

World Conference of Barristers & Advocates 2004

Cape Town, South Africa

12-14 April 2004

Rule of Law in Africa

Address
of
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When I first heard of the formation of the Barristers and Advocates Forum as a specialist group under the umbrella of the International Bar Association (IBA) I thought it was yet another elitist trade union to protect the interests of those among the participating Bars particularly at a time when the very existence of the referral Bar is threatened in some countries. I notice that one of the subjects for discussion at this conference is the future of the referral Bar. Later I read a report of the deliberations of the IBA Durban Conference in 2002 and in particular to the resolution adopted by the Forum with regard to support for judges and lawyers at risk in Zimbabwe including its resolve to support the UN Special Rapporteur on the Independence of Judges and Lawyers “*in his continued monitoring of, and reporting on the conduct of the Government of Zimbabwe towards lawyers and judges*”. This changed my perception that the participating Bars of the Forum were merely involved in self-protectionism. I followed closely its involvement and the concerns it expressed over developments in Zimbabwe and Swaziland. The selfless legal assistance it gave to lawyers and judges at risk in Zimbabwe was most commendable. I salute Adrian de Bourbon SC of the Zimbabwe Bar and Michael Hellens SC of the Johannesburg Bar for their defence of Judge Blackie. I also salute Jeremy Gauntlett SC of the Cape Town, Johannesburg Bar and Eric Matinega of the Zimbabwe Bar for their defence of Judge Paradza. The support it gave me as Special Rapporteur then was most valued and appreciated.

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I am today honoured in being invited to participate in this second conference and deliver this opening address.

This year is the 10th anniversary of the interim Constitution of this country and the first general election when for the first time black South Africans expressed their will at the ballot since the first European settlers arrived three and a half centuries earlier. It marked the official end of apartheid. That icon of all the goodness in humankind, Nelson Mandela, described April 26, 1994 as “*a day like no other before it*”. “*Today marks the dawn of our freedom*”, he said.

One outstanding feature of that election was that prisoners were allowed to vote. It was reported that that issue was one of the most contentious of the transition negotiations. The then President de Klerk finally ruled that all but those convicted of murder, rape and other violent crimes could have the franchise.

On May 9, 1994 in his inaugural address to the people as President of the Republic of South Africa here in Cape Town in reference to the earlier publication of the ANC’s Bill of Rights in 1990 he was reported to have said, inter alia, “*They project a democracy in which the government, whoever that government may be, will be bound by a higher set of rules, embodied in a constitution, and will not be able to govern the country as it pleases*”. In essence he referred to a constitutional government based on the rule of law.

The transformation of South Africa then to a fully independent and sovereign nation with a sound Constitution was seen by the international community as a gateway for transformation of the entire region of the African continent. Within the last ten years one organ of the South African State is today the glowing beacon for the rest of the world. This is the Constitutional Court. As the ultimate interpreter of the Constitution it has over the years developed a jurisprudence of a class which ranks, or seen at times surpass the apex courts of the developed nations. Its two recent judgments in the Grootboom and the Treatment Action Campaign are landmarks on the vexed and

complex issues relating to justiciability of economic, social and cultural rights¹ and how to enforce them; the applicability of international law including non-binding opinions of specialized international agencies and the delicate, often sensitive, balance of separation of powers. These judgments will be seen as a significant source of strength for the most disadvantaged and vulnerable groups in South Africa and I hope for the whole of Africa.

In addressing the UN General Assembly for the first time by a South African President, Nelson Mandela said, inter alia, “*The great challenge of our age to the United Nations organization is to answer the question given the interdependence of the nations of the world – what is it that we can and must do to ensure that democracy, peace and prosperity prevail everywhere*”. There cannot be democracy peace and prosperity without the rule of law being firmly embedded in nations everywhere. In the last few years the United Nations has been addressing this very issue as a very high priority. The U.N. Millennium Declaration in reference to the scourge of war within or between States which had claimed more than five million lives in the decade before the end of the last century resolved to “*strengthen respect for the rule of law in international as in national affairs.....*”. In addressing human rights, democracy and good governance the Millennium Declaration resolved that the UN will spare no efforts to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms including the right to development.²

The same Declaration provided for the special needs of Africa with a resolution to support the consolidation of democracy in this continent and assist Africans in their struggle for lasting peace, poverty eradication and sustainable development, thereby bringing Africa into the mainstream of the world economy.

The Office of the United Nations High Commissioner for Human Rights is responsible for co-ordinating the activities of the UN system in the areas of human rights, democracy and the rule of law. In this regard promotion of the rule of law is a high priority in its technical cooperation programmes, recognizing the link between the rule of law and respect for human rights.³ There are today ongoing post-conflict situational

programmes in Angola, Burundi, Sierra Leone, Sudan and Democratic Republic of Congo (DRC).⁴

In his report to the General Assembly last September on the progress made on the implementation of the Millennium Declaration after expressing some of the progress made in international protection of human rights the UN Secretary General, Kofi Annan, admitted the slow progress in the promotion of democracy and the rule of law. With regard to Africa's development, the Secretary General said, "*it continues to be hampered by war. Many of the continent's recent conflicts have been characterized by extreme acts of violence perpetrated against civilians, including brutal acts of torture, rape, mutilation, harassment and executions. Children are routinely subject to abduction and forced militarization, perpetuating a youth culture of alienation and violence. In the last year, progress achieved in Angola and the Sudan has been overshadowed by continued conflict in the Democratic Republic of the Congo, armed violence in the Côte d'Ivoire and bloody fighting in Liberia, leading to widespread terror, social upheaval and mass displacement. For the international community, these national emergencies have developed into broader "crises of protection".*"⁵

The importance attached by the international community for the strengthening of the rule of law both at national and international levels was further seen when the Security Council was convened in September last year to address a specific agenda item, namely "Justice and the Rule of Law: the United Nations Role." The United Kingdom initiated the session. No less than 38 member States including a few from Africa spoke during the two days debate.⁶

The UN Secretary General in his opening remarks began by asserting that the Security Council had a very heavy responsibility to promote justice and the rule of law in its efforts to maintain international peace and security. That, he said, applied both internationally and in rebuilding shattered societies. He added "*We must take a comprehensive approach to justice and the rule of law. It should encompass the entire criminal justice chain – not just police, but lawyers, prosecutors, judges and prison*

officers.....”. In calling for the application of the United Nations standards for human rights and the administration of justice and the principles of international humanitarian law, human rights law, refugee law he cautioned against a “one-size-fits-all” approach which he said would not work. In the deployment of the UN mission to Liberia (UNMIL), he said, that rule of law components were included following his recommendations to the Council.

On transitional justice mechanisms he felt that concentration should not only be on individual responsibility for serious crimes, but also on the need to achieve national reconciliation. *“We need to tailor criminal justice mechanisms to meet the needs of victims and victim securities. If necessary, we should supplement courts with mechanism such as truth and reconciliation commissions”*. However, he appreciated that the goals of justice and reconciliation compete with each other. A balance needed to be struck depending on the needs of each society. Nevertheless he asserted that *“In striking that balance, certain international standards must be adhered to. There should be no amnesties for war crimes, genocide, crimes against humanity or other serious violations of international human rights and humanitarian law. The rights of the accused should be scrupulously protected.”* He concluded his remarks in the following stirring words. *“We have learned that the rule of law delayed is lasting peace denied and that justice is a hand-maiden of true peace”*.

I have outlined these developments in recent years at the United Nations to strengthen the rule of law at the national and international levels as these are relevant to the situation in this African continent. Africa is still in the process of transformation despite the fact that most of its States became independent more than forty years ago. A promising regional transformation the international community expected after the South African miracle in 1994 has been hampered by conflicts in a quarter of African States up to 2003. Neither the African Commission on Human and Peoples Rights nor the Organisation of the African Unity was effective in this aspect. Just about this time ten years ago we all recall how the international community stood by and watched the massacre of about 800,000 people in Rwanda. The worst genocide since World War II.

Increasing poverty rates and deteriorating health levels especially as a result of the spread of HIV/AIDS pandemic have compounded the situation. History has shown how poverty and illiteracy breed all forms of exploitations. Dictatorships thrive in such situations.

Despite this gloomy scenario there are positive developments for some optimism. Long running wars in some of these countries have ended including the twenty-five year war in Angola. Peace agreements have been signed in the DRC. Similarly in Burundi. UN Peacekeeping Forces in Liberia should lead to the end of conflict in that country. Sudan and Côte d'Ivoire remain a concern. However, the situations in these countries though fragile yet appear to be contained though the civil war in the Western Darfur region of Sudan, between black Africans and Arab militias allegedly supported by the Government in Khartoum remain a grave concern. Continuing impunity for serious human rights crimes are not addressed. It is not likely that anymore ad hoc tribunals like that for Rwanda and Sierra Leone would be set up because of the exorbitant costs involved and moreover since the establishment of the International Criminal Court.

The emergence of regional institutions like the African Union (AU) in 2002 to replace the Organisation of African Unity (OAU) with wider powers to address threats to democracy, human rights and the rule of law in the region is a step forward. Non-interference in the internal affairs of member States was the trademark in the OAU. It is not so in the AU which under its Constitutive Act is committed "*to promote and protect human and peoples' rights.*" It expressly provides that "*governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union*". Situations that could be considered as situations of unconstitutional change of government are defined in the Lome Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, 2000. They include military coups, intervention by mercenaries to replace democratically elected governments, replacement of such governments by armed dissidents and rebel groups and refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections. Pursuant to the Constitutive Act a fifteen-member Peace and Security Council modeled on the UN Security Council to respond to AU's response to crisis in

any member State to “*promote and encourage democratic practices, good governance and the rule of law; protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law as part of the efforts for preventing conflicts*” was established and very recently the fifteen members were elected. The Council could recommend to the AU to “*intervene in a member State in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity.*” It can authorize deployment of peace support missions. In this regard last month the AU agreed to set up a force of 15,000 troops by 2005 to be ready to intervene to prevent genocide or end arm conflicts. The Protocol establishing this Council also provides for the establishment of a Continental Early Warning System to advise timely on potential conflicts and threats to peace and security in Africa and recommend the best course of action to arrest the situation.

In addition to the Peace and Security Council the Constitutive Act provides for eight other organs of the Union including a Parliament and a Court of Justice of the Union for the attainment of the objectives of the AU. A protocol for the establishment of the Court of Justice of nine judges was adopted in July last year and will come into force after ratification of fifteen member States. The jurisdiction of this Court appears to be modeled on the Court of Justice of the European Communities at Luxembourg.

The objectives of the Parliament, members of which were very recently sworn in with a woman as its first President, include promotion of human rights, democracy, good governance, transparency and accountability, peace and security and facilitate cooperation and development in Africa.

Another promising development recently is the establishment of the New Partnership for Africa’s Development (NEPAD) with an African Peer Review Mechanism at the initiative of four concerned States namely South Africa, Senegal, Nigeria and Algeria. Though essentially focused on economic development but it recognizes that “*Peace, security, democracy, good governance, human rights, and sound economic management are conditions for sustainable development*”. This reflects the

essence of the Vienna Declaration and Programme of Action which articulated for the first time that “*All human rights are universal, indivisible and interdependent and interrelated*”. The Peer Review Mechanism (APRM) is a group of “*eminent persons*” which will conduct periodic reviews of members’ “*policies and practices*” for the adherence to the rule of law.⁷

A significant development for the rule of law in Africa is the establishment of the African Court on Human and Peoples’ Rights. The Protocol to the African Charter on Human and Peoples Rights for the establishment of this Court entered into force on January 25, 2004 after receiving the required 15 ratifications. At the forthcoming session of the AU Assembly of Heads of States and Governments in Addis Ababa in July this year decisions would be taken to pave the way for the functioning of the Court including the process of electing the eleven judges. The Court is expected to complement the work of the Commission.

Africa will soon rank as the third region to have a regional Court on human rights after Europe and the Americas. In this regard Africa is ahead of Asia where there is not a regional or even a sub-regional mechanism to deal with human rights. While these regional mechanisms are certainly much needed steps in the right direction for human rights protection and the rule of law without the need for international institutional support yet the concern is whether there will be adequate resources, both human and financial, to implement them for realization of their goals. Developed States will have to step in and contribute financially. It is learnt that NEPAD has been endorsed by virtually all international agencies and bilateral donors from the UN General Assembly to the European Union, Japan and the United States. At its Summit in 2002 the Group of Eight industrialized countries (G8) adopted an Africa Action Plan. This Plan has human rights and rule of law components in addition to political governance and economic development.

Are there adequate human resources in Africa to effectively put into operation these mechanisms and the consequential institutions and agencies? According to a

UNESCO report in 1999 as many as 30,000 Africans holding PhD degrees were living outside the continent. Students able to find overseas employment were leaving Africa for greener pastures while some of those trained abroad refused to return home. The UN Secretary General was reported to have said then that “*The brain drain of Africa’s best and brightest to the industrialized world has increased*”. This is a matter of concern. Efforts must be made to persuade these brains to return to develop the continent. In the interim international and other regional institutions with extensive experience in management of such mechanisms should render technical assistance.

While financial and human resources are essential to put these mechanisms to effective operations yet without political will from the respective political leaders in the African States, individually and collectively, to respect human rights and the rule of law and put the welfare and wellbeing of their citizens above their personal and political interests all these mechanisms will count for naught.

During the nine years as the UN Special Rapporteur on the Independence of Judges and Lawyers I intervened in more than one hundred countries including a large number in Africa. Most of my concerns in Africa were political interference with the judiciary. In the mid nineties in addition to the crisis in Rwanda the situation in Nigeria under the Abacha regime was of grave concern. The joint recommendation to the Commission on Human Rights with my fellow Rapporteur on Extra-judicial Executions to appoint a country specific rapporteur for Nigeria was carried with the strong support of South Africa and other concerned States. It was despite an eighteen member delegation from Abuja sent by General Abacha to canvass member States to oppose. We were pleased that Nigeria transformed after Abacha and took a leadership role in the establishment of NEPAD.

Today the continued deterioration of the rule of law and human rights protection in Zimbabwe are matters of extreme concern. Not just the well being of its own citizens is in jeopardy but the developments there must be seen as a threat to the rule of law for all Africa. I followed the deterioration closely. The Government earlier agreed to invite me

for an in situ mission. Then it resiled on the agreement. It failed to respond to my communications. It is the only State in my nine years experience I expressed my concerns in nine press releases within a period of two years when the situation was deteriorating rapidly. The Government finally responded in a four page scathing communication in coarse language leveling personal attacks against me addressed to the UN High Commissioner on Human Rights with copy to me over my public statement on the arrest, detention and charges brought against retired Judge Blackie.

I replied appropriately without descending to the level of that Government. After all that I was pleased when I learnt that on June 30, 2003 all the charges against Judge Blackie were withdrawn. Later, I was very pleased when I learnt that a Supreme Court Bench of Zimbabwe declared the arrest and earlier detention of Justice Paradza unconstitutional.

When the Executive organ of the State refuses to comply or defies orders of the judicial organ there is no hope for the rule of law. There is no hope for judicial and lawyers' independence. The government is no longer a government of laws but of men. Governmental lawlessness becomes the order of the day. That is what is happening in Zimbabwe today. It was reported just three weeks ago that the Government once again refused to obey two orders of the Court. Instead it used a State controlled newspaper to attack the judges who made those orders.

In November 2000 when the Government of Zimbabwe defied the judgment of the Supreme Court declaring the "fast track" land reform programmes unconstitutional and publicly attacked the judges I raised the matter with the Permanent Representative of Zimbabwe in Geneva and enquired why the Government was not prepared to pay adequate compensation for the lands. The answer was that the Government could not afford payment based on the then market values. In that event, I said, the prudent thing to do was to negotiate with the landowners instead of defying Court decisions and threatening and intimidating independent judges and thereby undermining the rule of law. I agree with the recent statement of the Nigerian Nobel Laureate, Wole Soyinka, that

Robert Mugabe was playing the race card to remain in power over the land reform programmes. What more it is learnt that many of the lands unlawfully grabbed were distributed to government and ruling party officials and their relatives.

How does the international community deal with such a government? The irony is that Zimbabwe got itself elected into the UN Commission on Human Rights last year and remains in the Commission this year. So are Swaziland, Sudan and Libya with Libya taking the Chair last year. It makes a mockery of the Commission which is under Article 68 of the UN Charter mandated to promote human rights universally. There was a perception in the minds of some that the Commission had been hijacked by human rights violators. The African block with the support of like minded States blocked a European Union resolution on Zimbabwe last year. Sad to say South Africa was part of the block. So far African diplomatic efforts, if any, have not brought any change in that country. Instead the situation is deteriorating. It is reported that the annual inflation rate is 620 percent and climbing. The unemployment rate exceeds 70 percent. One in four Zimbabwean is HIV positive; 4000 die every week. Agriculture output has been so ravaged that Zimbabwe now has the highest number of citizens starving to death in Africa. It is also being reported that there is a nefarious government policy of manipulating the supply and distribution of international and government food aid. If a Zimbabwean is not seen supporting Mugabe's ruling party he or she will be deprived of receipt of food aid.⁸ What is happening there could be summed up as a gross violation of human rights and Robert Mugabe and his henchmen must be made accountable for crimes against humanity.

The Vienna Declaration and Programme of Action underlined the importance and the pivotal role of an independent judiciary and legal profession structured in full conformity with international human rights instruments for the full realization of human rights, the process of democracy and sustainable development. Following this last November on the occasion of the tenth anniversary of this Declaration a group of experts met at a symposium in Vienna and adopted a specific Declaration on the Role of Judges in the Promotion and Protection of Human Rights and Fundamental Freedoms. The

symposium was initiated by the Government of Austria and officiated by the acting UN High Commissioner for Human Rights. I had the honour of participating in this programme. This Declaration was noted by the UN General Assembly and the Security Council in conjunction with the fifty-fifth anniversary of the Universal Declaration of Human Rights. A copy of this Declaration is annexed to the text of this address.

In addition to this Declaration, to assist member States to structure the justice system and train judges, prosecutors and lawyers on international human rights law the Office of the UN High Commissioner for Human Rights has last year published a Manual on Human Rights for Judges, Prosecutors and Lawyers. It is a training manual on human rights in the Administration of Justice. It is a comprehensive training tool of about 900 pages and can be found on the High Commissioner's Office website (www.unhchr.ch). Also last year the Human Rights Centre of the University of Essex published a Manual for Judges and Prosecutors on Combating Torture. This manual can be found on the University's website (www.essex.ac.uk). Many of you may already be aware of the Bangalore Principles of Judicial Conduct which was noted in a resolution of the UN Commission on Human Rights last year. The Commission encouraged member States to adopt these Principles in their domestic code of ethics for judges. The invaluable contributions of the Chief Justices and senior judges involved in the formulation of these Principles were most commendable. Among them from the African region were the Chief Justices of Nigeria, Uganda and Tanzania, the President of the Supreme Court of Mozambique and the Hon. Deputy Chief Justice Pius Langa of South Africa. These Principles were formulated in response to widespread concerns over judicial corruption and want of judicial accountability.

Rule of law tools to provide field staff and transitional administrators with comprehensive overview of the institutions and actors involved in the administration of justice sector and related activities in post conflict States are being designed and experts meetings are convened later this year by the Office of the UN High Commissioner for Human Rights to carry this project forward. These tools are intended to assist transitional

administrations in setting priorities and forming comprehensive policies and programmes in the area of rule of law development.

One of the major challenges for judges and lawyers in the next decade is to find a balance between counter-terrorism measures adopted by governments and preservation and respect for international human rights norms and the rule of law. No doubt terrorism itself is a violation of fundamental human rights and rule of law and must be combated accordingly. Practically all the various resolutions since Sept. 11 2001 emanating from the UN General Assembly, Security Council and the Commission on Human rights provide that efforts to combat terrorism must be in compliance with established international norms. In reality is that so? The Guantanamo Bay experience is a glaring example of how these international standards are sidelined by a super power which has over the years championed the cause of human rights protection. It is learnt that African States are united in the fight against terrorism particularly after the recent Madrid bombings. Several governments have or are in the process of passing such counter terrorism legislation. I learnt that there is currently before the Parliament of South Africa the Protection of Constitutional Democracy Against Terrorists and Related Activities Bill. What is important is that there should be sufficient checks and balances to guard against Executive excesses. There should be provisions for judicial reviews or supervisions over arrests and detentions. Fair trial procedures must be scrupulously observed. We cannot rely on the assurance of the Executive that it has sufficient evidence gathered from its intelligence services. There is enough lessons learnt on the reliability of intelligence reports and moreover how they can be “sexed” up.

Let me conclude. The new mechanisms which I referred to earlier are promising and augur well for Africa to progress and develop towards a rule of law and human rights regime. However, merely structuring institutions and mechanisms on the models of those in the advanced regions without adequate financial and human resources to activate them effectively will be a set back. There certainly is need for substantial assistance from the international community, both financial and technical. In this regard the confidence of the international community particularly the developed nations and financial institutions

need to be earned and sustained. That can only be achieved if political leaders in Africa are seen service oriented to the people and committed to transformation of the region based on respect for the rule of law and human rights. The chances of human rights being understood and respected improve as the economic and educational levels of societies improve. Hence there is a need to address these economic and social issues as priorities.

While outside military intervention in any sovereign nation must be a last resort yet when there is widespread human rights violations resulting in deaths and other human sufferings and the State is seen wholly or partly responsible or it is unwilling or unable to halt then the principle of non-intervention must yield to regional or international responsibility to protect the defenseless citizens. Violations of human rights anywhere must be seen as a threat to humanity everywhere. Even a regime change in such a situation may be justified and the offending political leaders brought to justice before a regional or international tribunal.

The immediate challenge for the African Union and its watchdog Council, the Peace and Security Council, is how it will deal with Zimbabwe and restore respect for the rule of law and human rights. Any positive change in that country will enhance confidence in the African Union domestically, regionally and internationally. In any event it must see to it that the likes of Robert Mugabe and his henchmen are never allowed political office on the African soil again. That will be the way forward for the rule of law in Africa.

April 12, 2004

Endnotes

- ¹ Republic of South Africa vs. Grootboom (II) BCLR 1169.
Minister of Health vs. Treatment Action Campaign. Case No. CCT8/02. at <http://www.concourt.gov.za>
- ² United Nations Millennium Declaration A/RES/55/2
- ³ Strengthening of the rule of law – Report of the Secretary General – A/57/275
- ⁴ E/CN.4/2004/51
- ⁵ Implementation of the UN Millennium Declaration – Report of the Secretary General A/58/323
- ⁶ Justice and the Rule of Law: The United Nations role. S/PV.4833 and 4835
- ⁷ See Africa on its Own: Regional Intervention and Human Rights by Binaifer Nowrojee
- ⁸ Mark Ellis, The World vs. Robert Mugabe I.H.T. April 2, 2004