declaration was not simply an ANC document. It became an OAU and subsequently a UN document. The United Nations ensured that the crime against humanity remained conspicuous before the world and that the anti-apartheid struggle received consistent support, not excluding the national anti-apartheid movements. Now, when the time to negotiate was upon us, our international friends and allies inspired in us the courage to achieve the seemingly impossible.

But the achievement is ours and the benefits accrue to our children and future generations of South Africans. Which brings me to my last point: you have to own the process. We argued over every word of every clause through countless drafts. Though we often didn't agree, even arguing is a way of cementing a bond and deepening the commitment to the process.

CONCLUSION

In my opening remarks I sketched a basic contradiction between the imperatives of justice for the atrocities of authoritarian regimes and the political compromises necessary to bring about peace. I suggested that stopping crimes against humanity through negotiations, as we did apartheid in South Africa, begs the question whether negotiations can promote justice and simultaneously deliver peace to conflicted societies.

I believe that our experience in South Africa demonstrates that, through negotiations, you can, as the saying goes, have your cake and eat it too. we achieved this, firstly, by assenting to amnesty in the interests of promoting peace. But though we agreed to forego criminal prosecutions, we retained the moral authority of individual accountability by attaching a range of conditions to the amnesty process, including full disclosure for the crimes for which amnesty was being applied. Far from establishing moral accountability as a poor second cousin to criminal conviction, we then expanded the purview of accountability and thereby deepened its meaning.

The TRC shifted accountability's centre of gravity away from retributive justice, making it instead a pillar, alongside acknowledgement of apartheid's criminality and suffering, of our national effort to restore the pride and dignity of the nation. Reconciliation through truth.

Today, we've moved beyond simple co-existence between South Africa's 'races'. We continue to move toward cooperation and mutual involvement. We are genuinely interested in knowing each other. We are a social laboratory in race relations premised on a commitment to reconciliation and peace, with all our contradictions.

In our struggle, we were driven by a humane and humanising source of history. Our negotiation for the transition was a triumph of humanity rising out of our troubled history, recalls the promise of the great Irish

poet, Seamus Heaney, who was moved by Nelson Mandela's release from prison to write:

History says, Don't hope

On this side of the grave,

But then, once in a lifetime

The longed – for tidal wave

Of justice can rise up

And hope and history rhyme.

Thank you.