SACHS J ABRIDGED JUDGMENT

Kaunda and Others v President of the Republic of South Africa

272. Section 198(b) of the Constitution makes it clear that one of the principles governing national security is:

> "The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation."

Mercenary activities aimed at producing regime-change through military coups violate this principle in a most profound way. As the main judgment trenchantly establishes, the government is under a duty to act resolutely to combat them, the more so if they are hatched on South African soil.

273. At the same time, section 199(5) provides that:

> "The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic."

This section emphasises that in dealing with even the most serious threats to the state, a noble end does not justify the use of base means. On the contrary, as I stated in *S v Basson*

> "none of the above should be taken as suggesting that because war crimes might be involved, the rights to a fair trial of the respondent as constitutionally protected are in any way attenuated. When allegations of such serious nature are at issue, and where the exemplary value of constitutionalism as against lawlessness is the very issue at stake, it is particularly important that the judicial and prosecutorial functions be undertaken with rigorous and principled respect for basic constitutional rights. The effective prosecution of war crimes and the rights of the accused to a fair trial are not

antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom."

274. The values of our Constitution and the human rights principles enshrined in international law are mutually reinforcing, interrelated and, where they overlap, indivisible. South Africa owes much of its very existence to the rejection of apartheid by the organised international community and the latter's concern for the upholding of fundamental human rights. It would be a strange interpretation of our Constitution that suggested that adherence by the government in any of its activities to the foundational norms that paved the way to its creation was merely an option and not a duty.

275. I believe that the main judgment, with which I agree, as well as the two complementary judgments all underline the importance and correctness of the acceptance by the government of its constitutional obligations in the present matter. In my view, in their basic outline the judgments of Ngcobo J and O'Regan J are compatible with and give added texture to the principal judgment of Chaskalson CJ. I do not think that the present matter calls for a definitive position on all the doctrinal nuances of *Mohamed.* Nor do I believe that a declarator concerning the government's obligations is required. Subject to keeping an open mind on *Mohamed*, I accordingly concur in the principal judgment, and with the order it makes. I also agree with the additional points of substance made in the two separate judgments. In my opinion, the government has a clear and unambiguous duty to do whatever is reasonably within its power to prevent South Africans abroad, however grave their alleged offences, from being subjected to torture, grossly unfair trials and capital punishment. At the same time, the government must have an extremely wide discretion as to how best to provide what diplomatic protection it can offer.