



## **THE JUDICIARY OF ESWATINI**



# **A STATEMENT MADE BY THE HONOURABLE JUSTICE BHEKIE MAPHALALA ON THE ROLE OF THE JUDICIARY IN PREVENTING CONFLICTS CAUSING HUMAN RIGHTS ABUSES AND THE POSSIBILITIES FOR COMPLIMENTARITY WITH ARUSHA AND THE HAGUE BASED INSTITUTIONS**

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- 1. We are meeting here today in Arusha, Tanzania, the Judicial seat of the African Continent. As Africans we anticipate and have great expectations that the African Court on Human and Peoples' Rights together with other Regional Courts in Africa inclusive of the Southern African Tribunal (SADAC), the East African Court of Justice as well as the Economic Community of West African States (ECOWAS) would ensure the advancement of justice as well as the promotion and protection of human rights in the African Continent.**
- 2. The practical reality on the ground is that the continental and regional courts have not succeeded in addressing the naked impunity of the abuse of human**

**rights. However, Domestic Courts have attempted to develop constitutional structures with provisions to promote and advance human rights and which further acknowledge political and economic inclusiveness as a remedy against political power. The abuse or perceived abuse of human rights has been the greatest cause of political conflicts and anarchy on the African continent and this has arisen from instances where there is systematic discrimination or due to fighting over access to resources.**

- 3. Political conflicts, civil wars and unconstitutional military coups have become a common feature in the African Continent and these conflicts have consistently undermined justice and the rule of law. The violent conflicts create a fertile ground for the wanton plunder of national resources, increase in the refugee population, starvation and hunger, sexual violence against women, reprisals against the civilian population as well as the fragmentation of State power. Incidentally during armed conflicts, the justice system**

**is often amongst the first public institutions to crumble.**

- 4. In those African States which are still enjoying some semblance of political stability, the judiciary is able to execute its constitutional mandate of preventing political conflicts which are causing human rights abuses. The judiciary has a constitutional duty to confront human rights violations decisively, punish those individuals responsible for committing heinous crimes and further provide redress for victims of human rights violations, war crimes and genocide. The Rome Statute of the International Criminal Court prohibits amnesty and immunity for crimes against humanity, war crimes and genocide. This ensures accountability against the perpetrators as well as justice to the victims.**
- 5. The United Nations Charter, the Geneva Conventions as well as other international instruments on human rights serve to underwrite the international human**

**rights order. The universality of constitutional structures against impunity proceed on the assumption that sovereign states would uphold the constitution and the bill of rights and that international institutions would play a supplementary role.**

- 6. The advancement of international law has entailed unrelenting pressure to ensure that individuals responsible for grave human rights violations face prosecution and consequent punishment. These prosecutions constitute an important weapon against impunity, restores the rule of law and build a culture of human rights. The evolution of international justice assist in dealing with human rights violations where domestic justice is unable or unwilling.**
- 7. The United Nations, in support of the International Criminal Court has introduced guidelines in dealing with gross violations of human rights inclusive of acts of torture, extrajudicial executions, slavery, enforced disappearance as well as systematic racial**

**discrimination. Domestic criminal justice is not designed to deal with serious crimes committed in armed conflicts such as torture, crimes against humanity and genocide because such crimes are rarely defined in domestic law of States Parties to the Rome Statute.**

- 8. The establishment of the International Criminal Court in 2002 has had a dramatic impact on international law. It is the first permanent international criminal tribunal with jurisdiction over individuals accused of genocide, war crimes and crimes against humanity. The Court is non-retroactive and prosecutes violations committed after its establishment or after the date of ratification by States Parties. It is a Court of last resort; its complementarity provision gives States primacy in initiating prosecutions.**
- 9. The Rome Statute allows the Court to intervene when a country is unwilling or unable to prosecute in three instances: Firstly, a State Party to the Rome Statute may refer its own situation. Secondly, the United**

**Nations Security Council may refer a case to the Court. Thirdly, the office of the Prosecutor may open a case if it can show that it has sufficient grounds to pursue prosecution but with leave of the Court's Pretrial Chamber.**

- 10. The criticism against the International Criminal Court is that Member States of the United Nations Security Council are not party to the Rome Statute even though they have an interest in the enforcement of the Rome Statute. It is a truism that African countries perceive the International Criminal Court as pursuing a selective approach to justice by targeting primarily Africans whilst ignoring other international crimes perpetrated by powerful Western Nations or their allies. Accordingly, African countries perceive the International Criminal Court as a repressive tool of Western Neo-colonialism. Such a perception underlines and explains why the African Union did not co-operate with the International Criminal Court to the indictment of the former President of Sudan.**

**11. In conclusion, it is my fervent hope that the African continent will stop importing political foreign solutions for African problems from countries which were responsible for African slavery and colonialism. It is a pity that those foreign countries who were responsible for our suffering and untold misery are today teaching Africans about democracy and justice. We have a divine duty as Africans to develop and strengthen the African Union and the regional institutions as well as the Continental and Regional Courts in order to dispense justice and strengthen the culture of human rights across the continent.**

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