

Date: **28 May 2013**

Place: Library Auditorium, UWC, Cape Town

Speaker: **Judge Albie Sachs**

I'm glad I've just been informed what I'm speaking about tonight. I think we'll have to re-align the topic.

Nineteen-eighty-eight, you mentioned. And it's raining, drizzling – nothing unusual about that. I'm sitting in the kitchen of Kader and Louise Asmal, feeling very, very at home – nothing unusual about that. And we're doing work that we know is historic. It was one of those 'pinch-me' moments (maybe the first real 'pinch-me' moment) – knowing that we were entering into a whole new phase, not simply denouncing, imagining, mobilising; but beginning to craft the foundations of the new society. The way we put it, we were converting the Freedom Charter into an operational document that would protect the rights for which people had been fighting.

What was unusual was that, for that whole weekend, Kader didn't smoke once inside that house!

I'd just come out of hospital after the bomb that cost me my arm, and the sight of an eye, and the Constitutional Committee of the ANC had a brilliant idea in terms of healing. In addition to the operations and the medications and the rehabilitation – all of which helped to manage the reconstruction of my body – the biggest healing agent they could think of was to put me together with Kader and instruct us to draft the first outline of a Bill of Rights for a new, democratic South Africa.

And I flew to Dublin; and sitting at the table – I'd actually imagined, Louise, that it was a wooden table, in my head it became a wooden table, but apparently it wasn't, it had a plastic-covered top – and the Constitutional Committee had said, "Just draft an outline..." – that was our mandate – "...of the fundamental themes that a Bill of Rights in the new South Africa ought to have."

I recall we divided up the work – I would do the material side and Kader would deal with the enforcement, and then we would swop. And I sat down at that table with a clean piece of paper – no books, no documents, no charters, no constitutions, no preambles – the idea being that a Bill of Rights should speak from inside of you, it should proclaim itself. It's something so fundamental, so central to what human beings are, and what they want, and

what they strive for, that they're entitled to, that it shouldn't be derived from anything: it should just emerge. And particularly those of us who'd spent decades swimming, immersed in that environment, the phrases should come out. And I'm writing now with my left hand – I had to learn to write with my left – and I jotted down a number of fundamental rights that the people of South Africa would have. And afterwards, we checked; Kader went through it, he made some textual changes, and we checked it against the great instruments of the world, and all the fundamental rights were there.

It wasn't because we were particularly clever or astute. It was because we'd been so deeply immersed and involved in a struggle, with millions of people taking part, and expressing their demands, that we were able to find the language. And have that 'pinch-me' moment: "Is this really happening? Is it really true?" And we had many, many more 'pinch-me' moments. They're not quite as frequent today as they were in that period.

So there was something almost inseparable between Kader and myself. We couldn't have been more different – I'm tall, he was short; I tend to be quiet, I don't think anybody ever called Kader quiet; he enjoyed his *dop*, I've tried hard all my life to become a drinker and failed. Our personalities, our styles of expression – totally different. And yet that became a strength. And when I think of the other members of the Constitutional Committee of the ANC – each one an individual, a life experience, a personality, a mode of working, points of reference. Jack Simons presiding, to begin with: this brilliant pedagogue, this great teacher, this person with an amazing mind, who loved an argument and a debate. And then, he was replaced by Zola Skweyiya – laconic, thoughtful, very experienced, a deep person. Penuell Maduna – ebullient, boisterous; Brigitte Mabandla, with Brigitte's special sensitivities; and so I could go on.

And we're learning, in the very process of working together, how valuable it is to have different experiences, points of view, personalities, backgrounds, all feeding in. And how fundamental debate – debate, debate, debate, and more debate – was; and presiding, the creator of the Constitutional Committee, the key person in this whole project, was Oliver Tambo.

It's not coincidental, or accidental, that he had a very special role in this whole constitutionalising of dimensions of the struggle - he was a protégé of Albert Luthuli. We've read in the comments about Kader that he had such an enormous influence over Kader Asmal, who was also from Stanger, from the same area. And OR never wavered. He had a

vision that was incorporated in the Freedom Charter, that opened – even in 1958 – the idea of a non-racial membership of the ANC, but he did not push it at that stage.

I should just mention, I'm speaking about the ANC not as though the ANC was the only participant in the freedom struggle; I'm speaking about the ANC because that's where I was, that's what I know. But in doing that, please – it's not a hegemonic approach, it's not appropriating our history, which is against the very approach that people like OR and Albert Luthuli and so on represented all the way through. Widen the embrace, widen the contact with others, find everything that's positive that can contribute, that you can learn from, from whatever source.

We used to speak, many of us, in the '70s, not about human rights, but 'so-called' human rights – it was even one word, 'so-called human rights'. There were two reasons for that. One was simply a reaction to the fact that Henry Kissinger, in charge of United States foreign policy, was always speaking about human rights, human rights, human rights, even when the CIA were training murderers and killers and assassins who went on to support the destruction of the democratically-elected government in Chile. And so this idea of human rights got caught up in the Cold War argumentation, and therefore we spoke about 'so-called' human rights.

It wasn't a problem for Oliver Tambo. He believed, in terms of the values of the Freedom Charter, as an African motivated by *ubuntu* – although we didn't use the term '*ubuntu*' in those days – and as a Christian. His Christianity was very, very deep, and many times he thought he would even leave politics, and become a full-time minister in the Anglican church. He never wavered, he supported revolution, he supported armed struggle. But he did so within a framework that was constantly anticipating a Bill of Rights in a future democratic South Africa.

But as I said, many of us spoke about 'so-called' human rights. I don't think Kader had the same problems many of us had at that stage – Louise might know, and maybe I can discuss it with her afterwards – but it wasn't 'so-called' for him. And I think it's partly that he was very much involved in international movements and could see the extent to which international law was favouring the notion of human rights as a set of values that should be binding on all peoples, in all countries. In my own case, strangely enough, it was listening at an international conference to people from South America – from Chile, from Brazil, from Argentine – speaking about '*dereitos humanos*' with the same passion and commitment and revolutionary endeavour that we had in connection with South Africa, that made me

understand that human rights can be something that is used in a purely opportunistic way to support the foreign policy of certain countries against major social change.

But why hand over the human rights project to people using it in that limited way? To people like ourselves fighting in Latin America for freedom, for liberation, *direitos humanos* was as central, as fundamental a source of passion. And so, ironically for me, I had dropped the 'so-called' because of *direitos humanos*.

But there was a second, more profound reason why it was complex for us: because in a way, in South Africa, we were and we weren't fighting for human rights. Our struggle was focused on national liberation. It just didn't make sense to speak about human rights when the majority of our people were living as a colonised population: driven off the land, their languages denied and marginalised, without the vote, without representation, without any participation in the sovereignty. To say that you can go to the beach, you can sit on any seat you like in a railway train, which was the analogy from the United States – it just didn't register. It's like saying 'human rights' within the context of slavery; you couldn't have it. You could never have human rights in the context of colonialism. You couldn't have it, because the system was so profound, so pervasive, so dominating, that [human rights] came to appear as a soft alternative that would leave the system intact while creating certain space for individuals to do things they couldn't do before.

So quite apart from the problem of the Cold War – appropriation/misappropriation of human rights – we had a conceptual problem in South Africa itself. I spent a fair amount of time wrestling with this. It worried me – how can we be against human rights? We were fighting for humanity, for people, for liberty. And yet, to make the focus on human rights the central character of our struggle – and we were being advised to do this by people all over the world: "Fight for civil rights in South Africa, for civil rights in the context of apartheid..." It was an absurdity. And it really meant give up the armed struggle, give up the boycott, give up all the instruments we were using to bring about transformation, and somehow proceed on a civil rights-type campaign, on its own.

The conclusion I came to was that the core aspect of our struggle was for self-determination for the majority of people, who had never participated in the sovereignty that Britain gave – effectively, to the whites – in 1910. But normally the fight for sovereignty is a fight for secession – partition, separation – from the dominant colonial power. We weren't fighting for secession, we weren't fighting for independence. On the contrary, a phony independence was being foisted upon the people through the bantustan system. We didn't want that kind of

independence. So it meant sovereignty (the essence), national liberation (the mechanism), democracy (the form): one person, one vote. It meant more integration, not more separation. It meant more commonality, not secession or separation.

And then I said, human rights then become the ultimate objective. And if you see this as a continuum, then human rights isn't opposed to the project of emancipation, the liberation of our country. We don't reject it; we see it as the goal. We see it as the kind of outcome that we want, of a free society for a free people.

Kader was – I wouldn't say impatient, but less interested in these conceptual problems that I might have been. But that was part of the fun and the glory of belonging to the Constitutional Committee – we would have our different preoccupations. He was more hands-on; and he just wanted to, like, get on with it, to use the instruments to hand to advance the struggle for freedom in South Africa. Oliver Tambo, in his very vision and approach, somehow merged all these different themes.

And it came through in very practical ways. Siphos already referred to the Kabwe Conference. (I didn't know you were there; I don't know if you had a different name then, I suspect you did!) One of the big issues on the agenda, a whole day, was the code of conduct. Is it permissible for the ANC to use what was called 'intensive' methods of interrogation against captured enemy agents who have information about plans to poison, to assassinate leaders, to blow us up, to spike munitions, to create every kind of mayhem?

And Oliver Tambo's approach was not, for him as the president, to say, "I forbid any practices like that", but to place the issue before the membership. And we had elected delegates there, inasmuch as we could elect people outside, in exile, to attend the conference. An issue like that had to become an issue embraced by the whole organisation, as a deep moral question – not as a command from the leader, but as a moral issue that entered into our mentality, thinking, ways of being, and was embraced by everybody in the organisation.

I was asked to present at some of the most beautiful moments in what's now becoming quite a long life, with many ups and downs and ins and outs. One of those moments was two young MK guys, coming up onto the platform, and one saying, "If you give Security even the tiniest bit of leeway to use what's called 'intensive' methods of interrogation, it never stops there." And another one coming up and saying, "We are fighting for life. How can we be against life?" And my heart just swelled. It's easy for me, a middle-class lawyer from a

comfortable background, working and living and moving in the realm of fundamental rights, to speak like that; but here's this young guy, probably not even alive today, in the frontline of struggle, and saying, we are fighting for life, how can we be against life?

For OR, that consistency went all the way through, when it came to terrorism. And I remember the hijacking, by Black September, of planes, that got huge headlines – people saying, “Why don't we do this? Why is our leadership scared?” And OR and the others saying, we don't do that. Not simply because it will give us a bad name, it will reinforce the notion of us being lawless, and simply wanting to grab the country and destroy any sense of values. It's not only that, who knows who might be on that aeroplane? The deeper reason is, what does it do to us? Who do we become when we are just instruments of death? When the strongest binding force, that deep, moral commitment to freedom and liberation is what humanises us and gives us the capacity to withstand the torture, the isolation, the imprisonment.

And one felt that all the time, coming from the leadership of people like OR. Against terrorism, against torture. In the liberation struggle, we were building up a Bill of Rights in our own ranks, in the most difficult circumstances, because of matters of deep principle. And some people speak about this as softness, as weakness – I've just read the other day, 'saintliness', as though somehow saying somebody is 'saintly' is something negative.

And now, OR is providing a quiet leadership to people like Kader and myself, and Zola, Penuell, Brigitte – not pushing, listening; putting things on the agenda, and projecting a Bill of Rights for a future, free, democratic South Africa, as part of the policy coming from the organisation. (I remember very well, because it was one month before I was blown up – some people date events from when they got married, from when they turned 21, their birthdays, maybe even when they got divorced. We date events from when we went into exile, when we went into prison, when we were blown up or came back into the country or voted for the first time.)

We were all there at that meeting to deal with constitutional principles. And OR was the one who projected the idea of a Bill of Rights. In Durban, some of our supporters had set up an anti-Bill of Rights committee! As someone put it, it wasn't a 'Bill of Rights', it was a 'Bill of Whites' – it was seen as a document that was intended to protect the privileges, the power, the property, the posts of those who were already well entrenched.

But OR insisted on a Bill of Rights. It was not just an important thing to show how democratic and sensitive to fundamental human rights we were. It was strategic – centrally strategic – in

overcoming the idea of protected rights for the whites in South Africa. Our friends from all over the world were saying, you've got to have special protections, you've got to understand their position – they're frightened. They brought it on themselves but you've got to be realistic. If you don't have special, entrenched positions to prevent the whites from being driven into the sea in South Africa, you'll never get change, and it'll never work.

OR resisted that. He said, our answer to protecting white minority rights is a Bill of Rights that protects the rights of everybody – the minorities, the majorities. That protects the fundamental human rights of everybody because they're human beings, and it includes the rights to culture, language, religion, the right not to be just chucked out of your home, the right not to be treated in an arbitrary way. He insisted on that. And I think he also realised, because he'd seen abuses inside his own organisation, that we needed a Bill of Rights against ourselves. But nobody is anointed by history to be an impeccable leader, and you need principles and structures and institutions to ensure that the values for which you've been fighting are entrenched, and can survive and can be invoked by people who feel they are being threatened. This is already now in 1988; Oliver Tambo serene and clear all the way through, in this respect.

To get back to Kader: international law was something special that he brought to the table – whether it was that little kitchen table, or the table we used in Lusaka. The Geneva Conventions were added to by protocols that recognised that war was not just simply the clash of mighty armies, of states: there were all sorts of irregular forms of combat, internal civil wars, prisoners who were being taken. Rules had to be given, had to be laid down in respect of those situations. Kader saw the importance of these rules for a struggle like ours and helped OR to craft a signatory position of the ANC to these protocols, saying that if any enemy combatants – that meant soldiers of the regime – were captured, the ANC would treat them as prisoners of war, with all the rights and privileges and protections that went to prisoners of war. It was very well received in Geneva; it was received as a respectful international law. Even if it didn't have enormous practical consequences, it was a strong signal of respect for international law, and crafted in proper, technical legal language, appropriate to the circumstances. And Kader was there with the sensibility and the legal technology to ensure that this wasn't just some kind of boastful piece of polemical presentation, but a properly crafted participation in an important international project.

Kader had encyclopaedic knowledge. If you wanted to know who was the captain of the Somerset cricket team in the English cricket league in 1937, he could tell you – he was like a Wisden on legs. We quoted many sources in our debates but the only person who ever

referred to a papal encyclical was Kader. I'm sure that wasn't unrelated to his being in Ireland, but nevertheless it was an unusual reference. He loved knowledge, he loved reading; he picked up information from all over the world. Statistics, facts, data, ideas, themes, who wrote what, who said something where. And that was enormously valuable for the work we were doing.

When he was able to come back to South Africa, and was made a professor here at UWC, he chose for his inaugural lecture a topic that hadn't been on the agenda at all – nobody was thinking about it. It's now called Transitional Justice. He'd studied so many countries that had moved from authoritarian regimes – often, dictatorial regimes. How did they deal with the crimes of the past? We learned about the Nuremberg trials, their principles, that was well known; and we got great information about that. We were introduced to new terms, like 'lustration' – it was used a lot in Eastern Europe, where it meant chucking out officials who'd belonged to the Communist Party and preventing them from holding office.

It was a very long lecture – it didn't come to an end; Kader didn't like endings. He was impatient, he moved on, he was dissatisfied, he wanted more information, he never settled. There was very little repose in Kader's thinking. And that's why there's relatively little published work by him but as an educator, he was enormously influential in his style, his manner. I've met two presidents of Ireland who've commented, "Oh, South Africa – Kader Asmal". His name crops up straight away, it's almost like a conditioned reflex: somebody from Ireland meeting a South African – Kader Asmal.

And people were deeply influenced by him, by his passion, his commitment, his seriousness, his sense of fun, his capacity to provoke. He was just different, he wasn't just another boring lecturer – or even another bright lecturer – going through the material in an organised, systematic way, so that you were piling up knowledge upon knowledge. Knowledge, ideas, events, personalities, themes, emotions... all came out in an ebullient, bright, provocative mix that people remembered. Many people say it changed their lives because they got involved in the anti-apartheid movement, which brought them into broader struggles and sharpened their intelligence. The connection between intelligence and emotion and passion and sense of destiny... Kader Asmal was the catalyst for all of that.

So we came away from his inaugural lecture enormously impressed with the erudition, but very unsettled because he didn't come to a conclusion. What does it lead to? What does it mean? And yet not too long afterwards, there was another passionate debate in the ANC just a few months before the first democratic elections, about what to do about the report by

the Motsonyana Commission into the violations of human rights by ANC personnel of people captured in Angola. They said they'd only heard one side of the story, from the former captives, but a strong *prima facie* case of the use of torture had been made out, and the ANC must follow up and take action against those responsible. And now there're about 80 of us deciding what to do. I remember, for many of us, it was simple: we set up the commission, and we must follow the findings. Pallo Jordan stood up, and [in] his special Pallo voice, slightly high-pitched, gave a very short presentation: "Comrades! I've learned something very interesting today. There's a thing called 'regime torture', and that is bad; and 'ANC torture', and that's okay. Thank you for enlightening me." And he sits down.

Commented [F1]: Can't find any online reference to this commission. The only reports of any commission of enquiry into ANC violations of human rights in Angola are the TRC hearings.

And then somebody stood up and said, "There's something strange about our debate today. What would my mother say?" – that's his mother, an African woman with maybe three or four years of schooling, not very sophisticated in politics but with a strong sense of right and wrong. "And my mother would say there's something odd about this debate, and unbalanced; because here we are, correctly discussing all the things that we've done wrong, but what about all the things that have been done to us for centuries? The violations, the cruelties – we're not speaking about that at all." And I'm not sure if Kader was the next speaker, but this was one of those issues... you can't decide by a vote of hands what to do on a moral question like that. Kader got up and said, "What we need is a Truth Commission." All the information he'd gained, all that erudition and learning and disparate pieces of fact suddenly found their moment.

And so the origins of the TRC, ironically, paradoxically, came not from a desire to expose or call upon those responsible for all the cruelties of apartheid to come forward and acknowledge what they did; but the trigger was the eagerness of the ANC to come into the new society with clean hands, with open acknowledgement of the things that we had done wrong, and that we didn't want to hide. And Kader Asmal was the person who found that even balance. This had to be not a project of the ANC as a political party, but the project of the new, democratically-elected national government, on behalf of the whole nation, looking at all violations from all sides.

It's very hard, speaking about Kader in the past tense. It's partly that he was such a vivacious, energetic person; he wasn't an old soldier who simply faded away. He was bright and brave and funny; sardonic, witty, abrasive, indiscreet, challenging, provocative, until the very last time that I saw him. One just says: Kader was Kader. A very unique person, a very special ingredient in our very rich panoply of people, individuals, personalities, who made up particular aspects of our struggle.

He didn't die rich. I don't think Kader was ever poor, but as far as I know he was never rich; and he earned the money to pay for his house, for his motor car, the things that he wanted. He never saw politics as a means of accumulation for himself, for his family, his friends; for people close to him. But I think it wasn't that he despised riches; he just reconfigured what's meant by riches – the things that are beyond rubies: ideas, debate, values, principles. And the inheritance – the legacy – that he left, I think, for all of us who were close to him, went well beyond so many millions, or billions, or trillions, or whatever it is, of Rands. The legacy was the Constitution: that document that started off with me learning to write with my left hand and Kader sitting in the other room, working on the mechanism, the enforcement. So it started off with that tiny little project – but it was a 'pinch-me' project: it's now the Constitution of South Africa.

And to me, that's the huge, huge change – when people say nothing has changed, I think there's something that says there's nothing in their heads that's changed. The reality has changed totally, the context has changed. It doesn't mean that everything is going right in our country. Everybody knows of things that are not going right at all, and I sometimes say we've shot ourselves in the foot so many times, we've run out of feet to shoot ourselves in. But the huge difference is we have the Constitution, we have the mechanisms, we've won the right to speak freely – we speak freely, we investigate, we denounce things that we don't like, we argue, we debate. You listen to any phone-in programme in the morning, you'll hear every voice from every part of the country, every political position. In that sense, our people are not brave, they just speak out, they're used to speaking out.

We have many brilliant investigative journalists. People will argue about whether they are always investigating the right things, the right people, the right focus. Sometimes, some people say it's getting a little bit monotonous, it's the same tune over and over again. The reply to that is, well, the same things are happening over and over again. That's the kind of debate that's permissible now. We have free and fair elections. People come from all over the world to study our elections – not to see if they're free and fair, but to see what lessons they can take to other countries that can be replicated there. We have a judiciary that is strong, independent. It has its internal debates and quarrels, intellectual quarrels, which every judiciary should have. We take it for granted. It's great we take it for granted; it's become part of our normality. It's sad we take it for granted, because we don't realise quite how great the achievement is.

It's in this context that I understand the awards to be considered and given here. If I understand it correctly, the idea is not to have just another polemic supporting this individual, that individual, or the other, brilliantly or not so brilliantly; but to deal with experiences, ideas, in a creative way, a fresh way; to have the same courage that we needed in the struggle days to deal with issues like torture, issues like terrorism, issues like race, and non-racism; issues like sexism – a very hot issue inside our movement, very hotly debated: how could a comrade be a freedom fighter by day, and a dictator at night? Difficult issues. We debated them then; now there are other – and sometimes the same – difficult issues. We debate them now, we debate them in a principled way, and we remember the legacy of people like Kader – not as some kind of finger-pointing, now-you're-being-naughty, behave-yourself... sort of a conscience, filled with negativity and criticism, but as a figure of impulsive intuitions in favour of freedom and justice and fairness, of speaking openly and honestly, of loving ideas, debates, acquiring more knowledge. To me, that's the manner in which the ghost of Kader will be participating very directly in the minds of everybody making these particular awards.

I think I'm called a Professor Extraordinary at UWC and as such, I congratulate the thought that's gone into the awards. I feel very proud that UWC's involved in this project, and I wish it every success. As a former judge, I myself can't take part in – and won't take part in – maybe the kind of judging that involves... forms of judgement that a former judge shouldn't be involved in! I leave that to my colleagues on the Bench. I don't want to be seen as in any way predicting how they might feel, whether that is used in a mischievous or even a positive way. I might have to decline some of the award supporting ideas. I think I can certainly work on the principles that have to be involved, and, if it's possible to have a post-judicial virginity, maybe find a way to protect that, and at the same time to encourage this very wonderful project that's taking place.

Thank you.