

Protecting Human Rights: the Role and Responsibilities of the Independent Bar

KEYNOTE ADDRESS

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Your Lordship, the Lord Advocate, Co-Chairs of the Conference,
Distinguished Members of the Faculty of Advocates and Members of the Bar,

Thank *you* for the invitation to address this Inaugural World Conference. I found it irresistible. It is an idea whose time has come and you chose to launch it in this beautiful city of Edinburgh, a place that is rich in history, and a veritable crucible of both Scottish and European civilization and culture including the law.

When I first received the invitation I did wonder why the Australian Bar Association would want to invite me, an Irish advocate who has been out of professional service and away from the cut and thrust of the Dublin Bar for a while now, to address a conference hosted by the Faculty of Advocates in Scotland! I was intrigued to discover that this was the setting of an inaugural world conference bringing together various independent referral Bars from different parts of the world: Scotland, England and Wales, Northern Ireland, Ireland, Australia, South Africa, Zimbabwe, Hong Kong and New Zealand. A small caveat: having addressed the Bar of the High Court in Lahore, Pakistan, recently I did ponder a little on how you select the bar associations represented here, and I would encourage you to be as inclusive as possible.

I also discovered that the theme of your inaugural conference is a subject that falls within my mandate as United Nations High Commissioner for Human Rights: *the independence of lawyers*.

Human Rights advocacy

Although it has been a quite a long time since I acted as an advocate in Court, I will address you as an advocate of a different kind. My current job requires me to be an advocate for recognition, respect, protection and promotion of human rights the world over, especially on behalf of the millions who are victims - or potential victims - of human rights violations. Looking at your programme for this meeting, I was pleased to see that you will not only be addressing the issue of the independence of the Bar, but also the role of the independent Bar in promoting and protecting human rights. I would like to share some thoughts with you on both issues.

You should not underestimate the challenge. In my experience over the last five

years, most victims of violations of human rights have no access to a lawyer at all. Nor do they know they have rights guaranteed under international instruments their country may have ratified. Detention without trial is common and if a trial takes place, there may be no defence lawyer present or expected.

In this context, I believe there is an opportunity to address these broad areas at a new level in African countries arising from the commitments made in the New Partnership for African Development (NEPAD). I know that some of you have made significant individual contributions by acting as trial observers or investigators of particular problems from time to time in developing countries, and that bar associations have formed bilateral relations which can be significant. But I believe there is a new opening which arises from the way in which African leaders in the NEPAD have prioritized their commitment to strengthening the administration of justice and rule of law, and adhering to international human rights norms and standards. They have also proposed a mechanism of African peer review to monitor progress.

The priority given to these key areas stems from the direct link now made by African countries between strengthening human rights protection and human development. The problem is that, despite the priority given, African countries will not be able to prioritize domestic resources because these will be needed to service the debt burden, tackle HIV/AIDS, provide better education, health care, infrastructure, etc. Hence the challenge to the international community, both at the official level of governments and international institutions and at the level of professional bodies such as yours. Could I suggest that a constructive outcome of this inaugural meeting might be the establishment of a task force to examine how representatives of independent bars might provide intellectual and professional support to this aspect of NEPAD. My Office would be very pleased to work closely with you on such a project.

The independence principle

A system based on respect for the rule of law not only needs strong independent and impartial judges and prosecutors, but also strong and independent lawyers who are able to pursue their work freely and without fear of reprisals. When I served on the advisory Board of the International Commission of Jurists I became familiar with the work of the Centre for the Independence of Judges and Lawyers and its annual reports on *Attacks on Justice - the harassment and persecution of judges and lawyers*, which bring home the scale of the problem in different regions of the world.

You have asked me to speak about human rights. Let me challenge you, and begin with a quote from Eleanor Roosevelt, who chaired the first UN Human Rights Commission that drafted the Universal Declaration of Human Rights:

“Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world ... Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”

What “concerted action” are your bar associations taking in this regard? I was encouraged by some of the ideas of the Australian Law Commission in its report *Managing Justice: a review of the federal civil justice system*. I note the recommendations on how local bars can expand access to justice by preparing pamphlets explaining how lawyers bill their clients; what one can expect from an initial consultation, pro bono work, etc.

Pricing policy can also be important in determining whether people can afford the services of independent advocates! Is it not also the responsibility of the independent Bar to ensure that access to justice, especially for the indigent, is treated as a human right to be defended?

International human rights foundations

Enough of this cross examination! Nor do I propose to lecture you on human rights, but just to reflect briefly on what we have gained in over half a century. The UN Charter and the Universal Declaration of Human Rights, adopted by the General Assembly in 1948, gave a vision of a world grounded in good governance, democracy, the rule of law, and respect for human rights. The Universal Declaration was transformed into binding international law in 1976 when two covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, entered into force. These treaties and the Universal declaration, known collectively as the International Bill of Rights, are the cornerstone of the remarkable body of international and regional instruments, well over 70 in number, which form the basis of international human rights law, and regulate the fundamental rights and freedoms of all individuals.

The regime of international human rights law established by these instruments is now recognized as a part of the national legal order in many jurisdictions in the world. Here in the United Kingdom, for example, the enactment of the Human Rights Act 1998, brought into the domestic law of the various jurisdictions of the

United Kingdom the rights provided for under the European Convention on Human Rights. In a number of other common law jurisdictions represented in this conference, various constitutional provisions or judicial mechanisms have similarly ensured the domestication of international human rights law in the national legal system. A good example is the Constitution of South Africa of 1996, which explicitly incorporates international human rights law as part of the law of South Africa.

The Office of the High Commissioner for Human Rights

Let me now introduce briefly the Office of High Commissioner for Human Rights. It was established by the General Assembly in 1993, to give leadership in the promotion and protection of human rights, democracy and the rule of law. I would add that, in its evolution, the mandate of this Office has also come to encompass the prevention of violations of human rights. So, you could say that my task as High Commissioner for Human Rights is to be an advocate for all aspects of human rights: the promotion of these rights, the prevention of violations of the rights, and the protection of those who have become victims of these violations. In this task, my Office has over the years paid particular attention to the challenge of protecting the independence of judges, prosecutors and lawyers, and speaking out whenever their ability to exercise their professional responsibilities in true independence was threatened or comprised by governments and other actors. We recognise that violations of the independence of the judiciary and of lawyers are, in fact, violations of the international legal obligation incumbent upon governments to respect such independence, and amount to violations of international human rights law.

Global Pool of Precedent

Recently, I addressed the World Association of Women Judges at their Conference in Dublin on a related subject, and advanced two propositions. First, I argued that the global human rights cause set out in the Universal Declaration has reached a certain maturity, and that that maturity should allow us to think in terms of a single system of universal rights protection where distinctions that have been drawn in the past between national and international law need to be rethought. Secondly, and following upon the first proposition, I argued that human rights protection is not the work of two unconnected systems - the international and the national - but rather that it is a shared enterprise with interlocking and reinforcing national and international dimensions..

What does this mean for the independent bar in the national jurisdictions? I think it means, among other things, that the regime of international human rights law is not a strange and far off terrain for the independent lawyer practising within the jurisdiction of his or her own national territory. Increasingly, the independent lawyer has to deal with human rights questions, whether at the criminal bar or commercial bar, or in matters involving trade or environmental disputes or, more obviously, in the context of constitutional litigation. Human rights have ceased to be a "fringe activity" and, as it was stated by Lord Goldsmith QC and Nicholas Cowdrey QC in their article "The Role of the Lawyer In human rights".¹

“[Human rights] is an area of law which is fundamental to everyone and which permeates all legal activity, economic and social, in public law and in private.”

I would add that it has become part of the professional duty of judges, prosecutors and lawyers to explore the full potential of human rights law and to use their competence to ensure that the rule of law prevails as our guiding pillar in the democratic societies in which we live. Your work as lawyers must thus constitute the pillar of an effective legal protection of human rights, which alone can ensure the protection of the individual against the abuse of power by those in authority.

International human rights courts

The interconnectedness of the international human rights system and national legal systems also manifests itself in the emergence of international or regional human rights courts in which national independent lawyers are increasingly involved. The European Court of Human Rights in Strasbourg and the Inter-American Court of Human Rights are the best known. The establishment of similar regional human rights courts has been mooted elsewhere, for example the proposed African Court of Human and Peoples' Rights, whose protocol has already been signed and ratified by a number of African States, and the proposed regional human rights court for the Southern African Development Community (SADC).

There are other judicial and quasi-judicial mechanisms established within the UN in which the independent lawyer is playing a critical role, as advocate or in some

¹ Lord Goldsmith and Nicholas R Cowdrey, "The Role of the Lawyer in Human Rights", HRI News, vol. 4, No.2 (1991), p. 1

other expert capacity. And then, of course, there are the *ad hoc* tribunals created to deal with the atrocities in the former Yugoslavia and in Rwanda. These have shown us the inter-linkages between the national and the international. The atrocities may have been perpetrated in a national context, but the crimes committed are condemned as crimes against international human rights law and international humanitarian law. The accused standing trial in these tribunals may be citizens of individual countries - and in one case so far a former head of state - and the lawyers prosecuting and defending them may originate from different Bars in different countries. But the common denominator is that the trials are aimed at securing justice based on internationally accepted norms and standards of international law. The recently established International Criminal Court (ICC) will build on this work.

Role of independent lawyers

What, then, is the role of the independent lawyer in the challenge of upholding the rule of law and international human rights standards in the context of not only his or her work in the national courts, but also in these international tribunals?

It was put simply by UN secretary General Kofi Annan a few years ago when he said²:

“The rule of law is essential to peace, development and the realization of human rights. The practice of law is a privilege, but a privilege that carries with it a heavy responsibility to ensure respect for the law.”

One way that legal practitioners - independent lawyers - can ensure respect for the law is for them to engage effectively with the challenge of promoting and protecting of human rights, not only for their immediate clients but for the benefit of society at large. This requires better familiarization with the content of international human rights law. Yet, not too long ago, the Special Rapporteur on the Independence of Judges and Lawyers made the sad observation that recent experience has shown that in many countries Bar associations are not responding to this expectation. He went on to note that³:

² Kofi Annan, 'Foreword' to *Global Law in Practice* (1997), p. v - vi.

³ Param Kumaraswamy, "The UN Special Rapporteur on the Independence of the Judges and Lawyers", *CIJL Yearbook*, Vol VII, p. 63, at 81-82.

“While in a few countries where the regime is repressive, fears of reprisal are real, yet in many other countries there appears to be an apathy coupled probably with the association being more concerned with addressing commercial and more materialistic aspects of the profession and embroiled in external politics and factionalism.”

The Special Rapporteur concluded that there was a need to sensitize Bar associations on their roles in the advancement of not only the independence of their profession, but also their role in the protection of judicial independence and human rights generally.

The Special Rapporteur on the independence of the Judiciary and Lawyers

The Special Rapporteur I am referring to is the distinguished Malaysian lawyer, Param Cumaraswamy, who is no doubt known to some of you. Since 1994, when the mandate was established by the Commission on Human Rights, he has worked actively to defend the independence of both the judiciary and lawyers, and has reiterated the need for independent lawyers to take their role and responsibility in defending human rights and the rule of law more seriously. This appeal, to independent lawyers to face up to these responsibilities is based on agreed international principles. *The Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990 provide the basis. These principles recognize, *inter alia*, that:

“Adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.”

Taken as a whole, the Basic Principles provide a range of rights and freedoms, together with duties and responsibilities which are incumbent upon lawyers. Among these is Principle 14, which states that in protecting the rights of their clients and in promoting the cause of justice, lawyers shall also “[seek] to uphold human rights and fundamental freedoms recognized by national and international law . . .” The responsibility of lawyers to uphold the promotion and protection of human rights is reiterated in Principle 23, which also guarantees the right of lawyers, like other citizens, to freedom of expression, belief, association and assembly.

In brief, then, I would remind you that your obligation to act to uphold nationally and internationally recognized human rights is clear. Like judges and prosecutors,

you play a crucial role in the administration of justice and in the prevention of impunity for human rights violations. While the State's duty is to secure your independence, your principal obligation is to act in such a way that democracy and the rule of law, essential for the survival and good ordering of the State itself, are preserved.

Respect for the independence of lawyers must also come from the standards of the Bar itself, in tackling corruption, bias, unethical or unprofessional conduct, and promoting values of independence, integrity, propriety and professional competence. I have no doubt that these are among the issues that you will be addressing in your discussions in this conference.

Your conference represents a new beginning - a bringing together from different countries and jurisdictions of independent Bars that share a common professional vision and a common legal tradition. This is yet another manifestation of the recognition of the need for lawyers to reposition themselves to play their part in today's increasingly globalized world. But, of course, your deliberations at this conference have a resonance that goes farther and wider than the legal jurisdictions of countries represented here. And in this, you are not alone.

I was pleased to learn of another international conference of independent lawyers which took place recently in Montreal. The gathering drew together some 300 lawyers from 80 countries to discuss the formation of an International Criminal Bar Association, which will aim at acting on behalf of accused persons appearing before the International Criminal Court, due to become operational in The Hague next year.

I believe that the proposed International Criminal Bar and other international Bar associations bringing together the world community of independent lawyers will have a particular responsibility to work towards the common objective of ensuring the protection of their own independence, the integrity of the national and international justice systems, and the protection of human rights and fundamental freedoms, including the right to fair trial and legal representation of those individuals accused of the most abominable crimes, whether in national or international tribunals.

Indeed, this responsibility must be to the fore when the challenge of confronting the scourge of terrorism has created an environment in which some argue that choices have to be made between our security and our civil liberties. This we must resist strongly. Those who committed the terrorist attacks in the United States on September 11th were enemies of freedom and democracy, with no respect for the

sanctity of human life and the values of human rights. But it would be a tragedy if the response to this assault on our common humanity was to entail an erosion of the very human rights and values which we have painstakingly constructed. The fight against terrorism should never be an excuse for the diminution of human rights. This is the message I have reiterated time and again since the events of September 11th, and which I wish to urge members of the independent Bars to take to back with them at the conclusion of this conference.

Let me conclude by referring to some of the practical work my Office is doing to promote and protect the independence of lawyers. In addition to supporting the Special Rapporteur, my Office is engaged in a number of technical cooperation programmes through which we conduct training courses and workshops for legal professionals, including judges, prosecutors and lawyers. In the last year alone training programmes have been undertaken in South Asia, the Arab and Andean regions, in Cambodia and East Timor. My Office has for some time now been cooperating with the International Bar Association to prepare resource materials and tools, by way of a training manual, for these human rights courses and workshops.

On that practical note, I wish your new Association well and hope as it grows it will look to the Office of the High Commissioner in Geneva as a partner in its human rights work.