

Remarks at the Symposium on International Law and Global Markets at the Occasion of Receiving the Dean Robert G Storey International Award for Leadership

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1. Introduction

Good afternoon colleagues and friends and a very warm thanks to the Center for American and International law to which I am an alumnus, for extending an invitation to me. My last visit to this Center, was 16 years ago when I attended the 38th Annual Academy Fellowship Program in 2001

Today, I am deeply honoured to receive the 2017 Dean Robert G. Storey International Award for Leadership, because, not only I am the first person from the African continent to receive such an Award, but I am also the first South African alumni from this august Institution to receive this accolade from my country. Furthermore, It could not have come at a more opportune moment in my life as not only is my country celebrating its 20th constitutional anniversary in 2017, but 2017 also marks a momentous epoch in our history and struggle for freedom, as we commemorate the 100th anniversary to honor the commitment of our struggle stalwart and founding father of our freedom and democracy, Mr. Oliver Reginald Tambo whose entire existence was directed at our liberation and freedom, establish the rule of law with an independent judiciary so that our nation will never suffer from the yoke of oppression again. I therefore commend the Center and the Southwestern Institute for International and Comparative Law for its vision in establishing this Award which is a befitting tribute to its founder, Dean Robert G. Storey who dedicated his life to peace, justice and the rule of law in the international community.

Coincidentally, the topic I will be speaking on, is also on an international subject, i.e. on ethical business and human rights. As I believe human rights and ethical business practice makes for good business and it's the right thing to do. My remarks will focus particularly on the international mechanisms such as the UN Guiding Principles on Business and Human Right (“the *Ruggie Principles*”) and the Sustainable Development Goals (“the *SDGs*”) and how they can contribute to the maze of access to justice universally. I will also touch on the pivotal role, National Human Rights Institutions (NHRIs) as part of the Global Alliance of National Human Rights Institutions (GANHRI), can play in contributing to access to justice and securing redress for victims of corporate-related human rights violations. I will briefly, highlight how the institution I work for in South Africa, namely, the South African Human Rights Commission, effectively uses its mandate to ensure access to justice for the vulnerable and the marginalised.

2. Business and human rights framework

2.1. Sub-Commission on the Promotion and Protection of Human Rights

The erstwhile Sub-Commission on the Promotion and Protection of Human Rights produced a damning report on the activities of Transnational Corporations and other business enterprises in February 2005 in Geneva. The Sub-Commission was created as a subsidiary body of the former Commission on Human Rights (CHR) as its think-tank and to conduct

research into topical issues. The Sub-Commission was required to produce informative and substantive reports for consideration by the Commission on Human Rights and action on way forward. The Sub-Commission produced a report entitled: the responsibilities of Transnational Corporations and other business enterprises with respect to human rights. However, member states of CHR were sharply divided on the issue with many calling for a total rejection and nullification of the report of the Sub-Commission. Member States, particularly from the Global South forming part of the delegation of CHR objected to this negative position and insisted that a report that spoke to major atrocities committed by Transnational Corporations (TNCs) and Other Business Entities (OBEs) in the areas of worst forms of gross human rights violations, of child labour, of environmental damage and destruction and failure to pay a living and decent wages for work done, could not be ignored. Ultimately, the CHR resolution 2005/69 created the mandate of the UN Secretary-General's Special Representative on Business and Human Rights

2.2. The development of the Ruggie Principles

In 2011, Professor John Ruggie during his tenure as the UN Secretary-General's Representative on Business and Human Rights developed the UN Guiding Principles on Business and Human Rights. These principles are commonly known as the Ruggie Principles, and their major aim is to "operationalize the Protect, Respect, Remedy" Framework for business and human rights. The Ruggie Principles rest on three complimentary pillars. The first one is the state's duty to protect against human rights abuses by third parties including businesses, by taking appropriate steps to prevent, investigate, punish, and redress such abuses through effective policies, legislation, regulations and adjudication. Secondly, the corporate responsibility to respect human rights which means, that companies are expected to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved. The third pillar is the access to remedy principle, which requires both states and business to ensure that victims of business related human rights abuses have greater access to effective remedy/ies, both judicial and non-judicial.

The preceding shows that these Principles have created a new cluster of responsibilities. That is, they counter the traditional view of many in the corporate world that human rights are a concern of state and not of business. At the epicentre of these Principles is the 'operationalization of the responsibility of businesses for respecting human rights by undertaking human rights due diligence'. In this way, these Principles have created a new normative requirement, whereby, businesses now have an onus to adopt policies and implement human rights friendly systems that will enable the effective management of human rights issues. The private sector can and should play a role in championing human rights. Thus, the corporate sector should uphold human rights wherever they operate. After all, it is about advancement of human dignity as enshrined in the Universal Declaration of Human Rights that shaped the universal discourse of peace and justice for all underpinned by dignity, freedom and equality for all.

2.3. Towards a treaty process

The process has since moved on since the development of the Ruggie Principles. In June 2011 the United Nations Human Rights Council adopted Resolution 17/4.¹ This resolution established a Working Group on the issue of human rights and transnational corporations and other business enterprises. The working group was amongst others, tasked with promoting the

¹ See http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4.

effective and comprehensive dissemination and implementation of the *Ruggie Principles*, and assisting States with developing domestic legislation and policies relating to business and human rights in their respective jurisdictions.²

Further, in 2014, the United Nations Human Rights Council adopted Resolution 26/9 establishing an “open ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights” with the mandate to “**elaborate an international legally binding instrument to regulate, *in international human rights law*, the activities of transnational corporations and other business enterprises**”.³

Resolution 26/9 stresses that the obligation and primary responsibility to promote and protect human rights and fundamental freedoms lies with the State, and that States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations. While the obligation of States to regulate business activities within their territorial jurisdiction is clear, on the other hand States’ obligations regarding corporate conduct acting abroad remain unclear.

3. Challenges with regards to access to effective remedies

Although the third pillar under the *Ruggie Principles*, addresses the issue of access to effective remedies in the case of human rights abuses caused by business, it is widely acknowledged that the Ruggie Principles singularly are insufficient to contribute to the maze of accountability. This is mainly because currently, there is an asymmetry between rights and obligations of businesses. While businesses are granted rights through hard law instruments, such as bilateral investment treaties and investment rules in free trade agreements, and have access to a system of investor-state dispute settlement, there are no hard law instruments that address the obligations of corporations to respect human rights.

Further, most of the African states do not have sufficient and effective domestic legislation to regulate the conduct of big businesses operating within their jurisdiction. Most domestic jurisdictions, particularly in the Global South often have, “patchy, unpredictable, often ineffective and fragile remedies for human rights protection”.⁴ The strong position of businesses is further exacerbated by the inequality of financial resources that normally exist in these circumstances. That is, big companies are able to employ teams of lawyers to use all available procedural hurdles to their clients’ advantage at the expense of the victims of human rights violations who are in most cases, poor, indigent and vulnerable who are unable to litigate due to the astronomical cost of civil litigation.⁵ Moreover, research⁶ reveals that the most victims are hampered from accessing effective remedies because of numerous juridical barriers and practical obstacles, both at the national and extraterritorial levels.⁷ It is in the

²See <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>

³ UNHRC Resolution 26/9, Accessed at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9

⁴ UN Human Rights Council, Progress report on legal options and practical measures to improve access to remedy for victims of business-related human rights abuse, U.N. Doc. A/HRC/29/39, para. 3. Accessed at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=24900

⁵ ‘In the courtroom & beyond: New strategies to overcome inequality and improve access to justice’, Business & Human Rights Resource Centre, <http://business-humanrights.org/en/corporate-legal-accountability-annual-briefing>

⁶ See <http://business-humanrights.org/en/>

⁷ *Ibid*

light of this that the African Union Commission is working towards developing means to promote the protection of human rights from being violated by corporate entities.⁸

4. The Role of NHRIs in the field of business and human rights

In the context of an absent universally applicable hard law to hold corporations to account, NHRIs have a pivotal role to play in addressing corporate-related human rights challenges and violations at international, regional and local level.⁹ NHRIs are in a perfect position to contribute to the ‘web of accountability’¹⁰ through monitoring and holding both government and corporations to account when they violate human rights. The role of NHRIs has been augmented by the adoption of the Sustainable Development Goals (SDGs) in September 2015. The SDGs have been developed in a way that demonstrates that they “mirror the broader international human rights framework, including elements of economic, social, cultural, civil, and political rights, as well as the right to development and set specific targets for disadvantaged groups.”¹¹ Thus, NHRIs can use mechanisms such as the Ruggie Principles and the SDGs to ensure that victims of corporate-related human rights violations secure redress.

5. The South African case study

5.1. Effects of the apartheid system on South Africa

South Africa is lauded the world over for having ‘the most admirable Constitution in the history of the world’.¹² Coincidentally, the year 2017 marks two decades since our much revered Constitution was promulgated. This is a time to reflect on the significant gains brought about by the constitutional dispensation. It is also a time to introspect and take stock of the societal challenges of inequality and unemployment which continue to beset our country. It cannot be gainsaid that although the apartheid system (historical separation of people into racial categories) has been abolished by the adoption of the Constitution, its scars and effects on society in the form of class and social stratification are still all too visible. Illiteracy, poverty and unemployment continue to be the pervasive challenges that serve to marginalise people. These challenges were recently identified as ‘critical obstacles’¹³ to access to justice in South Africa, demonstrating not only that they represent human rights violations in their own right but, also, that they impede access to remedies when rights might be violated.

5.2. The role of the South African Human Rights Commission

The South African Human Rights Commission (the “Commission”) is an independent body established by the Constitution and the South African Human Rights Commission Act 40 of

⁸ Joint Communiqué at the 12th AU-EU human rights dialogue hosted in Brussels, Belgium on 10 January 2017, available at https://eeas.europa.eu/sites/eeas/files/170110_communique_-_final_for_print_0_0.pdf

⁹ International Co-ordinating Committee of National Institutions for the promotion and protection of human rights, ‘The Edinburgh Declaration’ accessed at <http://nhri.ohchr.org/EN/Themes/BusinessHR/Pages/10th%20%20Biennial%20Conference%20of%20the%20ICIC.aspx>

¹⁰ Kate Donald, Promising the World: Accountability and the SDGs, 2016. <http://www.hhrjournal.org/2016/01/promising-the-world-accountability-and-the-sdgs/> and *Breaking the Accountability Taboo in Sustainable Development Negotiations*, CESR, June 2nd, 2015 <http://cesr.org/article.php?id=1732>

¹¹ Ibid.

¹² Sunstein ‘Designing Democracy: What Constitutions Do’

¹³ Bingham Centre for the Rule of Law ‘International Access to Justice: Barriers and Solutions’ 14

2013 to support constitutional democracy. Section 184(1) of the Constitution (Act 1996) sets out the mandate of the SAHRC as follows:

- (a) Promote respect for human rights and a culture of human rights;
- (b) Promote the protection, development and attainment of human rights; and
- (c) Monitor and assess the observance of human rights in the Republic.

The mandate of the Commission, therefore, is broad and relates to the wholesale realisation of human rights for all. The Commission has since 2014, been focusing on the theme of Business and Human Rights. The Commission in partnership with the Danish Institute for Human Rights has published a Business and Human Rights Country Guide. The Country Guide draws from the United Nations Guiding Principles significantly and is based on the roles and responsibilities of government and companies as set out in the UNGPs. The Country Guide offers guidance to corporations on promotion and respect for human rights in South Africa. It is intended that the Country Guide will lead to the development of a National Action Plan (NAP) on business and human rights in South Africa. The Commission has also undertaken a number of capacity-building efforts in the form of stakeholder engagements, seminars and workshops focusing on business and human rights.

Recently, the Commission intervened and was admitted as a friend of the court in the matter of **University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others**¹⁴ where the Commission submitted arguments in terms of international law highlighting that states have a duty to protect against and remedy human rights violations committed on their territory by private parties through creating effective judicial remedies to prevent or punish the infringement of a debtor's rights.

The matter involved low income earners whose salaries were subject to attachment orders, often for trifling debts, resulting in considerable rights violations which I have come to term the 'commodification of the right to dignity'. The matter went all the way to the Constitutional Court which ruled that these attachment orders, which were not subject to judicial oversight, were inconsistent with the provisions of the Constitution.

In doing so, it invalidated the unlawful deduction of money from the salaries of workers whose debts were often smaller than the interest accrued. At the Commission, we are pleased with the judgment, as it has led to legislative reform towards the amelioration of the plight of the poor, vulnerable and marginalised who were subject to egregious abuses. The commercial credit industry, particularly the unsecured credit industry has burgeoned in South Africa. The affidavit filed by the respondents in the matter revealed that, "As at June 2013, this industry supported 20 million credit consumers out of a population of 52 million. At the time the total debtors' book was estimated at R1.47 trillion, of which R168 billion comprised unsecured debts."¹⁵ It cannot be gainsaid that although unsecured credit enables those who would not ordinarily have access to credit to obtain it, it also leads to over-indebtedness. Thus, it becomes imperative that adequate checks and balances are put in place to prevent abuses in the unsecured credit system which if left unchecked could lead to human rights violations.

The Commission is also involved in on-going litigation in a matter where certain retail clothing companies in South Africa seek to challenge the constitutionality of a legislative measure promulgated by the Minister of Trade and Industry to promote responsible lending

¹⁴ 2016 (6) SA 596 (CC)

¹⁵ Ibid para 6

and prevent over-indebtedness. The Commission has been admitted as a friend of the court in that particular matter and will use various international law instruments, such as, the International Convention of Economic, Social and Cultural Rights, World Bank Good Practices for Financial Consumer Protection and the G20 High Level Principles on Financial Consumer Protection to argue that the State has a duty to promote responsible lending by taking effective legislative measures which address reckless lending, inadequate assessments of the affordability of credit for consumers and consequently high levels of over-indebtedness. This is pivotal in light of the fact that over indebtedness is significantly increasing in South Africa. Over indebtedness impacts disproportionately on poor households thereby rendering such households acutely vulnerable to violations of their constitutional rights to dignity¹⁶ and their ability to access socio-economic rights such as housing¹⁷, health care services and sufficient food¹⁸ and consequentially they are caught in a perpetual debt trap.

6. Conclusion

Once again, I am honoured to receive the 2017 Dean Robert G. Storey International Award for Leadership. Dean Storey was a visionary who worked tirelessly towards justice, but also towards a just world order, underpinned by the rule of law and an independent judiciary. He remains not only a mentor to all of us but he continues to inspire in all of us to challenge ourselves to address injustice wherever we find it, as the Late Dr Martin Luther King Jr. said “an injustice anywhere is an injustice everywhere.”

Let me conclude by making a clarion call to all of us to put all hands on deck, working tirelessly using the principles of business and human rights to foster fluid dialogue between private and public sector to create just legal conditions to guarantee that all people enjoy their human rights everywhere.

Thank you.

¹⁶ Section 10: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

¹⁷ Section 26: “Everyone has the right to have access to adequate housing.”

¹⁸ Section 27(1): “Everyone has the right to have access to health care services...sufficient food and water.”