

SPEECH BY THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA, BULELANI NGCUKA, AT THE INTERNATIONAL SOCIETY FOR THE REFORM OF CRIMINAL LAW CONFERENCE CANBERRA 26 – 30 AUGUST 2001

“Amnesties and Immunities as Necessary Tools in Combating Corruption”

Approximately eight years ago I had the privilege and honor to be part of the landmark constitutional negotiations that resulted in the creation of the new democratic South Africa we see today. Back then I was still very much a politician and was part of the ANC negotiating team led by former President Mandela. The entire negotiation process was a very sensitive and emotionally charged one. Negotiating the transfer of power from a minority regime to a democratic order can never be an easy process.

One of the thorniest issues that the negotiators were faced with was how to deal with the apartheid history that is so littered with horrific cases of human rights abuse and violence. South Africa could not make the journey from a past marked by conflict, injustice, oppression and exploitation to a new democratic dispensation characterized by a culture of respect for human rights without coming face to face with its recent history. There were very strong and divergent views on how to face that past. Some believed that we should follow the post World War II example of putting those guilty of gross violations of human rights on trial as the allies did at Nuremberg. Others urged that the past should be forgotten, and let bygones be bygones. At the constitutional negotiations we opted for a very difficult route – an option that has been celebrated by the world as a miracle desirable for any post-conflict dispensation. It was the most ambitious programme that sought to combine truth telling, clemency and prosecution, and eventual reconciliation. This option is succinctly put in the preamble of our Constitution, that we resolved to

“...Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;”

and

“... Build a united and democratic South Africa...”

Based on these principles we therefore established the Truth and Reconciliation Commission in terms of the Promotion of National Unity and Reconciliation Act to:

“..provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed.....; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with political objective committed in the course of the conflicts of the past...; affording victims an opportunity to relate the violations they suffered...; taking measures aimed at the granting of reparation to, and rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights...”

So the option we chose was that of individual and not blanket amnesty. The only condition to amnesty was “full disclosure” of truth – freedom was granted in exchange

for truth. Telling the truth about the past was the basis of the TRC so that people should know about the violations of the past and that preventative measures can be put in place to ensure that those things do not happen again.

Today I am no longer a politician, I am a prosecutor. So, why am I telling you all of this? I believe that the experiences relating to amnesty gained through the Truth and Reconciliation process do offer some principles of applicability to how we can deal with corruption today.

I must hasten to add, however, that immunity and indemnity, must at all times, be granted as a last resort because of the tension between the need to ensure that all are equal before the law and that those who engage in criminal activity are punished, and the difficulty the state is confronted with, the none availability of innocent witnesses and lack of evidence. When granting amnesties and immunities to offenders, prosecutors are faced with the same concerns expressed to the TRC. They are:

- ?? holding perpetrators accountable through prosecutions
- ?? obligations that the state owes to victims and the society, eg to investigate, prosecute and punish perpertrators
- ?? rights of citizens to see justice done
- ?? the perception that amnesties create a climate of impunity

I am not going to attempt to deal with some of the responses to these genuine concerns that are generally raised when people debate issues of amnesties and indemnities. A number of scholars have written on this topic and so I am not going to do injustice to that debate by commenting on it now. What I am going to say, though, is that I am a firm believer in the use of amnesties and indemnities as tools in the fight against corruption and any other form of organized crime.

Just as the basis for the establishment of the TRC amnesties was the truth so too the fundamentals for the granting of indemnity by prosecution is truth. As prosecution we grant indemnity to offenders because we want to know the truth about crimes perpetrated so that we can get to the root of the problem and deal with it. If the prosecution does not know the whole truth about motives and the modus operandi of offenders who commit acts of corruption, it will prosecute almost everyone and the problem of corruption will still be around, and in fact would probably escalate. If however law enforcement knows all the truth about acts of corruption, it can then advise those agencies that are victims of corruption on the modus operandi and weak areas in their systems so that preventative controls and systems can be put in place, and thereby dealing comprehensively with corruption.

An example of the benefits of using indemnity as a tool to combating corruption is the cricket match fixing scandal that shook the international cricket community. One of the

alleged participants in these corrupt practices was the captain of our national cricket team, Mr Hansie Cronje. When this scandal came to our knowledge the South African authorities immediately set up a commission of enquiry to look into the matter. In order for the commission to get to the root of the problem the National Prosecuting Authority offered Hansie Cronje indemnity on condition that the commission is satisfied that he told the truth. It would have been easy to prosecute Hansie Cronje on the basis of available evidence without knowing the whole truth about the extent of match fixing in cricket. By offering indemnity for full disclosure you are sure to get to the root of the problem and thus allowing the cricket community to put mechanisms in place to ensure that this does not happen again.

There is general consensus internationally that corruption is a serious threat to democracy, good governance and development in many countries today. There is also a growing consensus that in order to strike a decisive blow, governments must use all of its existing machinery to fight corruption. In developing their anti-corruption legislations many countries now adopt a more holistic approach to dealing with corruption. The result is that statute books no longer make provision for only defining the elements of the crime, prosecution and punishment. More and more statutes have components of education, prevention, detection and prosecution. Some even go further and stipulate on what is ethical behaviour and what is not. Some deal with the establishment of hotlines and whistleblower protection. All of this is done in order to deal with what is perceived to be a serious threat and has strong elements of organized crime.

The holistic approaches being developed do in a sense suggest that conventional methods of dealing with ordinary crime are insufficient when it comes to dealing with corruption, especially given the organized crime elements within it. Therefore prosecuting everyone who is linked to an act of corruption is not, in the long term, an ideal strategy to dealing with the problem. I am not trying to suggest that the State should not endeavour to prosecute every offender that it has a case against. What I propose is selectivity in prosecuting these types of cases. In any event, no system of justice in the world even pretends that it punishes each and every case of antinormative behaviour. In cases of corruption, an initial self-selecting factor exists in the fact that the evidence needed to initiate a prosecution will plainly be lacking in many cases. Selection on the basis of degrees of culpability is therefore not only necessary but quite legitimate. There is nothing wrong with selectivity as long as the rules are clear.

Without the possibility of an indemnity from prosecution it would virtually be impossible for the state to get at the people behind serious acts of corruption. The threat of prosecution can be a disincentive to offenders to give evidence that may be incriminating about co-offenders. Everyone agrees that prosecution should start at the top where possible, without, however, allowing “due obedience” to orders as a defence where a clear opportunity to resist an immoral order was available. It is this desire to get to the “top brass” that, even as we speak, criminal codes of many countries have provisions which allow for indemnity to offenders who turned state witnesses and have testified frankly and honestly about co-offenders, even if the evidence incriminates them. So indemnity to offenders for strategic reasons is not something new that has to be designed

to deal with the problem of corruption today, it has always been in our statute books and prosecutors have used it well and no one ever suggested that it encourages impunity and sacrifices justice.

Our current experience as the National Prosecuting Authority also charged with investigating and prosecuting organized crime and corruption is that in almost all the cases where we managed to get the bosses behind the crime syndicate, we had to indemnify one or two of the offenders in order to get evidence about co-offenders who are the real mastermind behind the crimes. This strategy has worked well in almost all of the major cases – whether it is the political violence cases in KwaZulu Natal, or car hijacking cases in Johannesburg, or even urban terror cases in Cape Town.

At the same time it does not necessarily follow that the interest of justice can only be served in these cases by a blanket amnesty or indemnity. There is a price to pay in amnesty or indemnity too. There are certain ground rules that have to be satisfied before amnesty or indemnity can be considered. I will attempt to take you through some of the general ground rules we consider before granting amnesty or indemnity. This list is however not exhaustive:

- ?? As a general rule the question of guilt or innocence is not an issue, however if the offender refuses to accept guilt or minimizes culpability, or raises a claim of innocence or miscarriage of justice then the prosecutor should address these issues;
- ?? Background investigation on the offender is considered in its totality. The offender must demonstrate remorse and that after indemnity has been granted he or she would lead a responsible and productive life;
- ?? Seriousness of the offence and the role played by the offender. When the role is relatively minor, the equities may weigh more heavily in favour of indemnity, provided the offender is otherwise suitable for indemnity;
- ?? The extent to which the offender has accepted responsibility for the offence and is prepared to make restitution;
- ?? The offender should be really desirous of forgiveness rather than vindication;
- ?? The likely impact of the indemnity in the immediate community or nationally, particularly on the current law enforcement priorities;
- ?? Cooperation with the investigative or prosecutive efforts that has not been adequately rewarded by other official action;
- ?? Availability of alternative sentence;
- ?? Frank and honest disclosure;

?? Evidence material to the successful prosecution and could not be secured through any other legal means

?? A combination of these and/or other equitable factors

In conclusion, I want to point out that as tools to fighting organized crime and corruption the usefulness of amnesties and indemnities should not be over-emphasised, such that other law enforcement strategies are overlooked. Justifiably, the public expects the truth telling to be a step in the direction of accountability by offenders, and not a poor alternative to it. Our experience has shown that amnesties and indemnities are rarely given, as should they be. Again, taking the example of the South African Truth and Reconciliation Commission, the Amnesty Committee (presided over by High Court Judges) has granted only about 150 amnesties out of the 7000 applications, with a further 2000 still to be dealt with, at the time the Commission report was released in October 1998.

I thank you