

ADHERENCE TO UNIVERSAL HUMAN RIGHTS NORMS AND STANDARDS IN PUBLIC INTEREST LITIGATION

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Recent comments, including at Wits University, appear to question the legitimacy of Human Rights and public interest litigants by juxtaposing them as alienated from social or grassroots movements, donor dependent, and hence donor - driven and serving western interests.

Having engaged in these debates for over fifty years; and more recently as UN High Commissioner for Human Rights, I take issue with some of these assertions, whether they concern the Southern Africa Litigation Centre, (the public interest law centre that brought Omar Al Bashir lawsuit before the South African Courts) or civil society organisations generally. It is important, since all of us seek the same goals, namely, the betterment of society that we adopt a more inclusive dialogue, respect diverse approaches and remain true to facts.

It is a matter of concern that several countries have used harmful propaganda against human rights advocates, journalists, and artists as an excuse to stifle criticism. Human Rights defenders and journalists are subject to arrests and detention. Countries have adopted legislation, banning NGOs or imposing restrictions on NGO and opposition activities, cutting off their funds and labelling them as donor - driven foreign agents, intent on destabilizing institutions. Public interest litigation has been particularly targeted, in places like Kenya, Ethiopia, and Russia.

Governments tend to perceive NGO exposures of violations as harmful to the image of the country instead of taking action to protect victims against such violations. There may well be concerns over foreign funding since donors do come with their own agendas that are not local priorities. The answer is for governments to provide funding and support for civil society organisations who are working to ensure that good laws are being implemented.

The legal basis for support to human rights - related NGOs, is derived from International Human Rights Law. The right to engage in activism (as opposed to violence), in defence of human rights is derived from a number of substantive human rights, including political participation rights, the rights to freedom of expression and peaceful assembly. The right to provide support stems from the right to defend human rights.

It is important that progressive public interest litigation be widely understood for what it is, namely, a mechanism for holding power to account in the interests of the powerless. These are the words of Northern Ireland's Public Interest Alliance, a law network whom I met in Belfast a few weeks ago, that seeks to engage the legal community and civil society in using the law to advance social change.

Human Rights are an effective mechanism for producing social change. Universally recognised rights such as the right to live in dignity and respect are fundamental to all societies, irrespective of diversity. Human rights are still the universal force for our time because the rights have become so widely recognised and because human rights places victims, not state power and image at the centre of attention. This is why international standards are so relevant for public interest litigation.

Ours is a rights - based society; South Africa subscribes to the United Nations' Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948; drafted as "a common standard of achievement for all peoples and nations", the Declaration sets out basic civil, political, economic, social, and cultural rights that all human beings are entitled to enjoy. Over time, this unprecedented affirmation of human rights became widely accepted as the standard to which all governments should adhere. The Declaration, together with the International Covenant on Civil and Political Rights and its two Optional Protocols, as well as the

International Covenant on Economic, Social, and Cultural Rights, and its Optional Protocol, form the "International Bill of Rights". International Human Rights day is now observed on 10 December around the world.

In 1994, President Mandela signed up to all the major UN Treaties, including the Convention against Torture, Convention on the Elimination of all forms of Discrimination against women and the Convention on the Rights of the Child, to name a few. Thus, we came out of isolation and re-joined the world.

Various Regional Treaties articulate related Human Rights, such as the African Charter on Human and Peoples Rights, European Convention on Human Rights and Fundamental Freedoms and the American Convention on Human Rights.

The South African Constitution, The Freedom Charter of the African National Congress, and the African Charter all incorporate the provisions of the Universal Declaration of Human Rights. This is the framework that lays the firm ethical foundations for our value-based society; for full respect for the rights and dignity of all persons and communities in daily interaction and in the way politicians should conduct good governance, lawyers and judges ensure justice and educators teach. People must be at the centre of economic development policies, and the provision of services.

We are fortunate that our Constitution allows for the application of International Law where there are gaps in protection in our National laws. The Constitutional Court relied on the ICESCR, even though South Africa had not ratified the Convention, having done so only this year, to rule that the authorities were obliged to provide the right to housing. International Standards also applied by the Court in its ruling on access to HIV/AIDS anti - retroviral medication, and access to generic drugs. These decisions were welcomed in many parts of the World as the monopoly of patented drug manufacturers was broken and the use of generics saved many lives.

It must be acknowledged that we have made huge strides in transformation and many efforts are led by government to deliver on human rights, such as housing, healthcare, access to justice, and freedom of speech and assembly. However, the process is still fraught with concerns especially from those who have been left behind.

It is easy to criticise; we also have a responsibility to assist with capacity, strategies and training as well as pressure the State to adopt and implement laws that are in compliance with international standards. We also need to assist civil society to know and demand their rights. Good laws will remain on paper as such, unless efforts to realize the rights they confer are tested and lack of implementation challenged by politicians, lawyers, and NGOs. If lawyers do not bring cases of violations to court, our constitution and Bill of Rights will remain an empty shell.

This brings me to the recent case of non - compliance of the arrest order issued against Omar Al Bashir, President of Sudan, by the Gauteng High Court. The vigilance exercised by the Southern Africa Litigation Centre, in launching urgent action, together with wide media coverage drawing attention to the Court's ruling was vital to raise awareness of disregard for the rule of law. The case is sub - judice and the response of the State is under judicial consideration; so I will refrain from comment save for highlighting the myths, misconceptions, and propaganda that have crept into the public discourse.

When, as UN High Commissioner for Human Rights, I addressed the academics and students of WITS University, at the invitation of the Vice Chancellor, Professor Adam Habib, the audience expressed concern over selectivity in human rights accountability. They were aggrieved that President George W. Bush escaped judicial sanction from the International Criminal Court for alleged crimes committed in the context of the illegal attack on Iraq, torture and unlawful incarceration of suspected terrorists in Guantanamo prison and the US controlled Abu Graib prison camp as also, indiscriminate killings of civilians by the use of armed robotics or drones.

I shared their frustration, because I uphold the principle that all individuals with responsibility for the commission of serious crimes of genocide, crimes against humanity and war crimes must, without exception be brought to justice. No one is above the rule of law and even a head of state or government must be held accountable. The fact is that Democratic President Clinton had signed the Rome statute at the end of his mandate but Republican President Bush had withdrawn the signature. The refusal by the United States and other major powers, including Russia, China, India, Israel and the whole of the Middle Eastern countries save for Jordan, to join the Court, is a matter for scorn and condemnation, not for abandoning the Court. We should acknowledge with pride that more than 120 states are now parties to the International Criminal Court and that the largest number of ratifications comes from the African continent - a resounding endorsement for ending impunity for these serious crimes. We should continue our demands for universal ratification.

The strongest calls for joining the International Criminal Court come from Americans themselves and in particular from their NGOs, academics and students. One in particular has consistently taken the lead that is Ben Ferencze, now 97 years, who at age twenty-two served as a United States prosecutor in the Nuremberg Military Tribunal for war crimes. I was among the eighteen judges who were inaugurated as judges of the ICC in March 2002, and saw Ben Ferencze, on that occasion, holding a lone vigil on the icy shores of the Hague beach for US participation in the Court. However, it is definitely not a defence to argue that just because other suspects are not charged no one else should be; or more pertinently, because the ICC did not indict President G. W. Bush and UK Prime Minister Tony Blair, Al Bashir should not be subject to prosecution and South Africa should not co-operate in his arrest.

Regrettably, Vice Chancellor Habib appears to veer in this direction when he unfairly berates the Southern Africa Litigation Centre and Kenneth Roth of Human Rights Watch and other activists for being the "advanced guard for colonial subjugation" for failing to consider that "if you are a leader in the US, its allies, or one of the other great powers, you need not be concerned about acting outside the rule of law because there is no accountability regime for you." and for being legal fundamentalists (for whom) the law is always right and must be observed unthinkingly"

These misconceptions must be dispelled with better information and it is important to do so as they are likely to be misunderstood by students under his watch. The Southern Africa Litigation Centre fights unjust laws and brings remedies for victims, such as their case in Botswana that spelled out rights for women in traditional systems. Ken Roth famously drew up a much-publicised indictment against G. W. Bush in anticipation of his appearance before the ICC someday. I recall that Mr. Bush cancelled a visit to Switzerland, where I was stationed, once rumour got out, that an indictment for war crimes in Iraq would be served upon him through the Swiss courts. You should also know that a significant body of academics and lawyers in the United Kingdom; served a formal evidence - based complaint against Tony Blair for alleged crimes in the Iraq attack.

This is the stuff of public interest litigation: never to forget the thirst for justice for victims of crimes and human rights violations.

Let me briefly allude to some of the myths and propaganda surrounding the indictment of Al Bashir and other African leaders:

The myths are:

- African Countries are being targeted by the ICC.
- This is the Western imposing Colonial justice on African countries.
- We can do the cases ourselves and do not need the ICC.
- A serving head of state cannot be prosecuted, as resolved by the African Union.
- South Africa's loyalties lie with Africa.

The facts are:

- Six out of the eight African Countries invited the ICC to investigate allegations of serious crimes committed in their countries because they were unable to carry out the investigations themselves. They are Uganda, Democratic Republic of Congo, Ivory Coast, Mali Central African Republic and Kenya (the latter by decision of their Parliament.)
- The remaining two situations in Darfur, Sudan and Libya were referrals to the ICC by the UN Security Council. In every one of these countries, the demand for justice and accountability came from the thousands of victims and their families who had suffered from the acts of genocide, crimes against humanity and war crimes perpetrated against them.
- Far from being western justice inflicted upon Africa, the Rome statute establishing the ICC, and the determination in its preamble to end immunity for these serious crimes received overwhelming support of African countries. In fact, the largest number of ratifications comes from the African continent, namely twenty-three.
- I can assure you, as someone who served as an appeal judge on the Court that it guarantees fair trial, respects the presumption of innocence and standard of proof beyond reasonable doubt. The judges are highly qualified national judges and academics, independent and representative of the world's jurisdictions. The Prosecutor, though independent in conducting investigations, is subject to checks and balances to rule out any politicisation in her work. Indictments are issued only upon authorisation by a three - judge chamber, who are satisfied upon evidence submitted, that there is sufficient ground to support the charges.
- It is important to emphasise that the ICC indictments are against individuals, not states.
- The primary responsibility under the Rome statute and under our National law, to prosecute individual suspects falls upon states. The ICC will not admit a case if a state satisfies it of its willingness and ability to investigate and prosecute ICC crimes. The Rome statute is clear: there can be no immunity or amnesty for ICC crimes because of their serious nature and the multitude of victims. **No one is above the law.** Other countries cannot, out of fear or favour, change the rules that they had all agreed to. They should hold their friends to the same account as they do their foes. The goal posts cannot be moved in the middle of the game, as we all know.
- South Africa is obliged to comply with its own national laws, especially the legislation implementing the Rome Statute.

The African Union adopted Resolutions preventing prosecutions of serving heads of state. These cannot have retroactive effect and certainly cannot supersede the Rome statute. Our loyalty should be for justice; justice for the thousands of victims. In the situation in Darfur, the accusation is that thousands of Black African Peasant farmers were killed and driven forcibly off their lands by the Janjaweed militia and Al Bashir's military. We, who suffered under colonialism, should not be supporting modern-day colonisation by descendants of Arab traders. When we fail to cooperate in the arrest of Al Bashir, what are we saying to the hundreds of thousands of his victims who are languishing in UN camps?

Let me move onto burning issues of concern that require the attention of human rights advocates. Despite the International and Regional Framework of Rights, systematic human rights violations persist across the world, from conflict, loss of lives and massive displacement to poverty, lack of freedom from fear and freedom from want.

South Africans are not realising their civil, political, economic, social and cultural rights, despite advances made by the State. Unemployment levels are high (24+% and more than 50% among young adults); income inequality remains high (Ventures Africa Magazine reveals that the numbers of billionaires in Africa has more than doubled in the last decade to fifty five; World Bank figures indicate that the top 10% in South Africa hold 53.8% of the income. STATSSA reveals that 10.2 million South Africans, that is, 20.2% of the population live in extreme poverty; and critical service delivery failures attributable to lack of education and skills, poor governance and rampant corruption are matters of daily concern.

The Public Protector, Thuli Madonsela recently proclaimed that the country has reached a tipping point in its battle against corruption. Human Science Research Council warns that corruption is a major obstacle to realising our constitutional ideals of freedom, security and justice. Senior managers are indicated as the number one culprits driving theft. 77% of all internal fraud was committed by senior and middle management, driven by unbridled greed. Billions of rands have been lost to theft -- money that should have been used to deliver urgently needed social services (<http://m.timeslive.co.za>) (Pricewaterhouse Cooper's SA edition of the Global economic crime survey released 18 Feb 2014).

Poor governance practices threaten the functionality of the public sector. Each year the Auditor General's reports show increasing levels of wasteful expenditure in the public sector, here again, cheating the public of valuable resources (Institute of Directors Southern Africa News and Press, 11 March 2015) South Africa has a good law, The Prevention and Combatting of Corrupt Activities Act, 2004 but there is a greater need for political will to implement this law.

The UN HRC adopted a resolution in March 2012 recognising the detrimental impact of corruption on the protection of human rights and on the ability of governments to fulfil their human rights obligations, particularly the economic, social and cultural rights of the most vulnerable and marginalised. Respect for fundamental human rights principles such as equality, non - discrimination, participation, transparency and accountability are essential to the fulfilment of all human rights and must be integral to an effective anti - corruption strategy.

The "Occupy Streets" protests by civil society organisations in many cities of the world following the financial crises a few years ago highlight the need to be rid of unaccountable, opaque institutions, whose decisions cause untold suffering for people. Vibrant civil society activities, protests and media exposes likewise highlight concerns in our country. The situation cries out for monitoring, human rights due diligence and public interest litigation to achieve accountability.

Impunity ferments human rights violations and undermines the fabric of society. Public interest litigation can provide impetus for change.

I encourage you to use the law to advance social change, including International Human Rights Law. By which I mean the entire spectrum of United Nations instruments; The African Union Charter and Protocols and the rulings of the African Commission on Human and Peoples' Rights. International Human Rights law is relevant for public interest litigation because it has useful tools that PIL advocates can use to highlight violations of IHRL on their clients.

A human rights approach presupposes rights holders and duty bearers, moves away from acts of charity to enforceable obligations. Such accountability is increasingly being demanded by communities, social movements and democracy campaigners worldwide. International and Regional human rights mechanisms including the Universal Periodic Review of the UN Human Rights Council, Special Procedures (independent experts appointed by the HRC for thematic and country areas) Treaty Body Committees and the African Peer Review Mechanism offer opportunities for intervention by National Human Rights Commissions, NGOs and others.

South Africa has largely incorporated its international obligations into its national legal framework but increased monitoring and accountability mechanisms are needed for implementation. It is indeed disappointing that South Africa has been remiss in ratifying obligations and submission of reports to International and Regional monitoring bodies. The ratification of CESC (Covenant on Economic, Social and Cultural Rights) was a welcome development that needs to be followed soon by ratification to its Optional Protocol; and ratifications of The International Convention on the Rights of Migrant workers and their families (ICRMW); International Convention on Prevention of Enforced Disappearances (ICPED); Optional protocols to the Convention against Torture (OPCAT) and Convention on the Rights of the Child (CRC) and International Labour Organisation 189 (ILO).

Numerous reports under various Human Rights instruments to which South Africa is a party are long overdue:

ICCPR no report filed since ratification in 1997. Further reports to CRC; CAT; CERD; CRPD; The SA HRC reports in its Annual International Report of 2012 that 2012 was a significant catalyst for South Africa with regard to human rights awareness and compliance. It underwent its second review in the Human Rights Council's universal periodic review process, under which all 192 member states of the UN are reviewed, and was criticised for alleged failure to implement many of the recommendations included in the first UPR review.

I wish you well in your deliberations over the next two days and remind you that access to justice is a right, not a privilege.