

## THE DILEMMA OF ALBIE SACHS: ANC CONSTITUTIONALISM AND THE DEATH OF THAMI ZULU

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*A Death in Exile*

Three months before the unbanning of the ANC and the release of Nelson Mandela, a senior commander of Umkhonto we Sizwe died in exile at the headquarters base of the ANC in Lusaka, Zambia. He died of the effects of TB, Aids and very possibly poison. He died suddenly, five days after having been released from detention by the ANC security department, and was under close ANC guard when he collapsed.

Soon afterwards a top-level commission of inquiry of four commissioners – all leading ANC members – was set up by the National Working Committee of the National Executive Committee (NEC), following a great deal of hostile speculation in the ANC about the circumstances and cause of the man's death. The commissioners did not begin their investigation until three months later. This was at the beginning of February 1990 – the same time as the legalisation of the ANC (on 2 February) and the release of Nelson Mandela. The four commissioners signed their report on 16 March 1990. Presumably it was presented to the NEC immediately afterwards.<sup>1</sup>

Through a combination of circumstances, this report from the exile makes possible a more searching inquiry into the credibility of the ANC in its constitutional negotiations. It permits a close evaluation of the gap between words and deeds. Though withheld from the public until August 1993, when it was released with the report of the Motsuenyane Commission into executions and torture in the ANC in exile, this report was effectively a document of the legal ANC. The ANC was by this time a party to the negotiating process. The report could only have been written with the changed circumstances of the ANC strongly in mind.

Among the four commissioners were two senior political and legal advisers to the ANC in its constitutional discussions. Of these, one was among the best-known international personalities representing the ANC in the decades of the exile: Albie Sachs, former Professor of Law at Eduardo Mondlane University in Mozambique, Director of South African Constitution Studies at the Institute for Commonwealth Studies, London, a member of the ANC Constitutional Committee and author of a number of books. We have here an insight into ANC military and security operations during the exile, produced in the spirit of its open, public constitutional proposals.

The tension between these opposite dimensions provides a means of testing the ability of the ANC to confront its past, and of deciphering the phraseology of its constitutional proposals. The reader is engaged not so

much in uncovering a history, as deconstructing current discourse. An inquiry into the ANC's past, the report is still more an index to its semantic integrity at present, and its means of operating in the future. It permits a critical judgement on the texts, spoken and unspoken, of ANC negotiators in their conclaves at the head of state, as well as on its security practices in exile.

The dead man was Muziwakhe Ngwenya, who grew up in Soweto and was then in his mid-thirties. He is better known by his pseudonym or exile 'travelling name' of Thami Zulu, or TZ. Throughout the report he is referred to as TZ. I will refer to him as Zulu, or Thami Zulu. The commission's report will be referred to either as the Thami Zulu report or as the Sachs report, since Sachs chaired the inquiry.<sup>2</sup> Like certain other essential details, Zulu's date of birth and age at death are not recorded in the report. Nor are the precise date and time of his death, a bizarre omission from an inquiry of this kind. Eighteen months after presentation of the commission report, an article in the Johannesburg *Weekly Mail* by Phillip van Niekerk gave his year of birth as 1954. An article on the same day in the London *Guardian* by its South African correspondent, David Beresford — clearly coordinated with the article in the *Weekly Mail*, and carrying similar but not identical material — gave his date of death as 16 November 1989.<sup>3</sup> No ordinary police inquiry would have omitted such details.

The death of Zulu resulted in so much dissatisfaction within the ANC that it could not be hushed up. This was a major, but not the sole, reason for the relatively extensive inquiry by the ANC that followed. The report leads into the labyrinthine world of secret military operations, counter-operations and counter-counter operations in the contest between the ANC and the South African state during the 1980s, a world familiar — in another continent — from the fiction of John le Carré.

Zulu came from 'a well-educated and relatively comfortable home in Soweto'. (p 8) His mother, Mrs Emily Ngwenya, was a primary school head-teacher. (*Sunday Times*, London, 4 March 1990) His father was also a head-teacher. They were sufficiently well-off to send him for most of his secondary level education to Waterford, a fee-paying boarding school in Swaziland modelled on the English public school system. He thus escaped the worst effects of Bantu Education in South Africa. In the words of the report, his life experience as a youth was 'different from that of most of the persons' in Umkhonto. His immediate family are members of the developing black middle class in South Africa, which has most to benefit from the current political changes. Following his death in Lusaka, these were not people to be kept quiet with sinister allegations or threats, or who had only limited access to the means of public discussion.

Zulu was a person of stature in the exile. A witness to the inquiry stated that Zulu was 'always used to being in command and never to being commanded'. He gave himself 'the airs of a Napoleon'. After abandoning his studies at the University of Botswana to join Umkhonto in 1975, he was appointed leader of a batch of young exiles who left Swaziland for Tanzania for

military training. Two years later he led the 'first group of the Soweto generation to receive military training abroad' [in East Germany]. Further training followed in the Soviet Union. He then became chief of staff at Nova Katenga military training camp in Angola, where he was distinguished by his brutality, coldness and cruelty towards the troops. (personal communication) Torture of Umkhonto soldiers in Camalundi camp in Malanje province and the death under torture of Oupa Moloï, head of the political department, took place in 1981 under his authority as camp commander. Zulu brazenly threatened others in the camp with the same treatment.<sup>4</sup> This was followed by his appointment to the post of Regional Commander, covering the whole of Angola, the only country where the ANC was then engaged in any substantial combat. As such, he held senior responsibility for the deployment of ANC troops in the civil war alongside government MPLA forces against the rebel army of Unita, with its infrastructure provided by South Africa.

Zulu was finally appointed commander of what was known as the 'Natal Machinery'. This was a grouping, based in Swaziland, responsible for what the report describes as the secret 'irrigation' of armed combatants into Natal and their military activity inside that area. (p 7) He was a crucial frontline commander responsible for conducting guerrilla and sabotage operations within South Africa. After his death, Joe Modise and Chris Hani (commander and chief of staff of Umkhonto) wrote a tribute which stated: 'Under your command, Durban earned the title of the most bombed city in South Africa . . . You performed your task with distinction and remarkable courage'. They recalled his 'efficiency and competence'.<sup>5</sup> Saluting this 'giant and gallant fighter'.

### *Fear and Loathing in Lusaka*

Zulu held this post from 1983 until 1988, when he and virtually the whole of the Natal Machinery were withdrawn to Lusaka for investigation by the security department, following severe losses to the South African state. Shortly before his arrest, nine ANC guerrillas under his command, including three women, were murdered in cold blood, at point-blank range, by a South African hit squad in two separate ambushes as they crossed from Swaziland into South Africa. One of Zulu's deputy commanders — known as Comrade Cyril, or Fear (real name Ralph Mgcina) — had been detained earlier by the ANC security department in Lusaka and interrogated. A summary of a confession by Mgcina, allegedly made at the end of May 1988, a month before the slaughter on the Swaziland border and Zulu's subsequent arrest, is attached to the Sachs report.

According to this document, Mgcina stated that he had worked for the South African Special Branch since 1973, had joined Umkhonto and been deployed as a 'leading cadre in one of our military machineries' in Swaziland. From this position, he had set up the assassination by a South African hit-squad of Zulu's predecessor as commander, Zwelakhe Nyanda, in 1983. The

summary by ANC security of his alleged confession, dated 3 August 1988, states that the strategic goal of SA intelligence was to allow infiltrated structures in Swaziland to grow

and then cut them down, but leave an embryo for the ANC to build on and within that embryo leave its own forces so that the new structure is also controlled. This would go on indefinitely.

Mgcina subsequently died mysteriously in the custody of his ANC captors. Beresford states he had 'refused to sign a confession that he was a South African agent'. His wife, 'Jessica', was also detained and questioned. The Sachs report states that during the investigation in Lusaka, 'two leading members of the Machinery admitted to having worked with the enemy'. The question was whether Zulu was a 'third person' also working for South African security. (p 8)

In their account of the ANC in exile, Ellis and Sechaba state that Zulu was a member of the South African Communist Party (SACP), and was present at the extended meeting of the central committee in East Berlin in 1979 which elected Moses Mabhida to the post of general secretary.<sup>6</sup> He came close to joining the Umkhonto High Command, with 'strong backing' from Chris Hani, then Umkhonto commissar. (p 170) At the ANC consultative conference at Kabwe in Zambia in 1985 — its first for 16 years — he chaired 'some crucial sessions' of the Internal Reconstruction Committee. Zulu was clearly an important figure in the ANC, destined for high office, until his recall to Zambia. He was then held prisoner in Lusaka by the ANC security department for 17 months, from June 1988 until his release on 11 November 1989. Curiously, the Sachs Commission, which had access to his interrogators, state he was in detention for 14, not 17, months.

The commissioners are listed in the report as follows:

**ZNJOBODWANA.** Convenor and presently member of the Dept of Legal and Constitutional Affairs; formerly an attorney in South Africa.

**ISAAC MAKOPO.** First Chief Representative of the ANC to Botswana, 1978-83; formerly chairperson to the Regional Political Committee, Lusaka; presently Head of the National Logistics Committee in the Treasury Department of the ANC.

**TIM MASEKO.** Worked as a Research Chemist in Swaziland; formerly principal and Chief Administrator of Solomon Mahlangu Freedom College, Morogoro, Tanzania.

**ALBIE SACHS.** Formerly an advocate and Law Professor in South Africa; currently Director of the South African Constitution Study Centre at the Institute of Commonwealth Studies in London.

The commission has special interest because of the legal background of Jobodwana and Sachs. In addition to them, the ANC in its negotiating strategy now has the benefit of a whole corps of constitutionalists. These include Kader Asmal, professor of Human Rights Law at the University of the Western Cape, and like Sachs a stalwart of the exile. Asmal spent most

of the period of exile as a lecturer in law and as a senior administrator at Trinity College, Dublin, and was a central figure in the Anti-Apartheid Movement in Ireland. Among his recent publications is an article entitled 'Democracy and Human Rights: Developing a South African Human Rights Culture', to which is appended the first draft of the ANC's Bill of Rights of November 1990.<sup>7</sup> At a conference on Ethnicity, Identity and Nationalism in South Africa held at Rhodes University, Grahamstown, in April this year, Asmal presented a paper on the current constitutional negotiations, reprinted in a long extract in the *Southern African Review of Books*.<sup>8</sup> The stress on human rights in the ANC constitutional proposals is obviously very important. The manner in which the ANC has actually approached the matter of human rights, in practice as well as theory, may be seen from the case of Thami Zulu.

### *Human Rights, for Some*

The ANC produced its Constitutional Guidelines in 1988 while numerous members remained imprisoned, without trial, in its prisons and detention camps in several African countries. Its Bill of Rights of November 1990 was drafted and published while a smaller but still substantial number — including some later described as 'genuine comrades' by Nelson Mandela — remained prisoners in an ANC prison at Mbarara in southern Uganda, prior to their release in August 1991.

In his paper at Grahamstown, Asmal quoted the declaration by the ANC that its Bill of Rights would guarantee a society upholding

fundamental rights and freedoms for all on an equal basis, where our people live in an open and tolerant society, where the organs of government are representative, competent and fair in their functioning, and where opportunities are progressively and rapidly expanded to ensure that all may live under conditions of dignity and equality.

What is at issue is his comment, reprinted in the *SARB*, that there are 'no hidden agendas' in such claims. This is the importance of the position of Albie Sachs in the Thami Zulu Commission. From comparison with his published writings, a major part of the report, if not all, appears to have been written by Sachs. He currently holds senior political office in the ANC, after election to the NEC at the ANC's national conference in Durban in July 1991.

On 9 May 1990, days after returning from exile after leaving the country 24 years previously, and after a near-fatal attempt on his life by South African Military Intelligence in 1988, Sachs admitted to a mass meeting of students at the University of Cape Town that the ANC was still holding prisoners. He said he had been moved to tears by a recent visit to a detention camp, and admitted that the ANC had 'mistreated' prisoners in the past.

If people come back and say they have been mistreated by the ANC, it is not necessarily lies. But if people come back and say that is the ANC [policy], that is lies. (*Times*, London, 11 May 1990)

The previous month, five former ANC guerrillas (Bandile Ketelo and his colleagues) told the world press about torture, murder and imprisonment for dissent in its prison camps in exile. A week later Nelson Mandela conceded that torture had indeed taken place in exile (but erroneously claimed that those responsible had immediately been punished). From the Thami Zulu report, it now becomes possible to evaluate the relation of Sachs, as a leading constitutionalist in the ANC, to the issue of its human rights abuses.

Several months after his return from exile and his speech at UCT, Sachs published a book in Cape Town entitled *Protecting Human Rights in a New South Africa*.<sup>9</sup> The preface is dated 'London and Cape Town, August 1990' (ie four months after the revelations by the former ANC detainees, and three months after Sachs' speech at UCT). It contains not a word about the ANC's prison camps or its human rights abuses. Nor is there any reference to this in Sachs' autobiographical account, *The Soft Vengeance of a Freedom Fighter*, published in Britain, also in 1990.<sup>10</sup>

The book on human rights presents important, though unofficial, guidelines on ANC perspectives for human rights in South Africa. It appears to be an expanded version of an address presented earlier by Sachs at the London School of Economics, at an occasion named in honour of the British stalinist lawyer, the late D N Pritt.

During the heyday of the ANC prison camps, from 1978 to 1988, a chasm opened up between the declared aims and beliefs of the ANC and its actual practices, a history of semantic distortion bearing on the crisis of violence within South Africa over the past few years. Put simply, the ANC's manner of dealing with internal dissent during the exile does not breed confidence among its political rivals and opponents — among blacks as well as whites — when they look to their future.

The story of a single individual makes the point. In their history of repressions within the ANC published in *Searchlight South Africa* No 5 (July 1990), Ketelo and his colleagues recalled the experiences of three ANC colleagues whom they describe as the 'very first occupants of Quatro prison'.<sup>11</sup> The 'travelling names' of these three exiled members of Umkhonto we Sizwe were given as Ernest Khumalo, Solly Ngungunyana and Drake. After increasing dissatisfaction among troops in Fazenda training camp in Angola in 1978, these three are said to have left the camp in 1979 to go to the capital, Luanda, to demand their resignation from the ANC. In Luanda they were beaten in the street by ANC and Angolan security officers, bundled into a truck and taken straight to Quatro.

According to Ketelo, Ngungunyana was released after two years, Khumalo in 1984 while the fate of Drake was described as still unknown. These men endured the worst period in Quatro. Khumalo had the appalling experience of being released from the prison in 1983, only to be re-arrested

and returned to Quatro the same day. He served about five years. There was no trial, no charge, and no means by which the prisoners could defend themselves. They were subject to constant brutality. The sharpest edge to this history of arbitrary practice, however, is this: 'Ernest Khumalo' was the exile pseudonym of a half-brother of the king of the Zulus, King Goodwill Zwelithini, the titular head of the KwaZulu Bantustan and patron of the Zulu nationalist party, Inkatha. Khumalo's real name is Immanuel Zulu. He completed a course of study in Liverpool in Britain over a year ago and has resisted efforts by his close relative, Chief Mangosuthu Buthelezi, the head of Inkatha, to return to South Africa to deploy his experience in exile to discredit the ANC. (personal communication)<sup>12</sup>

### *Perceptions in KwaZulu*

Through the unbridled arrogance of its security department, the ANC sent a message to Inkatha leaders over ten years ago in this single episode that may well have helped inflame near-civil war within the country, at the cost of thousands of deaths. The KwaZulu Bantustan, like all such regions within South Africa's borders, was and is a one-party state run under a blatant ideology of ethnic chauvinism, with shameless patronage to the advantage of the ruling political elite. Nothing could have been better calculated to breed distrust among Buthelezi and Zwelithini in the constitutional character of the ANC than its treatment of their relative, Immanuel Zulu. For these men, the liberal phrases of the ANC as pronounced by Asmal, Sachs and others ring hollow. The horrors of the past six years involving countless murders by members and supporters of Inkatha may well have happened anyway. There are deep social and political causes. But no amount of killings by Inkatha members and the KwaZulu police, sanctioned and endorsed by Buthelezi and Zwelithini, should be permitted to obscure the crucial point. If this was how the ANC treated their relative, a loyal member of the ANC who rejected the Bantustan philosophy, what hope could there be for KwaZulu leaders in a centralised state ruled by the ANC?

Their response was to develop and trust in their own armed might, rather than the possibility of an effective civil polity in which the ANC would form the majority party. In the light of ingrained suspicion of ANC motives deriving from its treatment of its own members in exile, the adequacy of its attempt to address the death of Thami Zulu (Muziwakhe Ngwenya) has more than an emblematic significance.

Sachs who was among the best-known ANC legal figures during the exile, is unusual for the manner in which he has attempted to relate to the issue of 'the camps'. It is unlikely that any of the ANC constitutionalists knows more than he does about the operations of the security department. To some extent, Sachs was the liberal and juridical 'conscience' of the ANC in exile. The manner in which he used his knowledge is therefore a crucial measure of the organisation as a whole.

The Sachs report quotes an ANC doctor in exile, Dr Pren Naicker, 'the main person in charge' of Thami Zulu's medical needs while in ANC custody from the time he manifested symptoms of ill-health until his death. According to Naicker, conditions for ANC detainees in Zambia were in a 'truly parlous state' before the appointment of the new head of ANC security, Joe Nhlanhla, in 1987. No details are given. Conditions, 'poor as they were, had improved immeasurably' compared with the previous period (under Mzwandile Piliso). Some months earlier Naicker had had to raise with Nhlanhla the 'appearance of bruises on the arms and wrists of certain of the detainees'. (pp 12,15) That is all that appears in the 22-page report referring to actual instances of human rights abuses in ANC custody — a matter now richly documented in the report of the ANC commission headed by Advocate Thembile Louis Skweyiya SC (August 1992), the report by Amnesty International (December 1992), the report of Advocate Robert Douglas SC (January 1993), the article by Ketelo and his colleagues (July 1990) and in the report of the second ANC commission of inquiry into its human rights abuses, headed by Mr Sam Motsuenyane, which reported in August.

The Sachs Commission presents a convincing account that Zulu was not tortured during his detention. But the context in which it investigated the possibility of torture was deficient. As a former advocate in the South African Supreme Court, it should have been obvious to Sachs and his fellow commissioners that the question of whether or not Zulu had been tortured could not adequately be investigated unless they were able to establish whether or not torture had previously been widely practised in the ANC.<sup>13</sup>

This they did not do. Instead of carefully establishing a general context, against which the specific experience of Zulu might be more precisely located, the commissioners filled pages of the report with abstract principles. These are worth quoting, because of the problematic relation of words to deeds in the ANC.

Section 3 of the Thami Zulu report quotes from the ANC Code of Conduct, with a summary and commentary by the commissioners. There is no indication here that 'mistreatment' — Sachs' phrase at UCT — was in fact widely practised by the security department, as this journal has recorded.<sup>14</sup> The character and limits of 'intensive' interrogation are also not defined, either in passages quoted from the Code of Conduct or elsewhere in the Sachs report.

#### *The Sachs Commission and the Kabwe Conference*

The report goes on to state that the Code of Conduct was adopted at the Kabwe conference in 1985, 'precisely to deal with the question of human rights within the organisation'. It states:

The delegates at the Conference firmly rejected any notion that any means whatsoever, however cruel, could be used in defending the physical integrity of the organisation, or that members surrendered



## The Thami Zulu Report on the ANC Code of Conduct

The legal framework within which we conducted our investigation was provided by the ANC Code of Conduct . . .

The preambular part of the Code of Conduct states in conclusion that 'we do not take our standards from the enemy; we do not simply turn the glove inside out, but rather we create our own standards within our traditions of struggle and in the light of our goals for the future'.

The bulk of the Code of Conduct deals with the definition of different kinds of offences and with the procedures for investigating and submitting cases to judgement. The portions relevant for our enquiry read as follows:

### Grave Crimes Against the Struggle -

1. A grave crime shall be committed by any person who, inter alia . . .

b) Infiltrates the organisation acting on behalf of or in collaboration with:

i) the racist regime;

ii) the intelligence services of other organisations or groups of other countries; in other words, infiltration into organisation even on behalf of a friendly country would be a grave offence.

c) Being already a member of the organisation, establishes or maintains contact with any of the above bodies.

. . . the basic investigation of Thami Zulu fell under this heading. Simply put, the issue was whether or not TZ was an enemy agent.

The methods of investigation contemplated by the Code of Conduct appear in Section C:

1. Investigation of grave crimes shall primarily be the responsibility of Security.

2. It is the duty of all members to assist security in every way, both by giving relevant information when enquiries are being made and by respecting all the general rules of security.

3. All normal and reasonable methods of investigation may be used in the course of investigation.

4. Intensive methods of interrogation shall be permissible only in extraordinary circumstances and under proper authorisation and strict supervision by the highest political authority in the area. [In Lusaka this meant the NEC and Oliver Tambo himself as president. — PT]

5. Torture or any form of cruel, degrading or inhuman treatment of a detainee or a person on trial is forbidden'.

In the present case there was no question of intensive methods of interrogation being permissible or authorised.

Paragraph 4 refers to battle situations or other conditions of extreme emergency, and even here, it should be noted, torture or any form of cruel, inhuman or degrading treatment is forbidden.

Thus, the ANC Code of Conduct does not sanction any form of cruelty, whether physical or psychological, in the treatment of detainees. It makes no difference whether the detainees are being held for theft or violence or acting for the enemy. Nor from this point of view is it relevant whether they are suspects or proved agents of South African security. The degree of incrimination might have a bearing on steps taken to prevent escape, but would not affect the detainee's rights to at least minimum conditions of health and personal dignity. At no stage does the ANC Code permit torture or any form of illtreatment of any detainee. (pp 2-4)

their basic human rights once they joined the ANC. Similarly, delegate after delegate stressed that the viciousness of apartheid in no way justified viciousness on our part. (p 4)

The problem of ANC constitutionalism is wrapped up, a riddle inside an enigma, in this passage. Whatever was said at the Kabwe conference — and it is the responsibility of the ANC to produce full and complete minutes — this event marked the lowest point in the history of its deliberative proceedings. This magazine has published an account of the packing of the Kabwe conference by the security department, the suppression of meaningful debate and the silencing of critical opinion that took place there.<sup>15</sup> By the time it was convened in June 1985, those ANC members who had most insistently called for a conference over the previous five years had been silenced by the firing squad or were subject to constant brutality in prison. They remained prisoners at Quatro for a further three years after it concluded.

The conference was the direct result of the ANC mutiny the previous year, which demanded an end to human rights abuses in the organisation. In all probability drawn up with major assistance from Sachs himself, the Code of Conduct was mainly a fig-leaf covering a brutal practice of suppression of dissent. The report of the Stuart Commission into causes and nature of the mutiny was not tabled at Kabwe. Up to the time of writing, it has still not been made public. The Skweyiya Commission found that it had apparently *not even been placed before the NEC* by August 1992, when it reported its own findings.<sup>16</sup> This was 18 months after the unbanning of the ANC, and a full year after the national consultative conference in Durban in July 1991.<sup>17</sup> Vital knowledge about the history of the ANC remained restricted knowledge, excluded from elected members of its highest constitutional body. The presentation of the Kabwe conference as a forum for defending human rights by the Sachs Commission is not credible.

#### *A Personal Statement*

Sachs is a humane man, who genuinely desires an impartial and non-vengeful system of justice. That is why he wishes for 'soft' vengeance for the bomb that maimed him. In his account of the bombing and its aftermath, he describes his feelings after hearing that Mozambican and ANC security had arrested a man who had allegedly confessed to planting the bomb in his car. The man was described as a black Angolan working for South African Special Forces (a sub-department of Military Intelligence). In a radio interview, Sachs said that his most fervent wish was that the alleged assassin should be

tried by due process of law in the ordinary civil courts, and if the evidence was not strong enough for a conviction, he be acquitted. The risk of an acquittal was fundamental, since the creation of a strong system of justice in Mozambique, one in which the people had con-

fidence, which operated according to internationally accepted principles, would validate all our years of effort . . . (p 199)

This was an honourable standpoint, offering guidance for the future of judicial conditions in southern Africa, all the more stirring because in rejecting the norm of an eye for an eye ('hard' vengeance), Sachs as political exile, as jurist and as victim was making a statement of his deepest convictions. Due process, he said, would be a 'personal triumph over the bomber . . . the ultimate in my soft, sweet vengeance'.

The problem lies in Sachs' blurred perception of what he calls 'our values'. It would be mean-spirited, insulting and wrong to doubt his sincerity over the need for due process for the man believed to have maimed him. There is no doubting also his desire to eliminate torture, imprisonment without trial and executions by his colleagues in the security department and the military. He genuinely feels anguish at the malpractices of his own side, 'all our years of effort', to which he gave half a lifetime in exile, and an arm and an eye. But the constraints upon him — political constraints, both external and personal — are too heavy, and they wear away judicial principle.

This appears in the Sachs report when it refers to the creation of the post of Officer of Justice under Section B of the ANC Code of Conduct, acting under overall supervision of the NEC and in collaboration with the President's Office.<sup>18</sup> The function of Officer of Justice was to:

- (a) maintain the principles of legality within the organisation;
- (b) supervise investigations when they reach the stage that charges are being contemplated against members; . . .
- (i) ensure that no person in the custody of or under investigation of officers of the organisation is treated in a cruel, inhuman or degrading way;
- (j) make regular inspections of the way persons deprived of their liberty are treated, with a view to ensuring that the purposes of re-education rather than vengeance are fulfilled; . . .
- (k) see to it that no undue delay takes place between completion of investigations and the date of trial; . . .
- (m) take all steps to minimise the period of waiting . . . (p5)

Excerpts from the Code of Conduct were published last year by the Skweyiya Commission in its report, including several of the clauses set out here. (pp 16-24) A matter nowhere taken up in the Sachs report, or referred to anywhere in Sachs' books, but published in the Skweyiya report, is the clause in the Code of Conduct dealing with 'exceptionally serious cases'. This states that that 'where no other penalty would be appropriate, maximum punishment may be imposed'. The Skweyiya Commission concludes: 'By maximum punishment, is envisaged the sentence of death'. (p 18)

This crucial passage is omitted in the Sachs report, despite its relevance. It is the legal formulation of death penalty by the ANC: no small matter for a country regarded as the hanging capital of the world, where violent death is everyday. The Sachs report quotes instead a passage from the Code of

Conduct stipulating that the 'rights and privileges' of prisoners should be based on the 'humanist traditions of the ANC'. (p 5) Once again liberal legal phraseology obscures a thorny truth.

The Code of Conduct and creation of the post of Officer of Justice were clearly the result of strenuous efforts by individuals such as Sachs. There is no cause to doubt their sincerity in wishing to establish legality in the ANC, so as to rein in the abuses that had provoked the mutiny, with its further cycle of executions, torture and large-scale imprisonment of loyal members. In its lengthy citation of legal norms, however, the Sachs report conceals the fact that the post of Officer of Justice was an almost total dead letter. Two years after the Sachs report, the Officer of Justice, Zola Skweyiya, told the inquiry chaired by his brother Thembile Skweyiya that his efforts to visit Angola in 1986 and 1987 had been 'blocked at every turn' by the then head of the security department, Piliso, and that he himself had been in danger of being arrested. He had been allowed to visit Angola late in 1988, but was denied access to Quatro. Efforts to visit Uganda were also blocked. (pp 63-64) Severe abuses continued unchecked, well on into 1991.<sup>14</sup>

From the Sachs report it is clear that Zola Skweyiya did not at any stage visit the detention centres where Thami Zulu was held. The commission is critical that the Code had 'not been fully implemented'. It was most unsatisfactory, the report goes on, that no clear time-limit had been placed on detention without trial. (p 6) The period over which which Zulu was held as a suspect was far too long. It finds no evidence to suggest that Zulu had otherwise been improperly treated, and no information has emerged to suggest otherwise. The investigation had been carried out in a 'serious and professional manner'. (p 19) The commissioners conclude that there was sufficient evidence to justify Zulu's detention; that there was no proof that he had in fact been a state agent; but that he had been guilty of 'gross negligence' and possibly also personal misbehaviour. (p 18) I am not aware of any cause to doubt these conclusions. The commission appears to have operated on these matters in a judicial fashion.

### *The Final Days*

Zulu had entered detention, in the words of the report, as a 'large, well-built slightly overweight person, and come out gaunt, frail and almost unrecognisable'. (p 10) On his release on 11 November, he was taken to stay at the house of a friend, Dr Ralph Ngijima. He told Ngijima that his condition had deteriorated drastically while he was in an isolation cell, lying all day on a mattress on the floor. In previous years Zulu had suffered from TB. Having developed diarrhoea, mouth sores (thrush) and a spiking fever towards the end of his time in detention, he was taken in charge of Dr Naicker to University Training Hospital (UTH) in Lusaka for X-rays on 1 November. Nothing was detected on the X-rays, but a blood test taken at the same time showed he was HIV positive. The Presidential Committee (Tambo's

office) then ordered his release. Ngijima considered Zulu's condition on arrival at his house to be shocking, but not suggestive of imminent death. The following day Ngijima fell seriously ill himself and had to be taken to hospital for an emergency operation.

Zulu died of heart and lung failure four days later on 16 November, while Ngijima was still in hospital. The histopathological analysis after his death showed advanced TB in various organs, including the sac around the heart. Medical opinion in Lusaka, London (where specimens of blood and stomach contents were taken for analysis) and South Africa enabled the commission to decide that he was a victim of Aids, which had destroyed the immune system, permitting rapid advance of TB.

The problem for the commissioners was that samples of Zulu's blood and stomach contents sent for analysis at UTH in Lusaka showed traces of diazinon, an organic phosphorus pesticide, in both specimens.<sup>19</sup> The blood also contained 84 milligrammes percent alcohol, the equivalent of about three pints of beer. A forensic scientist in London who was given the same specimens for analysis three months later said that diazinon has a strong and unpleasant taste. It does not dissolve in water or tea, but is soluble in alcohol. 'Three pints of beer taken within a twenty-four hour period and each containing a teaspoonful of diazinon could have been fatal'. (p13) Diazinon is not however accumulated in the body; it is excreted out. 'Thus if it had been given to TZ it would necessarily have been given within a day or at most two days prior to his death'. The commissioners state that while they cannot express any certainty as to whether Zulu had been poisoned, they felt 'the likelihood is that he indeed was'. (p 14)

At this point the investigation breaks down. There could not be a greater contrast between the scrupulous manner in which medical forensic detail has been accumulated and assessed, and the absence of forensic investigation subsequent to these findings. If diazinon could only have been administered to Zulu within one or at most two days before his death, then the identity of his murderers had to be established through a careful trawl of all people who had access to him over that time, and who might have provided him with poisoned beer. There is no indication in the report that any such inquiry was made. No information is provided about who visited Ngijima's house during that time. The investigation disappears into a hole. The commissioners state: 'If TZ was poisoned, then we cannot see that anyone other than South African security could have been responsible'. (p14) The obvious point is avoided: if poison was administered to Zulu in three bottles of beer, those who supplied it were almost certainly members of the ANC, and perhaps very senior members.

This point is simply not canvassed. There no attempt to compile a list of people who had seen Zulu in the two days before his death. The commission further suppressed information which appeared later in the South African and British press. The identity of one individual who did see Zulu during those two days is known. It is Chris Hani, then Umkhonto chief of staff.

After his return to South Africa, Hani seems to have given details of his own account of the lead-up to Zulu's death to Van Niekerk of the *Weekly Mail* and (in the same briefing) to Beresford of the *Guardian*. This appears to have been the immediate stimulus for their coordinated stories in Britain and South Africa on 6 September 1991. Following Hani's murder in April 1993, there is an onus on Van Niekerk and Beresford to make plain exactly what their relation to Hani was in compiling their accounts.

The countdown to Zulu's death appears to be as follows:

*Sat. 11 November:*

Zulu released from detention and brought, very ill, by the security department to Ngijima's house.

*Sun. 12 November:*

Ngijima taken ill and rushed to hospital for emergency operation.

*Mon. 13 November:*

Ngijima phones Hani from hospital and tells him to check up on Zulu. Hani and Modise, the two senior commanders in Umkhonto, go to the house, find the gate locked and 'vault over a high fence to get to TZ', whom they find in a very sick state. 'After that two MK men were sent to look after him'. (Van Niekerk) These were men loyal to Hani. (personal communication) They are so far unidentified, and there is no way of knowing whether or not they were interviewed by the Sachs Commission. This is obviously crucial for any serious inquiry into possible murder by poisoning. Failure to establish the precise role of these two men vitiates any judicial inquiry.

*Tues. 14 November:*

Hani returns to the house and finds Zulu still in a bad state. Zulu does not want medical help but 'appeared to be worried that the Security Department is going to "finish me off" if he got into their hands'. (Beresford) This is clearly Hani's own account, and points a finger directly at the security department, then headed by Joe Nhlanhla (director), Jacob Zuma (head of counter-intelligence) and Sizakele Sigxashe. (Skweyiya report, p63, and Beresford) Both Van Niekerk's and Beresford's accounts suggest Hani pointing an accusatory finger at Zuma, now assistant general-secretary of the ANC and one of the five-man team originally charged with conducting negotiations with the government.

*Wed. 15 November:*

Hani calls in a doctor to attend to Zulu in the night 'and left two MK members to keep watch at his bedside'. (Beresford) Zulu suffers attacks of vomiting and diarrhoea.

*Thurs. 16 November:*

Zulu starts gasping and is rushed to UTH, where he dies.

The Sachs Commission refers to 'lack of cooperation between Military HQ [ie, Modise, Hani] and security [ie, Nhlanhla, Zuma, Sigxashe]' on the

issue of Zulu's detention and death. (p 19) This is a bland understatement. Beresford writes that under the ANC's command structure, the security department was responsible for detentions, was completely separate from the military command and had overriding investigatory powers.

Thami's detention, which came as a shock to the military, was without the sanction of either Modise or Hani. The two commanders made furious demands inside the ANC National Executive to know the basis of Thami's detention and to have access to him. Both were refused.

Beresford writes that unless Zulu committed suicide, 'the finger of suspicion points to those in attendance on him in the final hours of his life . . . which includes members of Umkhonto we Sizwe itself'. He speaks of 'bitter, if unspoken antagonism' on the part of the military towards the security department. If South African intelligence had infiltrated an agent into the upper echelons of the ANC who was responsible for Zulu's murder, 'the potential for manipulation is obvious'.

Van Niekerk quotes an unnamed commander (probably Hani):

TZ's detention was not discussed with us . . . Our response was one of bitterness and led to a straining of relations between the army and security.

Security was very powerful — it had the powers of life and death.

The death of TZ is an indictment of the methods we used against suspects, ignoring his track record and the views of those who worked with him closely.

The central issue for this article, however, is not the matter of determining the exact details in the last years and days of Thami Zulu, or even inadequacies in the investigation by the Sachs Commission. Many of these difficulties are probably irreducible, given the nature of a secret war.

What is at issue is Sachs' publication of a major book on perspectives for human rights in South Africa that makes no reference to human rights abuses in the ANC in exile — problems which he was very aware of at the time, at first hand. Even if he wished to explain the context in which these abuses took place in terms of his own understanding of the issue, this is not a matter that is irrelevant to the subject of his book. It is its most difficult and complex dimension. For a legal figure of his stature not to have mentioned the matter is to deceive his readers. He creates further difficulties for the already dreadfully burdened issue of human rights in South Africa. Kader Asmal's ringing declaration about 'no hidden agendas' is untrustworthy, and this book shows it. Sachs' sophistication, his legal training (both academic and practical), his fluent writing style and his familiarity with the legal system, the universities and the media in major western countries, together with his appealing personality, serve to mask the most sensitive problems for human rights investigation in South Africa, rather than clarify them.<sup>20</sup> The distinction between Sachs' role in protecting human rights inside the ANC and in concealing its abuses is difficult to make. His work is part of the problem, not its solution.

*The Pursuit of Justice*

There is no need to give extensive extracts from Sachs' book, *Protecting Human Rights in a New South Africa*. A great deal of it is sound and needs no further comment. Other parts give proposals for adaptation of the ANC programme to the hard realities of South Africa's capitalist structure. These are not matters that I am concerned with here. What is at issue is a very liberal prose that obscures what it should illuminate. A few references will be sufficient.

Sachs claims, for instance, that the

frequent and massive human rights violations in our country, together with a vigorous movement of contestation and considerable international attention, have produced on our part [ie the ANC] unusual sensitivity to and a passionate interest in the safeguarding of human rights. (p 40)

Would it were true!

For those of us who have suffered arbitrary detention, torture and solitary confinement . . . the theme of human rights is central to our existence. The last thing any of us desires to see is a new form of arbitrary and dictatorial rule replacing the old. (ibid)

And yet . . .

In a chapter on 'The future of South African law', he writes of the 'legal freedom fighters in our past' — Gandhi, Schreiner, Krause, Seme, Mathews, Fischer, Nokwe, Berrange, Kahn, Muller, Mandela, Tambo, Slovo and Kies — people who saw their legal careers as being 'inextricably linked up with the pursuit of justice'. (p 98) No reference to the problematic relation of at least three of these to the ANC's system of prison camps in exile. No reference either to the fact that a number of these jurists for decades justified the tyranny of the Soviet Union, the model for Quatro and its clones. He writes of the qualities of professional legal integrity, including that of 'never consciously misleading the court'. (p 99) But to mislead a whole population . . .

One could go on, but this is enough. If the ANC gets its way in its constitutional embrace with the National Party, or even part of its way, Sachs is likely to have an important place in the judicial system of the 'new' South Africa, perhaps even a place in the cabinet. In relating to Sachs, one is relating to the ANC at its most spell-binding. The matter of this article is the future of the legal system in South Africa, perhaps for decades to come

Like those notables in the west who sang the praises of the Stalin Constitution of 1936, Sachs is victim of a romantic fallacy: of asserting a desired ideal, clothed here as a legal norm, as if were a factual truth.<sup>21</sup> His inspiring prose soars overhead and discredits the human rights objectives to which he earnestly and genuinely aspires. The ANC publicist is internally at war with the jurist, and the publicist frequently wins out. One sees the personal moral anguish of the activist reared in the old-style certainties of the SACP (he first



visited the Soviet Union in 1954, the year after Stalin died), in conflict with the yearnings of a decent man. Thus the tears to which he gave acknowledgement at UCT. Between the 'comrade' and the activist for human rights, an internal conflict sparkles like static electricity.

Several things need obviously be done. Sachs should write an honest, straightforward account of his own efforts (and those of others) within the ANC to secure better observation of human rights. As a member of the NEC, he should insist that the minutes of the Kabwe conference be published. As he writes in his book on human rights, 'it ill behoves us to set ourselves up as the new censors . . .' (p 183) He should act on these words.

Finally, it is a scandal that the ANC should have refused to carry out the recommendations of the Motsuenyane Commission — above all, that torturers and killers should be removed from office in the ANC, and that compensation should be paid to victims — until such time as the National Party takes action against the state's own killers and torturers. The decision by the NEC to defer action on its own abuses until the convening of yet another commission, a so-called 'Commission of Truth', is an act of hypocrisy at the highest level of the ANC.<sup>22</sup> By this decision the ANC shakes hands with the NP in a pact of blood. As a member of the ANC, Sachs must take responsibility for this deeply cynical measure.

The 'conscience of the ANC' is looking worn.

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2. Reported by Phillip van Niekerk, 'Who killed Thami Zulu?', *Weekly Mail*, 6 September 1991. Van Niekerk refers to the commission's findings as the 'Sachs report'.
3. David Beresford, 'Poison in the ANC's ranks', *Guardian*, London, 6 September 1991. I take the spelling of Muziwakhe ('his house', or family, in Zulu) from the articles by Van Niekerk and Beresford, who had access to Ngwenya's parents. Both journalists are highly respected. Van Niekerk was visited in hospital by Nelson Mandela after being shot in the head by gangsters following the massacre at Boipatong.
4. Bandile Ketelo et al, 'A Miscarriage of Democracy. The ANC Security Department in the 1984 Mutiny in Umkhonto we Sizwe', *Searchlight South Africa* No 5, July 1990. pp40-41.
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7. Kader Asmal, 'Democracy and Human Rights: Developing a South African Human Rights Culture', *New England Law Review*, 27 (1992), pp287-304.
8. Kader Asmal, 'Making the Constitution', *Southern African Review of Books*, Vol 5 No 3, May/June 1993.
9. Albie Sachs, *Protecting Human Rights in a New South Africa*, Oxford University Press, Cape Town, 1990.
10. Albie Sachs, *The Soft Vengeance of a Freedom Fighter*, Grafton, London, 1990. This is a remarkable and moving book, one of the best of a large number of autobiographical accounts by leading individuals in the 'liberation struggle'. Its strength derives from Sachs' emotionally honest description of the experience of being very nearly murdered by a car bomb in

Maputo in April 1988, placed by South African state agents, and of his efforts to recover personal and public poise after loss of an arm and the use of an eye. The danger of indulgent self-dramatization, common in a certain type of South African exile literature, is mainly set aside here by the nature of the subject, which is his own trauma. It marks a moment of transition from the tendentious public prose of previous writing by South African political figures, towards the truth of inner feelings, and a vivid acknowledgement of the sensuous pleasures of life.

11. Ketelo et al, *op cit*, p38.
12. Only one of the leaders of the mutiny in the ANC in Angola in 1984, Mwezi Twala, appears to have gone the distance of joining Inkatha. Twala has become an organiser for Inkatha in the Vaal region. Another detainee who has been amply described in the South African press as a real agent of South African security before he was arrested and tortured in exile by the ANC, Patrick Hlongwane, has delighted in making a nuisance of himself. Released from the ANC prison in Uganda in August 1991, Hlongwane formed a grouping on his return — almost certainly with state funds — called the Returned Exiles Committee (REC) which operated out of Inkatha premises north of Durban. At a recent meeting of the National Party Youth Congress, he embarrassed President FW de Klerk by claiming to be the NP information officer in Soweto. He claimed afterwards to be also a military member of the fascist Afrikaner Weerstandsbeweging (AWB). (*New Nation*, 16 July 1993) If a character like Hlongwane had not existed — half criminal, half clown — he would have had to be invented.
13. Sachs' book, *The Jail Diary of Albie Sachs* (1966, since reissued) was adapted for the stage by the British dramatist David Edgar. Edgar's dramatised version was performed by the Royal Shakespeare Company and appeared subsequently on television and radio in Britain.
14. See *Searchlight South Africa*, numbers 5, 7, 8, 9. See also Amnesty International, *South Africa. Torture, ill-treatment and executions in African National Congress camps*, London, December 1992 (AI Index AFR 53/27/92). The Skweyiya report (see note 16) noted 'gratuitous and random violence perpetrated on the detainees by camp guards' at the ANC prison in Uganda, well on into 1991. (p 47)
15. Mkatashingo, 'The ANC Conference: From Kabwe to Johannesburg', *Searchlight South Africa* No 6 (January 1991), pp 91-94.
16. *Report of the Commission of Enquiry into Complaints by Former African National Congress Prisoners and Detainees* (the 'Skweyiya report'), Johannesburg, August 1992. p56.
17. The date was mistakenly given as July 1992 in Paul Trewhela, 'The ANC Prison Camps. An Audit of Three Years, 1990-1993', *Searchlight South Africa* No 10 (April 1993), p19. In the same article the name 'David Moshoeu', MK regional commander in Angola at the time of the mutiny, should have read David Mashigo. His real name is Graham Morodi. The Stuart Report acknowledged that the mutiny was caused very largely by 'excesses of the security department'. (*ibid*, p16) Thus its suppression.
18. As executive president, Tambo was responsible for the army, the security department and information and publicity. For a discussion of Tambo's responsibility, see Paul Trewhela, 'The ANC Prison Camps', *op cit*, pp 24-26. Tambo was buried in South Africa in May this year in an atmosphere worthy of a Christian saint. Standing beside Nelson Mandela during the ceremony, in combat fatigues and giving the Umkhonto salute, were two of the leaders from the exile most heavily implicated in abuses: Joe Modise, commander, and Andrew Masondo, former national commissar and founder of one of the most brutal security organs, the People's Defence Organisation.

The Skweyiya report quotes a statement made by Tambo on behalf of Umkhonto we Sizwe at the headquarters of the International Commission of the Red Cross on 28 November 1980. Tambo said, solemnly undertook to respect the conventions and undertook in particular to apply the Geneva Convention on the treatment of prisoners of war, by which he meant 'regular armed forces of the South African regime captured by the cadres of Umkhonto we Sizwe'. This excluded spies.

The Skweyiya Commission found there had been 'shocking and persistent violation of the Code of Conduct by certain members of the security department of the ANC' (p 24) — violation also, by implication, of Tambo's undertaking in Geneva. Tambo made this undertaking during one of the most terrible periods of oppression of ANC members in Angola, when — among others — Immanuel Zulu was in Quatro. It was made for international

political consumption, and perhaps in the hope of providing a modicum of safety for captured guerrillas in South Africa. But it had no relevance in the camps.

19. I mistakenly spelt this 'Diazoin' in my article in SSA No 10. (p 30, n 6)
20. Having obtained his PhD at the University of Sussex after arriving in Britain, Sachs became senior lecturer in law at the University of Southampton. He received an honorary award of LLD from the university. Following his work as professor of law at Eduardo Mondlane University in Maputo, Mozambique (1977-83), he became director of research in the Mozambique Ministry of Justice. After the car bomb attempt on his life, he taught at Columbia University in New York as well as directing the South Africa Constitution Studies Centre at the Institute of Commonwealth Studies in the University of London. Since returning to South Africa, he has been attached to the University of the Western Cape and the University of Cape Town.
21. For a typology of the species, see David Cauter, *The Fellow-Travelers*, Weidenfeld and Nicolson, 1973.
22. 'ANC torturers are granted a reprieve by Mandela', *Daily Telegraph*, 31 August 1993.

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