South Africa, AZAPO v. Republic of South Africa

[**Source**: Constitutional Court of South Africa, Case CCT 17/96, July 25, 1996, footnotes omitted]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

THE AZANIAN PEOPLES ORGANIZATION(AZAPO) [...]v.[...] THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICAJUDGEMENT

[...]

1. 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 state and a majority who sought to resist that domination. [...]
2. [...] [I]n the early nineties [...] negotiations resulted in an interim Constitution committed to a transition towards a more just, defensible and democratic political order based on the protection of fundamental human rights. [...] 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.
3. This fundamental philosophy is eloquently expressed in the epilogue to the Constitution which reads as follows:

“National Unity and Reconciliation

[...] 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 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 but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses 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. [...]"

[...] Parliament enacted during 1995 what is colloquially referred to as the Truth and Reconciliation Act [...] ("the Act").

1. [...] A Truth and Reconciliation Commission [...] also is required to facilitate "...the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective..." [...]
2. Three committees are established for the purpose of achieving the objectives of the Commission. [...] The Committee on Amnesty is given elaborate powers to consider applications for amnesty. The Committee has the power to grant amnesty in respect of any act, omission or offense to which the particular application for amnesty relates, provided that the applicant concerned has made a full disclosure of all relevant facts and provided further that the relevant act, omission or offense is associated with a political objective committed in the course of the conflicts of the past [...].
3. [...] Section 20(7) (the constitutionality of which is impugned in these proceedings) provides as follows:
    a. "No person who has been granted amnesty in respect of an act, omission or offense shall be criminally or civilly liable in respect of such act, omission or offense and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offense." [...]
4. 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 state, 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. [...]
5. 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. [...]
6. [...] Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. [...] 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 effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatizing to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigors of the law. The Act seeks to address this massive problem by encouraging these survivors and the dependents of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation 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. [...]

7. 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 dependents 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 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. [...]
8. 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, 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.
9. The Argentinean truth commission was created by Executive Decree 187 of December 15, 1983. It disclosed to the government the names of over one thousand alleged offenders gathered during the investigations. The Chilean Commission on Truth and Reconciliation was established on April 25, 1990. It came to be known as the Rettig Commission after its chairman, Raul Rettig. Its report was published in 1991 and consisted of 850 pages pursuant to its mandate to clarify “the truth about the most serious human right violations ... in order to bring about the reconciliation of all Chileans”. The Commission on the Truth for El Salvador was established with similar objectives in 1992 to investigate “serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth”. In many cases amnesties followed in all these countries.
10. 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 states in transition, taken with a view to assisting such transition, are quite different from acts of a state 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.

11. Mr. Soggot contended on behalf of the applicant that the state was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of section 20(7) which authorized amnesty for such offenders constituted a breach of international law. We were referred in this regard to the provision of article 49 of the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, article 50 of the second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, article 129 of the third Geneva Convention relative to the Treatment of Prisoners of War and article 146 of the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. The wording of all these articles is exactly the same and provides as follows:

“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...” defined in the instruments so as to include, inter alia, wilful killing, torture or inhuman treatment and wilfull causing great suffering or serious injury to body or health. They add that each High Contracting Party shall be under an obligation to search for persons alleged to have committed such grave breaches and shall bring such persons, regardless of their nationality, before its own courts.

1. The issue which falls to be determined in this Court is whether section 20(7) of the Act is inconsistent with the Constitution. If it is, the inquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law. International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment. [...]
2. [...] Section 35(1) of the Constitution is also perfectly consistent with these conclusions. It reads as follows:

“In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law”.

The court is directed only to “have regard” to public international law if it is applicable to the protection of the rights entrenched in the chapter.

1. The exact terms of the relevant rules of public international law contained in the Geneva Conventions relied upon on behalf of the applicants would therefore be irrelevant if, on a proper interpretation of the Constitution, section 20 (7) of the Act is indeed authorised by the Constitution, but the content of these Conventions in any event do not assist the case of the applicants.

2. In the first place it is doubtful whether the Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which this country found itself during the years of the conflict to which I have referred.
3. Secondly, whatever be the proper ambit and technical meaning of these Conventions and Protocols, the international literature in any event clearly appreciate the distinction between the position of perpetrators of acts of violence in the course of war (or other conflicts between states or armed conflicts between liberation movements seeking self-determination against colonial and alien domination of their countries), on the one hand, and their position in respect of violent acts perpetrated during other conflicts which take place within the territory of a sovereign state in consequence of a struggle between the armed forces of that state and other dissident armed forces operating under responsible command, within such a state on the other. In respect of the latter category, there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterized as serious invasions of human rights. On the contrary, article 6(5) of Protocol II to the Geneva Conventions of 1949 provides that

“At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”.

1. The need for this distinction is obvious. It is one thing to allow the officers of a hostile power which has invaded a foreign state 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 state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatized 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 state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction. [...]

Conclusion

1. 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 optimize 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 conceivably have chosen to differentiate between the wrongful acts committed in defense 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. [...]

Order

1. In the result, the attack on the constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 must fail. [...]

Discussion

1. What is your opinion on the dilemma between peace and justice, between reconciliation and prosecution of offenders, between the (practical) chance of the victims to know the truth and their (theoretical) right to see their victimizers punished? In which sense is the South African solution a compromise between the two positions?
2. a. Which acts are covered by Art. 6(5) of Protocol II? Does it also cover violations of the law of non-international armed conflict? Why should Protocol II deal with prosecutions for violations only from the standpoint of amnesty, while it does not prescribe their punishment? [See also Colombia, Constitutional Conformity of Protocol II [Paras 41-43]]
   b. In the cited provisions (concerning international armed conflicts) of the Geneva Conventions, does the obligation to prosecute grave breaches exclude amnesty or pardon for such acts? Are Arts 51/52/131/148 respectively of the four Conventions relevant to the answer? Assuming that IHL does not prohibit grants of amnesty, also for persons who have committed grave breaches, which criteria could be brought forward to circumscribe an admissible amnesty?
   c. Is the explanation of the Court as to why impunity for violations of IHL is more necessary and acceptable in non-international armed conflicts than in international ones convincing? Is the dilemma between peace and justice, between reconciliation and punishment greater within a State than between States? In international armed conflicts, does the obligation to punish violations only concern “officers of a hostile power”?
   d. In granting amnesty, would a distinction between violations of IHL “committed in defense of the old order and those committed in resistance of it” be acceptable from the point of view of IHL? Does such a distinction violate IHL? At least in international armed conflicts? Which principles of IHL are involved?
3. Does South Africa have to respect IHL or only to “have regard to it”? Why must the Court only “have regard to” IHL? Would the Court have invalidated the Act if it had come to the conclusion that it violated IHL?
4. How does the decision qualify the situation prevailing in South Africa before the end of apartheid? Does the Court refer to Art. 1(4) of Protocol I? Is that provision applicable? On what substantive point does the definition of a “national liberation war” by the Court differ from that given in Art. 1(4) of Protocol I? Is that difference understandable in view of the philosophy of the South African Constitution and the reasoning of the Court? What is left of Art. 1(4) if a South African court deems that the situation in South Africa under apartheid did not fall under its provisions? Does this result support or weaken the US criticism of Art. 1(4)? [See United States, President Rejects Protocol I]