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Peace with Justice: Amnesty in South Africa

- Député européen (Verts, France) - Mes initiatives - Amnistie... Amnésie... Impunité... Justice transitionnelle -



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Introduction

I thank the organizers for inviting me to participate in this conference. It should be noted that we became a democracy for the first time in April 1994, a mere 13 years ago. The legislation which established the Truth and Reconciliation Commission (TRC) in South Africa, the Promotion of National Unity & Reconciliation Act (The Act) was promulgated in 1995. Accordingly, when I discuss the TRC process in SA, I would ask you to bear this in mind. In this intervening period up to the present time a number of international norms have been developed. However, the issue remains relevant. According to Louise Mallinder, there have been 420 amnesty processes since the 2nd World War, with a large number of them occurring in the last 25 years. [1]

One finds that the form that an amnesty process takes in any country is usually linked to the relevant strengths or the balance of forces in a country. If one side has completely overwhelmed the other, one finds that you will have the equivalent of treason trials or a local variant of the Nuremberg Tribunal. If the parties are deadlocked in a civil war situation or one of the parties poses a substantial threat to the other, there is usually provision for amnesty.. We are then faced with the conundrum of peace vs justice. It has been argued however that the choice is not always as stark as this: One can still have a form of justice with peace. There is no need for justice to be thrown aboard.

Amnesty in South Africa

So what was the context in South Africa leading up to our amnesty process? You had these enormous expectations having built up with the release of Nelson Mandela. Negotiations on a new political dispensation had been dragging on for over three years. The far right wing had stormed the venue at which the negotiations were taking place. In addition to the existing death squads in the police, a further 300 were trained and unleashed on political opponents by the State; The supporters of the liberation movement had embarked on ongoing protest action against the then government blaming it for the dragging out of negotiations; ; The apartheid govt. still had control of the armed forces and the economy . Unknown elements, with allegations of state collusion, were carrying out massacres on trains and at taxi ranks. The leader of the Communist Party was assassinated by members of a far right wing group. In summary, the country was on a knife edge.

The two major parties, the African National Congress (ANC) and the apartheid government were deadlocked on the issue of amnesty. The ANC wanted people tried for gross violations of human rights. The Apartheid government wanted blanket amnesty and even purported to give the security forces such an amnesty. This was rejected out of hand and not pursued further.

Peace with Justice: Amnesty in South Africa

A compromise was reached on a conditional amnesty. The compromise was set out in broad terms in what came to be referred to as the 'Epilogue' located right at the end of the interim constitution which read:

"National Unity and Reconciliation:

The Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The 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 down 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 transgressions of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can be addressed on the basis that there is a need for understanding but not for revenge, a need for reparation but not for retaliation, a need for ubuntu, [2] 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."

This was part of the three legged Pivotal Compromises that made the negotiated settlement possible in SA [3]. These were:

- The amnesty provision in the interim Constitution, which was legitimated as it was this version which governed our first democratic election. The legislature which was then elected drafted the final Constitution.
- The two stage Constitutional drafting process.
- The Government of National Unity. All parties which received at least 10% of the vote were allocated a cabinet seat.

It took the legislature almost a year of debating the Act establishing the TRC before it was promulgated. The role of civil society was crucial during this process: Both of the major political parties wanted all hearings of the TRC to be held behind close doors. It was only after intensive lobbying by civil society organizations that it was agreed that all hearings would be in public and any 'in camera' hearings would be the exception after being motivated for.

The TRC Process

The main objective of the Act was to 'promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past'.

The Act established three committees:

- The Committee on Human Rights Violations whose function was to conduct enquiries into gross violations of human rights and present as complete a report as possible detailing human rights violations in South Africa during

this period.

- The Committee on Reparation and Rehabilitation whose function was to gather information and make recommendations to the President on reparations to be made to the victims.
- The Amnesty Committee which had jurisdiction to grant complete amnesty to applicants who made full disclosure of all relevant facts regarding offences committed with a political objective in the course of conflicts of the past.

The Amnesty Process

Civil and criminal amnesty was granted to persons upon individual application who made full disclosure of relevant facts, whose act was proportional to the objective aimed at, (the so-called Norgaad principle,) and demonstrated that the criminal acts in respect of which amnesty was claimed was committed with a political objective during the course of past conflicts.

The amnesty committee was chaired by a judge of the High Court. There were a number of judges seconded to the Amnesty Committee, and a judge had to chair any committee which involved a gross violation of human rights.

Gross violations of human rights were defined as killing, abductions, torture and severe ill treatment.

The definitions of gross violations of human rights as well as victims were politically neutral in that it was not dependent on which side you were on. Thus, a policeman who was shot by a guerrilla could be a 'victim' of a human rights violation.

Amnesty was also extended to the state on whose behalf some of these violations were carried out. Accordingly, the State could not be held vicariously liable for civil damages if amnesty had been granted for any action.

Some Legal Challenges

Unlike the Westminster system under British common law, Parliament was no longer sovereign. The Constitution imposes process and substantive constraints on the exercise of the power on organs of state including the TRC. In a system such as ours, courts determine whether power is exercised in accordance with the Constitution. This remains a consistent principle: The TRC process remains accountable to the human rights standards entrenched in the Constitution.

There were a number of legal challenges which the TRC faced. Broadly speaking, the macro challenges regarding the legality of the amnesty provisions were brought by victims and challenges regarding process were brought by alleged perpetrators. The most important case brought before the Constitutional Court was that of *AZAPO v President of the RSA* [4].

The Applicants, victims of gross violations of human rights whose family members were murdered and tortured, challenged the constitutionality of the Act which permitted the granting of amnesty. They argued that Those wronged had a constitutional right to have justiciable disputes settled in a court of law. The granting of amnesty infringed this right. The granting of amnesty to a perpetrator obliterated the right to claim the protection of the law for being wronged.

The Constitutional Court upheld the granting of amnesty as it was sanctioned by the Constitution itself.

The Court dealt directly with the issue that grave discomfort is felt by allowing perpetrators of evil acts to walk free.

The Court reasoning was that the Act allowed the victims to unburden their grief publicly, to receive the collective recognition of the new nation that they were wronged and most importantly to help them to discover the truth about what happened to their loved ones, under what circumstances it did happen and who was responsible.

Without the incentive of amnesty, truth may not emerge.

Furthermore a negotiated settlement may also not have been possible without the incentive of amnesty.

Maintaining the right to prosecute would have kept the victims substantially ignorant about what happened to their loved ones.

It would result in the victims perpetuating a sense of resentment and grief and while the culprits may be physically free, they remain locked out of the new society.

For the process to work, there had to be both civil and criminal indemnity. The Court justified the State being

indemnified for acts committed by persons in the course and scope of their employment by adopting a broad interpretation of the issue of reparation. It stated that the new state was entrusted with the task of reconciliation and reconstruction.

Generations of children born and yet to be born will suffer the consequences of poverty malnutrition, homelessness and disempowerment. Resources of the State will have to be deployed imaginatively – to free the potential of people. Choices had to be made between respecting the delictual rights of the victims and thus diverting desperately needed funds for providing for food for the hungry, roofs for the homeless and facilities for education. It was therefore legitimate for the state to favour the reconstruction of the society involving a wider concept of reparation.

The Court also made reference to the requirement that reparation be provided to the victims. In the matter of *Du Preez v TRC*, the Court held that the TRC operate within the constraints of a constitutional democracy. Accordingly, administrative action had to be lawful, reasonable and procedurally fair [5].

Procedural fairness requires not only that the person implicated be given reasonable and timely notice of the hearing, but also that he or she is at the same time informed of the substance of the allegation against him or her, with sufficient detail to know what the case is about. What is sufficient information would depend upon the facts of each individual case. Importance of a fair process in seeking out the truth.

These processes are administrative as opposed to judicial.

Consequences for persons who did not apply for amnesty

In terms of the TRC legislation, persons who were refused amnesty or who did not apply for amnesty would be prosecuted. The state has been extremely lax about pursuing these prosecutions. After representations and threats by civil society to bring legal action to force the State to prosecute persons who fell into these categories, the State published prosecutorial guidelines in December 2005.

It has been argued in a legal application challenging these guidelines that :

- The amended policy will require the National Director of Public Prosecutions (NDPP) to exercise his prosecutorial discretion in a way which would amount to a rerun of the truth for amnesty procedure under the former TRC. The policy purports to confer powers, formerly exercised by the TRC's Amnesty Committee, upon the NDPP. The new policy permits the NDPP to offer indemnity against prosecution. Indemnity against prosecution, for the purposes of this document, is equated with the issuance of amnesty. While the NDPP is not empowered to provide amnesty to serving prisoners he is empowered to effectively indemnify others against prosecution, a power previously conferred on the TRC's Amnesty Committee. The net result is the same: impunity [6].
- It amounts to an improper attempt to perpetuate the TRC's legal regime in order to allow those who chose not to participate in the TRC a second bite at amnesty. No law will authorize the extension of such powers. It does so rather under the guise of prosecutorial discretion. In so doing the policy interferes with the independent exercise of the NDPP's discretion as to whether or not to prosecute. The amended policy is both unconstitutional and a violation of South Africa's obligations under international law [7].

The President of SA, Mr Thabo Mbeki, on the 21 November 2007 announced he was setting up a 'Reference Group' consisting of persons nominated by political parties in Parliament, to make recommendations to him regarding granting pardons to persons serving sentences for political crimes. These were persons who had not applied for amnesty. He mentioned 1062 applications for pardon had been received.

Conclusion

Louise Mallinder recommends [8] that domestic amnesty processes should be upheld provided that the following conditions are met: The amnesty should have a democratic legitimacy. Amnesty should represent a genuine desire to promote peace and reconciliation; Amnesties should be limited in scope, either on the basis of certain crimes being excluded or only persons participating in restoring peace and democracy; Amnesty should be conditional: For example – full disclosure, or the giving up of arms; and finally, amnesty should be accompanied by reparations.

Diane Orentlicher, in her June 2007 [9] paper 'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency' maintains her support for the criminal accountability for atrocious crimes but qualifying it with local agency fashioning and implementing policies of justice. Her motivation for her stance is the thirst of human rights victims for justice and international support in achieving this; Effective utilization by human rights advocates in leveraging these international norms with Pinochet in the UK and Hibre in Senegal being cases in point; and finally, whilst there may be initial constraints, with the passage of time, there is an increase of political space and commitment of resources to achieve justice.

Having lived most of my life under apartheid, as an activist who was tortured, as a lawyer who represented persons who were tortured and families of detained and disappeared persons, I would have preferred it if perpetrators were all put on trial. However, if the cost was the total destabilization of society, condemning another generation to brutality and the stunting of its development then, I am in retrospect still in favour of amnesties in exceptional circumstances but on the following basis:

- Firstly, recognizing the primacy of victims of human rights violations. When discussing amnesties, one often finds that the perpetrators assume priority and the victims are relegated to a subsidiary role. This must be actively guarded against. In our process, if an application was made for amnesty, we would ensure that the victims, including the relatives of the deceased were present at the amnesty hearing. We would arrange transport and accommodation. If they could not afford legal representation, we would arrange and pay for a lawyer. They were entitled to oppose the granting of amnesty in accordance with the enabling Act.
- Any amnesty process adopted had to be legitimized through democratic processes and itself be part of a broad

democratization process.

- The participation and active involvement of citizens in the TRC processes has to be proactively encouraged. Hearings were scheduled to take place in locations where the atrocities took place. In a country where we have 11 official languages, provisions were made for simultaneous translations. Hearings were broadcast live on radio and sometimes on television in local languages. We raised money from donors to pay for this.
- Amnesties have to be conditional on full disclosure, proportionality of the crime to the objective aimed at, within the context of a political struggle (depending on the local perspective) and upon individual application.
- An oversight body be appointed or possibly the task be assigned to the national human rights institution to ensure that the recommendations of the TRC are implemented. This is especially true with regards to the perpetrators of gross violations of human rights who do not apply for amnesty or were refused amnesty.
- Adequate reparations to victims must be timeously dispensed. In South Africa, the government decided to pay only one sixth of the TRC's recommended reparations for victims.

The narrative flowing from the amnesty hearings and the other TRC processes must be recorded, preserved and widely disseminated. This cannot be stressed enough. It is essential for a number of reasons:

In order for any country to move forward, there has to be a common narrative. Often an oppressive regime, through its control of the media and in order to justify its atrocities creates a false narrative such as we committed these gross violations of human rights because of the Communist threat or Islamist threat or that these allegations are all lies;

If servants of the previous regime themselves disclose their atrocities, in applying for amnesty, then it is difficult to deny their veracity and dismiss it as being propaganda;

International human rights standards and international humanitarian law standards must be upheld as being the template by which any behavior is measured. Those of us who are committed to a vision of a shared humanity based on respect for human rights must not compromise on these hard fought for standards of human conduct: Torture, summary executions and disappearances will always be morally wrong, gross violations of human rights and for which perpetrators in the normal course will be held responsible. I cannot stress enough the sense of empowerment we human rights activists felt from knowing the support of the international community through the adoption of the International Convention Against Apartheid.

The South African TRC has been criticized for focusing on the perpetrator/victim dichotomy, rather than considering the beneficiaries of a racist apartheid system by persons such as Prof. Mamdani of Columbia University, which was held to be a crime against humanity. Serious consideration should be given to the socio-economic rights which were violated. We have inherited a country with millions of people were homeless, millions detained under influx control laws and, by law, 86% of the land was reserved for 8% of the population based on them being of European descent. In these circumstances, what about the indivisibility of all human rights? Should there not be serious consideration given to a basic income grant for persons falling below a certain threshold?

I want to conclude by quoting Diane Orentlicher [\[10\]](#) when she stated “International legal norms affirming that atrocious crimes ought to be punished have provided a powerful antidote to impunity. While there are of course times when those same norms cannot be enforced, it has seemed preferable to say ‘not yet’ than to reframe global norms in terms that suggest prosecuting atrocious crimes is nothing more than an option. For if we were to move entirely away from the language of legal obligation, we would take from those operating on the frontlines of their countries struggle for decency one of the most potent weapons in their arsenal.”

[1] Can Amnesties & International Justice be Reconciled?; The International Journal of Transitional Justice; Vol. 1; Issue 2; July 2007; Pg 208.

[2] The term 'ubuntu' can be broadly be interpreted as recognition of the humanity of people. There is a Zulu saying which states 'a person is not a person without people.'

[3] Prof Karthy Govender; Power point presentation; UN Conference on NHRIs and Transitional Justice; Cape Town; Nov. 2007.

[4] South African Law Reports; 1996 (4) SA 671 (CC).

[5] South African Law Reports; 1997 (3) SA 204 (SCA).

[6] In the Sunday Times edition of February 5, 2006 at page 21, the NDPP, Advocate Vusi Pikoli, was quoted as saying that the policy empowers him to indemnify against prosecution: "What we can do is offer people indemnity from prosecution".

[7] :Adv Howard Varney; Opinion; Feb. 2006.

[8] 'Can Amnesties and International Justice be Reconciled; The International Journal for Transitional Justice; Vol. 1, 2007; Pgs 208-230

[9] International Journal for Transitional Justice 2007 1(1):10-22; UN Independent Expert on Combating Impunity (2004-05)

[10] Ibid fn9 Pg 22