Zimbabwe

Summary by the executive committee of the International Bar Association (IBA) of their report on the state of the judiciary and the rule of law in Zimbabwe.

A delegation of distinguished international judges and lawyers visited Zimbabwe between 12 and 18 March 2001. It held meetings in Zimbabwe with lawyers, judges, academics and government representatives, including President Robert Mugabe.

The fact finding mission was organized by the Human Rights Institute of the International Bar Association (the IBA) and was jointly funded by the Open Society Institute. The delegation was sent in the light of the growing international concern at the apparent erosion of the rule of law in Zimbabwe, as evidenced by reports of lawlessness in the country and intimidation of the judiciary. The purpose of the delegation's visit to Zimbabwe was that of a fact finding mission to examine "(i) the current status of lawyers and judges in Zimbabwe; (ii) the legal guarantees for the effective functioning of the justice system, including the independence of the judiciary and respect for the judiciary, and whether these guarantees are respected in practice; (iii) the ability of lawyers to render their services freely; and (iv) any impediment, either in law or practice, that jeopardizes the administration of justice."

At the heart of the crisis concerning the rule of law in Zimbabwe are the events of 2000 when commercial farms were invaded by 'war veterans' and others. It is accepted by government that these occupations are unlawful. The courts have made orders, to which the State has consented, to bring the occupations to an end. Yet the government has refused to enforce the orders of Zimbabwe's own courts. The last elections were marked by serious violence. Violence continues in the country. The findings of the delegation are:

1 The government's refusal to obey the courts' orders is undermining the authority of the courts and encouraging a culture of lawlessness in Zimbabwe. The delegation believes that land reform is urgently needed in Zimbabwe. However, this reform must be brought within the confines of the law. The notion that the laws and judgments of the courts of an independent Zimbabwe can be ignored because of the injustices of pre-independence days is dangerous and misguided. It is through the application of the law, amended in accordance with the sovereign wishes of the people, where necessary, that justice is obtained and not through the encouragement of anarchy and lawlessness.

2 The independence of the judiciary is being undermined by threats to and intimidation of the judges. Threatening and demeaning remarks and acts have been directed against the judiciary. No government action has been taken to stop or discourage people from intimidating members of the judiciary. Such governmental inaction is unacceptable. The government has vigilantly to guard the judiciary against threats and intimidation. If a society permits its judges to be threatened and intimidated by violence, then it is only a matter of time before judges bow to the threats and intimidations.

3 The independence of the judiciary is also being undermined by the sustained campaign to force the resignation of a number of judges, including by threats of violence. This campaign has been fuelled and encouraged by the government. A principal target of the campaign has been Chief Justice Gubbay, who has been forced into early retirement. This forced retirement of Chief Justice Gubbay and the pressure on other judges to resign violates the tenure of judicial appointments as guaranteed by the Constitution of Zimbabwe and is not in accordance with international standards.

4 The independence of the judiciary requires protection for the tenure of judicial appointments. Such protection is needed to combat the arbitrary wielding of power by government officials. As such, the Minister of Justice's role in forcing the resignation of Chief Justice Gubbay and in approaching and seeking the resignation of two other supreme court judges is wrong. Any attempt by a government official, especially by the Minister of Justice, to seek the resignation of a judge, whose decisions against the government are deemed to be unpalatable, is a serious breach of the independence of the judiciary.

5 An effective administration of justice requires legal service providers to be free of intimidation and violence as they carry out their duties and responsibilities. In some rural areas of Zimbabwe, legal service providers are subjected to physical assaults, threats and intimidations. The police in the rural areas are either unwilling or unable to prevent the assaults and intimidations that have been perpetuated against legal service providers in the rural areas. This unhindered attack on legal service providers is adversely affecting the administration of justice.

6 A professional association of lawyers, the Law Society, may be under increasing pressure to curtail its criticism of governmental actions with regard to the judiciary. The Law Society has been courageous and vociferous in supporting the judiciary and the rule of law. The delegation earnestly hopes that the government does not intend to pass legislative amendments that would put limits on the ability of lawyers to engage in public discussion regarding matters concerning the law and the administration of justice.

7 The prevalent perception in Zimbabwe is that selective prosecution based on political allegiance is taking place. If true, selective prosecution would be in violation of the constitutional and criminal laws of Zimbabwe. Selective prosecution would also contravene Zimbabwe's international obligations. Due to the pervasiveness of the allegations, we note here that Zimbabwe has a clear obligation to ensure that it administers justice so that all people in Zimbabwe are accorded equal protection of the law. Selective prosecution leads to a culture of impunity in which people believe that they will be able to commit criminal acts of violence and go unpunished so long as their political party is able to get elected. The delegation is concerned that such a culture of impunity is growing in Zimbabwe

The recommendations of the delegation are:

(1) The delegation received assurances from President Mugabe and the Minster of Justice that the government will respect the independence of the judiciary. This assurance should be publicized to the people of Zimbabwe. This assurance should also be backed by the following concrete actions:

a The government should now implement the orders of the courts. These orders were made pursuant to the government's consent. There is no justification for any further delay in the implementation of these court orders, though sensitivity and care should be made in carrying them out; and

b A clear and unambiguous statement from President Mugabe that the continued occupation of the farms is

unlawful and that the time has come for all who are occupying farm lands to leave those farms so that the question of land reform can now proceed under the law.

(2) The government of Zimbabwe should zealously protect judges against threats of physical violence. All reasonable measures to protect the judges should be made by the government. The Minster of Justice, the Attorney General, as well as the police, should investigate acts that threaten the judges. Given the importance of the judiciary, none of these officials should wait for a formal complaint to be lodged before commencing an investigation into publicly reported and threatening statements against judges or investigating publicly reported acts that are an affront to the court. The delegation received important assurances from the Acting Chief Justice that he will protect the judges from attacks.

(3) Removal of judges from office should only be brought about pursuant to the procedures set out by the Constitution. Acting Chief Justice Chidyausiku told the delegation that he does not believe that there is any reason to initiate a constitutionally mandated tribunal inquiry to investigate any present judge of the high court or the supreme court. This is an important statement that should be publicized to the people of Zimbabwe.

(4) There should be an independent investigation to examine the allegations of selective prosecution with the right to have access to all relevant police and prosecuting authority files.

(5) There should be a clear and unambiguous instruction to all senior police officers that it is their duty to investigate all allegations of crime regardless of the political persuasion of the alleged perpetrator of the crime.

(6) Steps should be taken to strengthen the legal profession so as to increase access to justice in the country. This is an area in which the International Bar Association will offer its assistance.

(7) The government should desist from threats or inducements to influence the views of the legal profession on matters regarding the independence of the judiciary and the rule of law.

Preparation for trial

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You could proceed as follows: A. Complete a full analysis of the facts according to Steps 1 to 5. B. Define the theory of the case by careful analysis. C. Identify the strengths and weaknesses of the evidence on the material facts in issue. D. List the main facts which tend to help prove (or disprove) the disputed facts at the heart of the case. Call them your *good facts*. Then list the facts which would tend to assist the other side. Call them the *bad facts*. Note that the *good facts* for the one side are almost invariably *bad facts* for the other. E. Consider: (i) who to call; (ii) the sequence of your witnesses; (iii) the evidence to elicit from each witness; (iv) who the other side's witnesses may be; (v) their likely evidence; (vi) your cross-examination for each of them, including whether you need to cross-examine at all, and if so, the topics to be covered in cross-examination and the version to be put to them.

The *good facts* and *bad facts* are then manipulated throughout the trial according to a simple formula as follows: Emphasise the *good facts* in the opening address. Prove the *good facts* by leading the evidence of your own witnesses. Support the *good facts*, if possible, by eliciting favourable evidence in the cross-examination of the other side's witnesses. Diminish, if you can, any harm done to any of the *good facts* during the cross-examination of your witnesses by re-examining them. Minimise the impact of the *bad facts* by having your own witnesses deal with them in their evidence-in-chief or in re-examination, where possible, and by cross-examining the opposing witnesses appropriately. Argue the case by explaining why the *good facts* should be accepted as having been proved, why the *bad facts* should be rejected or ignored and why the court's verdict should be in your client's favour.

The same process is followed by the other side, except that the order in which the defence or defendant has the opportunity to deal with the *good facts* and *bad facts* differs, with cross-examination preceding their opening address. Of course, the defence or defendant will have their own theory of the case and their own view of what the *good facts* and *bad facts* respectively are for the defendant.

Counsel's trial notebook.

There are many good reasons for keeping detailed notes of your preparation. The trial may not proceed, in which event your notes will serve you well the second time around. You may not be available for the trial on the new dates, in which event your successor may have the benefit of your preparation. The client should not have to pay twice for the same work. Most of all, the case may be so complicated that you cannot store all the important things you need to remember on scraps of paper or in the recesses of your (fallible) memory.

A separate trial notebook should therefore be kept for each case. It is best managed as a folder with dividers for different topics. This notebook should also serve as your roadmap through the case, including the pleadings, notices, discovered documents and statements. The trial notebook should contain: (i) The results of each of the seven steps outlined earlier; (ii) An outline of your opening address; (iii) A separate section for each witness you intend to call, with a copy of the witness' statement, cross-referenced to relevant material such as statements of other witnesses and documents; (iv) A separate section for each opposing witness you anticipate, with notes on the topics for cross-examination, and cross-referenced to the statements of your own witnesses and to the discovered documents, and with a note of the facts to put to the witness; (v) A draft closing argument.

In time every advocate develops his or her own methods and style in preparing for trial, exactly as they do in the other skills and techniques of the litigation process. No two advocates use exactly the same model, but every successful advocate has a system that works. And every system that works includes the steps explained in this article. Competent and confident advocacy depends on it.