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PREVENTING TORTURE: IMPLICATIONS OF CAT GENERAL COMMENT NO. 2: KEYNOTE

*Justice Albie Sachs**

I was 39 years old, quietly teaching law in Southampton University, when I discovered I was a terrorist. I was in exile in England and had been invited to attend a conference on South Africa organized by Yale University's Contemporary History Department. Although I'd just gotten a passport, it was clear to me that I wouldn't be able to go to the United States because, according to the U.S. State Department, I was a "terrorist." Why was I a terrorist? I was a terrorist because I belonged to the African National Congress ("ANC"). The ANC had for many decades been engaged in a non-violent struggle against Apartheid in South Africa. The majority of South Africans didn't have the vote, didn't have rights at all, and their political leaders were driven underground. It was either fight back or remain silent, and the ANC chose to fight back. The Commander-in-Chief of the armed wing of the ANC was a certain Nelson Mandela: terrorist number one.

So, simply because I happened to be a member of the ANC, I was by definition a terrorist. That was on a Monday. On Tuesday, the pro-ANC lobby group in Washington D.C. managed to better the lobby group that had been supporting the South African government, and I was no longer a terrorist. And so I was able to visit the U.S.

We had been called many, many nasty things. But to be called a terrorist wasn't simply a label that was undignified, that distorted the very nature and character of what we were struggling for—it implicitly gave some kind of assistance to protecting Apartheid. The term "terrorist" had intense meaning in South Africa. The people fighting for freedom were labeled terrorists, and a panoply of laws had been introduced to justify detention without trial of

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alleged terrorists. The minute you were detained, you were denied the right to a trial, to access to lawyers and family, and thrown into solitary confinement under the control of the security police.

On a spring day in 1963, as I was entering my chambers, about six or seven cops emerged from behind pillars to detain me. It was as you see in the movies, police suddenly there, and I was whisked off to prison. So this is what it's like: I'm in a box. There's a mat on the floor. The windows are high, you can't see out. And this is my new place. Every person involved in the freedom struggle wonders: when I'm locked up one day in solitary confinement, what will it be like? How will I be? Will I manage? And it turned out to be far more punishing, and far more difficult than I'd ever thought. I'd believed one would simply be strong and brave and able to withstand everything they try to do to you. You're fighting a just cause, you're a human being with dignity and integrity—you don't give way. And yet, the character of solitary confinement is such that it reaches deep, deep, deep inside you—it's not just a question of will and rationality. Your body and soul fight your will.

You stare at your toes, you stare at the wall; you stare at the wall, you stare at your toes. You don't know how long this is going to go on. Human beings are born to live in communities and be part of society. We talk and we think. Even when we want solitude, it's solitude for purposes of rest, to then re-engage with society again. To be locked up inside that concrete cube, without contact with other human beings, is deeply anti-human. It penetrates right into your soul and produces a level of depression, alienation, and absurdity, that you begin to wonder: what are these words "freedom" and "justice?" What are they all about? The concepts become remote. You wonder: why am I suffering so much, why is life so horrible and miserable? And it goes on and on and on, and you never know when it's going to end because you are totally in the hands of other people who determine everything about you, when you eat, when you sleep, when you see the sky.

I tried to keep myself active. One challenge was to go through all the states of the United States of America. It was a mental activity, so that Albie would be communicating with Albie if he couldn't communicate with anybody else. And I would do Alabama, I would say *Ar-kansas* . . . and I think I got up to something like forty-three or forty-six states. Even though this was before I was blown up and still had ten fingers, I wasn't able to write it all down, I didn't have pencil and paper, and in any event it might be invidious today to mention the states that I forgot. I would sing songs, and again go

through the alphabet, coming up with an interesting profile of the hit tunes of late 1963. I would start with “Always,” “Because,” “Charmaine,” “Daisy,” and so on. I had trouble with the letter “x” so I sang “Deep in the Heart of Texas.” You laugh to yourself, and you weep a bit to yourself because you are going through these childish things just to feel human. My favorite was “Always,” [singing]

*“I’ll be living here always,
year after year, always,
in this little cell,
that I know so well,
I’ll be living swell always, always.”*

And I would do a lonely waltz and be amused that this Noel Coward song taken from Irving Berlin, was helping the freedom struggle in South Africa.

*“I’ll be staying in always,
keeping up my chin always,
not for but an hour, not for but a week,
not for ninety days, but always.”*

Ninety days, that was the name of the law: the Ninety Day Law. It said you could be locked up in solitary confinement for ninety days, released for a few minutes, and then locked up for another ninety days. And our top courts declared that this was okay. And another ninety days, and another ninety days. It turned out to be 168 days in my case. So, being called a terrorist was not simply being branded with an ugly label. It had dire consequences for the hundreds and thousands of us that were locked up. As “terrorists,” we lived outside the world of the rule of law, there was no due process. The people who make all decisions about your health, your life, your safety, and your future, were the police. Torture takes place and violence takes place. Months later you might appear in court, with no visible signs of injury, no broken bones that are visible, the wounds have healed, and the judges look and wonder what the problem is? They see a timid and insecure prisoner in the witness box or a witness who has been tortured to testify against somebody else, as opposed to the confident and assured security police who deny that anything untoward has happened. Anxious about the threat of terrorism in society, the judges are only too ready to disbelieve these “wild” allegations being made by the detainees. So this certainly was one reason why we felt that the label of “terrorist” was something ignoble, inappropriate, and wounding, as well as a cover for security police brutality.

But there was a stronger reason for our hatred of the word. The ANC had in fact taken a stand *against* terrorism. This was a deep moral issue inside the organization. I remember when we were in exile and the Palestinian Black September Movement was active in hijacking airplanes. Young ANC members were saying to the leadership: what's the matter with you? They criticized Oliver Tambo,¹ with his briefcase and his glasses, "you're just a lawyer, you're too scared to take these kind of actions, what kind of leader are you . . . look at the huge publicity Black September is getting, putting their struggle on the map, the whole world is talking about it, are we just too timid, too lawyer-like, have we spent too many years preaching non-violence, to really grasp these opportunities and do what the struggle requires?" But the leadership was very, very firm. No terrorism.

That was a period of "isms." There was imperialism, socialism, communism, fascism, and, from the past, Nazism. One of the "isms" was terrorism. We took "isms" very, very seriously; if you were accused of the wrong "ism" in your particular movement, you could be in big ideological trouble. The basis for the challenge to terrorism was partly pragmatic. You never know who might be on that airplane; it could be Oliver Tambo himself, or people supporting our struggle, because terrorism was indiscriminate in that way. Another concern was that adopting terrorist forms of struggle would play into the hands of the Apartheid government. It would support the claim that the whites in South Africa would face annihilation, that this was simply a battle between black and white, not between justice and injustice.

But I believe there was a much deeper and more profound reason for rejecting terrorism that went beyond fears of how its indiscriminate impact could be used to distort the nature of the struggle. It concerned what it does to *you*. It's what it does to the freedom fighters. When you become an instrument of death, when you don't care about human life, then you are destroying the very heart of your struggle, the very foundation of the claim to life and dignity that gives you the courage to withstand all the difficulties and the trauma and imbues you with a sense of solidarity and connection with other people. It's profoundly destructive of your ethos, of who you are, and of your struggle.

¹ Oliver Reginald Tambo was a South African anti-Apartheid leader and activist. Tambo was a central figure in the ANC and held various posts including Secretary General, Deputy President, President, and National Chairperson. Together with Nelson Mandela and Walter Silsulu, he was one of the founding members of the ANC Youth League.

Even if the ANC leadership didn't always expressly spell out these deeper philosophical factors, I know that when it came to someone like Oliver Tambo, such beliefs lay at the core of a principled opposition to terrorism. He was always aware that when you embark upon an indiscriminate war, of one group against another, of one community against another, and not of people fighting against a system of injustice and oppression, then the struggle becomes endlessly bitter. You can rebuild broken buildings, but it is far harder to repair bitter minds.

In 1985 we held a conference of the ANC in exile in a small town in Zambia called Kabwe. The conference was organized to make important decisions about intensifying the struggle while pursuing the possibilities of negotiations, the two being seen as connected. We were surrounded by Zambian troops because there had been commando raids conducted by the South African government to kill ANC members in Zambia. And with a couple hundred delegates in attendance, we discussed what were called "methods of struggle."

I recall vividly King Sabata Dalindyebo going up to the platform and addressing the delegates. Comrade King, as we called him, was one of the patriotic traditional leaders who had refused to become a stooge of Pretoria and accept its little benefits, like a motor car and stipend. He came to Mozambique where I was in exile and I was asked to look after him and his family. One day I took them to the beach and had the delight of lending him my bathing costume—I had never lent my swimming costume to a King before.

He goes up to the platform and he speaks in isiXhosa, his native tongue. I notice the audience is laughing as he speaks. The oppressed people have to know the language of the oppressors; yet if you belong to the privileged community you don't have to know the language of the oppressed. So I, being one of about ten percent of the audience who were culturally backwards and didn't understand isiXhosa, had to wait for the translation, and ten minutes later we were able to laugh.

This was the story he told: two men were fighting with sticks, viciously, very angry with each other. Their wives were watching and urging them on. And the one wife said to her husband:

[M]y darling husband, you know that you are a better fighter than your opponent, you are stronger than him, you've always beaten him. But today you are losing. And why? It is because you are using only one hand to grasp the stick, while the other

hand is holding a blanket to cover your nakedness. *Forget your damn nakedness*—drop your blanket, and smash him up!

People laughed. We saw the analogy. He was saying that the ANC was unduly restricting itself in its methods of struggle and preventing itself from achieving victory. In doing so, he was echoing what some were saying in the corridors: until the whites bury their children like we bury our children, until they feel the pain that we feel, they will never give way. The response of the audience was simply to engage in polite laughter, and then to move on. I would have stood up and in grave tones said, “Comrade King, the policy of the ANC for many years has been to negate terroristic tendencies in the organization . . . blah, blah . . .” The African way is through quiet laughter to project the response that we hear you out, we respect what you are saying, we understand the intensity of your emotions and feelings, but in fact our policy will stay on course. So this was reaffirmation that we didn’t go for civilian targets, for soft targets. We simply continued with a political struggle that had an armed component that directly targeted structures of domination and control, but didn’t go for people simply because they happened to belong to the oppressor community, even if these people had voted for oppression, and given support in different ways to oppression.

Another issue discussed was the question of what to do with captives in the hands of the ANC. I was working in Mozambique as the Director of Research in the Ministry of Justice when I got a telephone call one day from Oliver Tambo. I was always pleasantly amused that if Oliver Tambo wanted me to come and see him, he would ask me in the most polite roundabout way—I know that you’re extremely busy, if it would help I can speak to President Samora Machel to facilitate your absence, and if you can’t come, I would fully understand. A junior official of the ANC would say: Comrade Albie, you are expected in Greenland next week, prepare a ten page written speech about the situation in South Africa. But that was not part of Oliver Tambo’s style, and he invited me to come if I could possibly manage it to Lusaka to help with something he said was rather important.

I was curious to know what it was that he couldn’t mention on the phone. I arrived on a hot day in 1983, and the President of the ANC in exile was using a piece of rolled-up newspaper to swat flies while he got to this very important matter. Eventually, after going through the courtesies of welcome, he told me what the problem was. Pretoria was trying hard to destroy the ANC, sending people

to kill the leadership and to create every kind of mayhem inside the organization. A number of these operatives had been captured. The question was that there were no rules or regulations dealing with what to do with the captives. Ours was a purely political organization, not a State, and its constitution dealt with annual meetings, elections, subscriptions, and the policy of the organization. It didn't touch on what was in effect a code of criminal law and criminal procedure.

We don't know what to do, he concluded, and did I have any advice? I confidently replied that it wasn't very difficult at all; there were international instruments that said that all torture or cruel and inhuman punishment or treatment were prohibited. He was quiet for a moment and then said: "we use torture." I almost fainted. He said the words with a bleak face and didn't give any further explanation. Years later I learned that there had been allegations that ANC security had been using very brutal methods against these captives in ANC camps in Angola, where the circumstances had been very difficult. Tambo had then established a Commission of Inquiry comprised of senior ANC members, who had interviewed people and given him a report confirming that torture had in fact been used. All I discovered at that moment was that he wanted me to prepare a draft of what he called a "Code of Conduct" for the ANC.

Of all the legal writing I have done, and it has been quite a lot over many decades, I would say that the Code of Conduct I drafted is second only in significance to a tiny note I sent out of prison when I was detained. During that detention, I was subjected to sleep deprivation and just kept awake for hours and hours on end, with drugs probably put in my food. When I collapsed on to the floor, I just remember the shoes of the security police moving urgently around me, some black, some brown. The voices above all were staccato. I was lifted up, fingers pushed open my eyelids, I felt water pouring on to me. And it happened again and again. My body was wrestling with my intelligence, and I felt myself weakening and weakening. Afterwards, I smuggled a little note out on a tiny piece of paper trying in just two sentences to say what had happened to me hoping that the matter would go to court. That is the most important legal document I have ever written.

Second in importance is the Code of Conduct, which was in effect a code of criminal procedure and criminal law for a liberation movement in exile, establishing the rule of law, principles of legality, of human rights, inside the organization itself. Oliver

Tambo's approach was not simply to sign off as President on the Code of Conduct and declare it to be the policy of the organization. Rather, he insisted that it go to a mandated delegates' conference, because an issue like this had to become a theme thought through and embraced by the whole movement.

So for months before the conference, one of the issues discussed by scattered ANC branches throughout the world was the question of the adoption of the Code of Conduct. Basically the code established three levels of offense. The first level dealt with the obstreperous member who goes to a branch meeting drunk, who messes up discussions and who doesn't respect the chair. You don't use detention against someone like that, or other heavy responses, but you do have to have some kind of discipline and control. The second level was for people who would crash vehicles while they were drunk, or stab somebody, or steal, or abuse women or men in the organization. We needed some form of penalty to address that sort of behavior. Finally, the most serious level related to treatment of people sent in to try to destroy the organization.

The Code provided for three corresponding tiers of investigation. At the first level, there was just a branch disciplinary inquiry. At the second, there would be an ad hoc tribunal and at the third, a very special and more permanently established tribunal. There would be a right to defense, to know the charge, to challenge and bring evidence, and have independent representation, even though the legal defenders would be ANC members, they would be quite independent from the structures of security. There would be the normal onus of proof on the presenter—we didn't use the word "prosecutor"—to establish with a very high degree of certainty that the person was responsible, followed by various levels of penalties. And finally, there would be a right of appeal.

The big question was what to do in what people called "extreme situations," where a battle was raging and there might be somebody with information that might be extremely potent and significant. Should a measure of "intensive investigation" be permitted? Variants of that phrase were used at the conference. Should some form of intense investigation be permitted in situations of extreme pressure where there was reason to believe that the captive might have crucial information? And one by one, delegates came up to the platform and said "No." I still remember that most of those who spoke were young soldiers from *Umkhonto we Sizwe*,² and they said no. They said that the minute you gave the

² *Umkhonto we Sizwe*, translated as "Spear of the Nation," was the military wing of

slightest leeway to interrogators, it would get used for all interrogations, all the time. I remember one delegate saying: we are fighting for life—how can we be against life? Life, not just meaning being dead or alive, but giving respect for the human spirit and for humanity.

It was a thrilling moment for me. It represented what I thought, and I'm sure, what Oliver Tambo thought. It became clear that the Code of Conduct represented something that the movement as a whole and the rank and file felt strongly about. There was overwhelming rejection of any kind of special interrogation techniques. What was understood was, torture is torture is torture, something abhorrent and something disrespectful to who we were. Anything that opened the door, the tiniest little crack, to permit torture, was to be excluded. So, the Code of Conduct was adopted with overwhelming support, and it did not allow for any exceptional forms of interrogation in even the most necessitous circumstances.

I was not in the armed struggle. My friend Denis Goldberg was. He was good with his hands, so he ended up in *Umkhonto we Sizwe*, and spent twenty-three years of his life in Pretoria Prison. I was a lawyer and that was my function. I was good at talking, *yack, yack, yack*. But the armed struggle came to me. And it did so in the form of State terrorism. State terrorism is not often discussed in debates on terrorism. Yet, States have been responsible for more indiscriminate killings and more violations of human rights than any irregular groups, certainly in my lifetime. In addition to having the power to assimilate, State terrorists have the power to impose silence—the power to cover up, to a far greater extent than any irregular groups might have.

I was blown up by a bomb in Mozambique. I was just one of millions who had been traumatized over the decades, whose bodies had been violated, and whose spirits had been placed on the wrack by State violence. Our response was not to demand an eye for an eye. While I was recovering in the hospital, I remember a letter someone sent me saying, “don't worry, Comrade Albie, we will avenge you.” I wrote back thanking him, but meanwhile I thought—do you mean you're going to chop off the right arms of the people who did this to me, and blind them in one eye? What kind of a country will we produce? Who will we be? But if we get

the ANC. In August of 1990, *Umkhonto we Sizwe* ceased operations in anticipation of the end of Apartheid, and was fully integrated into the South African National Defence Force by 1994.

democracy in South Africa, that will be my soft vengeance. Later, I heard that one of the persons responsible had actually been captured in Mozambique. I remember thinking, and later recounting in my book *Soft Vengeance of a Freedom Fighter*,³ if he's put on trial in Mozambique and the evidence is insufficient and he is acquitted, that will be my soft vengeance. What was important was to live in a country where the rule of law and due process operated. Achieving democracy and the rule of law in South Africa, rather than putting some rascal behind bars—possibly unfairly—that would be my soft vengeance.

That happened to be my personal kind of response, but it also became a national response in the sense of creating a law-governed process that required the perpetrators of torture or violence on all sides to come forward and acknowledge what they'd done. The Truth and Reconciliation Commission ("TRC") was set up so that the country could move forward without lies and deceit. We could recover the bodies of people who had been secretly buried and families could know how the victims had died and give them a decent burial at last.⁴ The public character of the proceedings enabled our whole society to convert knowledge (such as facts, data, information) into acknowledgement (appreciation) that everyone could embrace the values and ask: Where was I? What could I have done? What can we do in the future to prevent this? That whole process, a very rich, complicated, controversial process, was our kind of response. We rejected the idea of doing unto them what they had done onto us. We didn't want to become like them.

And that brings me to the last part of this presentation. Now Albie is wearing a green robe, together with ten colleagues at the Constitutional Court.⁵ We hear several cases with one fundamental theme: do extremely wicked people, who challenge the very notions of the rule of law, of constitutionality and fundamental rights, have the right to claim protection from the legal system that they are trying to overthrow? I mention three cases.

The first is that of Mr. Khalfan Khamis Mohamed, who had apparently been involved in the blowing up of the American Em-

³ ALBIE SACHS, *THE SOFT VENGEANCE OF A FREEDOM FIGHTER* (2d ed. David Philip Publishers 2000) (1990).

⁴ The Truth and Reconciliation Commission was established in 1995 by the Government of National Unity to help deal with the conflict that occurred under apartheid. The Truth and Reconciliation Home Page, <http://www.doj.gov.za/trc/> (last visited September 3, 2008).

⁵ Constitutional Court of South Africa, <http://www.constitutionalcourt.org.za/site/home.htm> (last visited Sept. 3, 2008).

bassy in Dar es Salaam.⁶ It was a terrible, terrible act. It killed scores of people just doing their work, a majority of them Tanzanians, and it was aimed at international law as such, targeting an international diplomatic institution. After the bombing, Mohamed came down to Cape Town, gave a false name, and got documentation as a political refugee. The FBI had heard that he was there, but they didn't know which name he had chosen and so they waited with a photograph for him to return one day to get his documents updated. In the meanwhile he had taken up employment with a baker—apparently he was a very good pastry-chef, with a quiet demeanor. One day, Mohamed did not turn up to work and the owner of the bakery inquired and was told that he was in detention. The baker tried to get a lawyer for him, but was refused permission to do so. And within thirty-six hours Mohamed was flying in a military plane to stand trial on a capital charge in New York. The baker went to the High Court, and the High Court said: we can't give you any relief, he was an illegal alien living under a false name, he's been deported out of the country, and there's nothing the court can do.

The matter was taken on appeal to the Constitutional Court. There was absolutely no problem with the fact that Mohamed deserved to be put on trial for what he had allegedly done. It was a terrible, terrible act. There was no question that if proper procedures had been followed, the South African government would have been legally obligated to hand him over for trial. But there were two issues that concerned us deeply. The first was that he had been denied the right to legal assistance. And it's precisely the people facing the most serious charges who most need legal assistance. If you're up on a parking offense, the failure to have legal assistance is not going to be catastrophic. But in a matter of life or death, the law and the constitution have to function and be seen to function. So our court made some sharp comments about the failure of the South African authorities to allow Mohamed access to a lawyer.

But there was another matter of even deeper concern for us. Our Constitution, as interpreted by our Court, forbade capital punishment.⁷ To hand somebody over to a country where the person might be executed, was like handing somebody over to a country

⁶ Mohamed v. President of the Republic of South Africa 2001 (3) SA 893 (CC) (S. Afr.) *available at* <http://www.saflii.org/za/cases/ZACC/2001/18.pdf>.

⁷ S. AFR. CONST. § 11 (1996); S v. Makwanyane 1995 (3) SA 391 (CC) (S. Afr.) *available at* <http://www.saflii.org/za/cases/ZACC/1995/3.pdf> (declaring capital punishment unconstitutional).

where a person could face torture. It was against our Bill of Rights. In fact, when one of the accused in that very trial had been discovered to be in Germany, the American government had approached the German government for his extradition and the German government had refused to hand him over unless it got an assurance that he wouldn't be executed. That assurance had been given, and he had been handed over following due process of the law.

I felt a sense of indignation when I saw the term "rendition" used in the papers before us. The implication was that when it came to Germany or other powerful countries of the West, you respect the rule of law. However, when it comes to that country at the bottom of Africa, you go for rendition. We battled so hard to get our constitution, to get the rule of law in our country, and to have due process as part and parcel of the very fabric of our society. Now we find South African officials collaborating with officials from another country to disrespect and disregard the very things that we had been fighting for. In any event, our judgment made it very clear that the South African immigration authorities who had handed Mohamed over had violated his rights not to be sent to a country where he faced the death sentence without a proper assurance being given that if found guilty he would not be executed.

The question then was, what to do? We couldn't send a gunboat to sail past the Statue of Liberty to land commandos to rescue him. Separation of powers required that foreign affairs, and not the Court, be responsible for dealing with the diplomatic dimensions of the matter. But what we could do and did do was to send a copy of our judgment and position on the matter to the judge who was presiding over the trial in the United States.⁸ Then the question before him was whether or not to let the jury know what the South African court had decided. In any event the jury split, I believe it was seven-five, which meant Mohamed wasn't executed.⁹ I might mention the date of the [Constitutional Court] decision was May of 2001. If it had been a few months later

The second case involved a person who had been dubbed "Dr. Death" by the press.¹⁰ In the late period of Apartheid, Dr. Wouter

⁸ Judge Leonard B. Sand, of the U.S. District Court of the Southern District of New York, presiding judge over *United States v. Bin Laden*, 156 F.Supp. 2d 359 (S.D.N.Y. 2001).

⁹ *United States v. Bin Laden*, 156 F.Supp. 2d 359, 371 (S.D.N.Y. 2001).

¹⁰ *The State v. Wouter Basson* 2005 (1) SA 171 (CC) (S. Afr.) available at <http://www.saflii.org/za/cases/ZACC/2004/13.pdf>; see also Albie Sachs, *War, Violence, Human Rights, and the Overlap between National and International Law: Four Cases before the South African Constitutional Court*, 28 FORDHAM INT'L L.J. 432 (2005).

Basson was head of the biological and chemical warfare unit of the South African military.¹¹ It was alleged that he had used money given to him to buy poisons and antidotes abroad to acquire a pleasure resort and hotels in South Africa in his own name. His defense was that in fact he was doing that as nominee for agents from Libya, Russia, and East Germany because that was their kickback for providing him with these antidotes. The trial judge believed that Dr. Basson's explanation of why he had used the money in the way that he had done could possibly be true and acquitted him of the fraud charges. But the most serious charge against him was that he had employed his medical skills to create a poison which was used to inject about 200 members of SWAPO—South West Africa People's Organization—freedom fighters from Namibia, who were asphyxiated, taken in a small airplane and dropped over the sea—Argentine fashion—where they drowned and were eaten by sharks. The judge said that because the charge was conspiracy in South Africa to commit murder in Namibia, he didn't have jurisdiction to hear the matter; conspiracy in Country A to commit an offense in Country B can't be tried in Country A, only in Country B.

The matter went on appeal to the Supreme Court of Appeal, where the State claimed that the trial judge had been manifestly biased in favor of the accused, and that in any event, the conspiracy to murder charge should not have been quashed. However, the Supreme Court of Appeal said on procedural grounds that the State hadn't prepared its documents properly, so it would not entertain the matter. Then the case came to the Constitutional Court.

We first considered a preliminary question: did the case raise a constitutional issue, thereby giving our Court jurisdiction to hear the appeal? For varying reasons, all the judges held that it did. In a separate judgment, I said one reason why it was a constitutional matter was that it implicated international law, specifically South Africa's duties both under the Geneva Conventions and under customary international law, to prosecute what war crimes and crimes against humanity. Our Constitution expressly required that international law be applied in our courts,¹² a factor that should have

¹¹ Project Coast was a top-secret chemical and biological weapons program instituted by the South African government during Apartheid (1981–1993). With the end of Apartheid, South Africa's various weapons of mass destruction programs were stopped. CHANDRE GOULD & PETER FOLB, *PROJECT COAST: APARTHEID'S CHEMICAL AND BIOLOGICAL WARFARE PROGRAMME* (United Nations Publications UNIDIR) (2002).

¹² S. AFR. CONST. Ch. 2 Sec. 39 § 1(b) (1996).

been used by the Supreme Court of Appeal to weigh against the technical faults in the application; thus, given the gravity of the allegations, the Court should have exercised its discretion to hear the matter, not to reject it.

My judgment detailed the horrendous offenses Dr. Basson was alleged to have committed, but concluded with the observation and fact that these crimes had been horrific didn't in any way diminish his right to have a fair trial. On the contrary, when dealing with allegations that involve profound attacks against the whole notion of the rule of law, democracy, and constitutionalism, it becomes particularly important for the prosecution to distance itself from the cynical morality of those who allegedly seek to challenge these concepts. This requires resolutely defending the very qualities that are most under threat.

The third and last case involved a group of mercenaries from South Africa who were apparently on their way to Equatorial Guinea to overthrow and kill the president of Equatorial Guinea.¹³ They stopped off in Harare, Zimbabwe, but the South African authorities had given the Zimbabweans a tip off, and they were arrested. The case received international prominence because Mark Thatcher, the son of former British Prime Minister Margaret Thatcher, was alleged to have been involved, and indeed he eventually paid a very big admission of guilt and fine in a plea bargain acknowledging his role, coupled with a promise never to return to South Africa.¹⁴ It was a poignant situation. Our courtroom, which was much smaller than this room,¹⁵ was packed with the mothers and the fathers, the lovers, and the brothers and sisters of the mercenaries demanding that their rights be protected under the South African Bill of Rights. But they were not in South African soil; they were locked up in Zimbabwe. To what extent could we use the South African Bill of Rights to defend and protect people who were completely outside of the Court's jurisdiction? We decided that in general terms our Bill of Rights could not be imposed on other countries. For example, we couldn't say to the United States that it could not execute a South African who had committed a crime in the U.S. because to do so would be a violation of that person's rights under the South African Bill of Rights. American

¹³ *Kaunda v. President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC) (S. Afr.) available at <http://www.saflii.org/za/cases/ZACC/2004/5.pdf>.

¹⁴ Laurie Goering, *Thatcher's Son to Pay Big Fine in Plea Bargain; Admits Breaking S. African Coup Law*, CHI. TRIB., Jan. 14, 2005, at 4.

¹⁵ The Symposium was held at The Association of the Bar of the City of New York, 42 West 44th Street New York, NY.

law would apply, and the imposition of the death sentence would be a matter for the U.S. Supreme Court or for the legislatures to determine.

But that wasn't the end of the matter. They continued to be South African citizens, wherever they were. Did this give them any claim for protection from our government? We had to decide the question in a hurry, reconvening during the middle of our recess—there would be little value in a beautifully crafted but posthumous judgment. The allegations of the families were that they were going to be tortured, possibly in Zimbabwe, and certainly in Equatorial Guinea. They quoted from documents by the International Commission of Jurists and other organizations to prove that there would be a show trial or no trial at all, and that they could well face summary execution after torture. I remember feeling the irony of the situation and blurting out from the Bench: they go into a lion's den and then complain that there is a lion. Yet for all the paradox, we were a court committed to the principles of our Constitution, and our Constitution respected life and the right to a fair trial for all.

But what kind of protection could they lawfully seek? We couldn't say that customary international law had abolished capital punishment; it hadn't reached that stage, although it was moving in that direction. However, we did say that the right to a fair trial was recognized by international human rights instruments and had become part of customary international law. We accordingly held, with varying degrees of firmness, that the prisoners had a right to get what diplomatic protection they could from our foreign affairs authorities in relation to the right to a fair trial.

Secondly, we said, they should not be subjected to torture. The right not to be tortured, enshrined in the Convention Against Torture, is now part of customary international law. There were credible allegations that the prisoners could face torture, and again with varying degrees of forcefulness we said our foreign affairs authorities were under a duty to use their best efforts to prevent that from happening. The common thrust of our different judgments was the significance of the interface between customary international law principles and the rights enshrined in our Bill of Rights. The fact that the alleged mercenaries were creating mayhem on our continent, that they were not freedom fighters taking up arms against their own leaders who they regarded as oppressors, but hired guns not under any command, or subject to any discipline, nor functioning within any system of legality, didn't take

away the fact that they were human beings. As such, they were entitled to rely on basic principles of customary international law.

Let me conclude by saying that in South Africa we have a particular constitution that came about in a particular way. But what's been extremely inspiring and encouraging to me as a judge has been to discover that judges in other countries with totally different constitutional arrangements have stressed the importance of the need to apply their own domestic law with respect to principles of customary international law and fundamental human rights. We in South Africa are guided by a very value-rich constitutional text. Indeed, you can't be an originalist in South Africa, relying on the literal text of the Constitution, without being a judicial activist. In the United Kingdom, there isn't any written constitution at all, and in the United States, you have a written constitution with a text that is very different in many ways from ours. Yet, it's a matter of great inspiration and pride for me to see that judges from different parts of the world, working within different constitutional structures, have all managed to uphold the same deep values. Their judgments show that the integrity of deep fundamental principles should not be undermined simply because the pressures of the legal system are great. On the contrary, the greater the stress, the greater the need to uphold the fundamental principles.