



**Address by Public Protector Adv. Thuli Madonsela during the
Institute for Security Studies' 5th Annual International Conference
in Sandton on Thursday, August 14, 2014.**

Programme Facilitator and Director of Research at the Nelson Mandela

Foundation, Mr Verne Harris;

Federal Judge of Buenos Aires, Judge Daniel Rafecas;

Members of the Institute For Security Studies

Distinguished elegates from varying sectors;

Members of the media;

Ladies and gentlemen;

Good morning!

To the women among us, happy Women's Day I am sincerely honoured to address this session of the conference of the Institute For Security Studies (ISS). I thank the

ISS for involving me in this very important dialogue. Your conference takes place today, which, for us as the Public Protector South Africa, signifies the launch of our Stakeholder Dialogue for 2014. As soon as I am done here I will be joining members of the Public Protector Team in Braamfontein, where we will be engaging with, among others, the Premier of Gauteng, the Speaker of the Provincial Legislature, the Mayor of the City of Johannesburg and the Legislature as a whole. We will be engaging them in a conversation on “**Joining Hands in a Partnership against Maladministration and Corruption**”. Your conversation on crime accordingly fits very well with what we are trying to do as the Public Protector Team. As you all know corruption is a crime and effective dealing with corruption requires a vibrant rule of law culture in any society.

After talking to the politicians, we will proceed to Orlando in Soweto, where we will engage in the same dialogue with the people of Soweto inviting them to join in the partnership or united front against maladministration and corruption while attending to their complaints. We have done this for five years. Every year we take a different theme. This year unfortunately we are revisiting a theme we engaged in a few years ago. We will be focusing on what really does the Constitution say about the role of the Public Protector and what does the Constitution say government has a duty to do in engaging the Public Protector. The whole conversation will be around the meaning of section 181 and 182 of the Constitution and in so far as it relates to government, section 181(3).

This is unfortunate because we dedicated a whole year to this conversation but in the last year or so problems have emerged that have required us to go back to the drawing board on what really does the Constitution say. It is for this and many other reasons that we are excited that we are here to discuss the rule of law and talk around a credible justice system and the role of Chapter 9 institutions. This takes me back to what has brought us here today. Firstly, let us all applaud the Institute for Security Studies (ISS) for bringing us here today to discuss this important subject during its fifth annual international conference. I also commend the civil society organisations that are here with us to discuss these matters. The ISS has asked me to talk very briefly about “***Transparency and Accountability in the Face of Challenges to the Rule of Law in South Africa: The Role of the Public Protector.***”

Justice Louis D. Brandeis, of the United States once said: “Sunlight is said to be the best disinfectant.” For me, this statement captures the essence of the importance of transparency in preventing and combatting wrongdoing in society, including state affairs and the criminal justice system.

The best starting point is always to get a common understanding of the concepts. There are three key concepts we need to talk about very briefly today. Those are, accountability, transparency and the rule of law.

Let us start with accountability. There are many forms of accountability. For example, we are all accountable for our actions, including the ethical and criminal implications of our decisions or actions. At that level accountability means a process that enables an actor to give account of or clarify their conduct and take responsibility thereof, including making amends or accepting sanctions where necessary. At the core of accountability is ensuring there is no impunity. Where criminal conduct is involved, impunity not only undermines healing for victims but also encourages recidivism, that is, repeat offending.

In the context of public accountability, there is a definition I thought I could share with you from the United Nations General Assembly that was crafted specifically regarding accountability by secretariat. It says “Accountability is the obligation of the Secretariat and its staff members to be answerable for all decisions made and actions taken by them, and to be responsible for honouring their commitments, without qualification or exception. Accountability includes achieving objectives and high-quality results in a timely and cost-effective manner, in fully implementing and delivering on all mandates to the Secretariat approved by the United Nations intergovernmental bodies and other subsidiary organs established by them in compliance with all resolutions, regulations, rules and ethical standards; truthful, objective, accurate and timely reporting on performance results; responsible stewardship of funds and resources; all aspects of performance, including a clearly defined system of rewards and sanctions; and with due recognition to the important role of the oversight bodies and in full compliance with accepted recommendations.”

You are probably aware that the secretariat of the United Nations will be like a mini government with the general secretary and staff and that the General Assembly is made up of all the countries that constitute the UN and the secretariat exercises power on the basis of stewardship. The power is not its power but is given to the secretariat on the basis of trust. The members of the General Assembly cannot be there all the time. They have to trust that those they have entrusted with power will act within the confines of the precepts that have given them those powers and in the best interest of the members of the General Assembly and the countries that are represented. I thought the situation is the same with any country in that those in government are expected to be stewards in their exercise of public power and control over state resources. That power is given to them on the basis of trust and again with the understanding that members of society can't always be there. It is then assumed that those that have been given power will always do so within the confines of the law and the best interest of the power givers.

The UN's approach suggests that accountability in the exercise of entrusted power incorporates answerability and taking responsibility. Incidentally, one of the first reports I issued shortly after I became Public Protector dealt with accountability and criminality in the criminal justice value chain.

My office had been approached to investigate alleged failure by the police to investigate a case of alleged drug dealing and illegal towing and chopping of vehicles in the Pretoria area. Police officials were allegedly involved in those criminal

activities. A high ranking official in the police was asked to look into the matter by the complainant and when nothing happened the complainant felt that this was encouraging impunity as the perpetrators were going on without any hindrances. He then approached the Public Protector and by the time the investigation was done, the criminals had left the place. However, a police radio was found at the place, which suggested that there had been some kind of communication going on and the house in question showed that there had been some drug dealing. The finding from my side as the Public Protector was that the police had failed to discharge their responsibilities. I found that the failure to investigate the complaints was unjustified, unreasonable and in conflict with the spirit of the Constitution and the Police Act. I also found that this adversely affected the credibility of the police and could be seen as defeating the ends of justice. The remedial action included the requirement that disciplinary action be taken against responsible members of the South African Police Services (SAPS) and that criminal prosecution be also considered against deserving members. The report back on the implementation of remedial action eventually indicated that disciplinary action had been taken against some of the members and that some were prosecuted.

This brings me to the role of my office in ensuring both transparency and accountability within state affairs. The part we play in this regard flows from the provisions of section 181 of the Constitution which establishes the Public Protector as an independent constitutional body with powers as provided for under section 182 which powers are to “investigate any conduct in state affairs or in the public

administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action". Section 182 of the Constitution further enjoins the Public Protector to be accessible to all persons and communities while indicating that legislation will regulate and expand the powers.

The powers of my office have indeed been regulated and expanded by various pieces of legislation, key among these being the Public Protector Act 23 of 1994.

The impact has been to give the Public Protector six key statutory mandates and additional powers regarding the conducting of investigations. The key statutory mandates are the following:

- Investigating maladministration, abuse of power and abuse of state resources under the Public Protector Act,
- Investigating corrupt activities as defined under section 17, 20, 21 of chapter 2 of the Prevention and Combating of Corrupt Activities Act 2004 with respect to public money.

My office is a safe harbour, together with the Auditor-General, for whistle-blowers under the Protected Disclosures Act 2000. This includes the disclosure of white collar crimes in state affairs. Where the disclosure is more of a criminal nature than administrative conduct, those cases are referred to competent bodies such as the Hawks, for example, sometime last year we received a complaint that a certain member of the Executive is involved in criminality involving abetting drug lords. We

didn't investigate it because it was less about white collar crime or administrative action and more about criminality. The matter was referred to the Hawks.

The beauty of an Institution such as my office is the range of remedies that allow it to ensure accountability beyond the traditional criminal justice system remedies on matters of corruption and malfeasance. Key to the remedies is the opportunity to claw back some of the state funds that are siphoned away through corruption and malfeasance.

You will agree with me that making amends should include giving back ill-gotten money. What is important in such instances is not just ending impunity but clawing back the money so that it can be deployed to advance the public courses it was meant for rather than the state forking out more money to fix the damage.

Those of you who are familiar with the RDP programme would understand that if you only worry about sending people to jail you are going to have two problems. The first one is that the burden of proof is quite high. You also depend on the competency of the police and prosecution to prove beyond reasonable doubt that crime was committed before a person can be sent to jail. Secondly, even if they go to jail you may not be able to get back your assets and therefore claw back the money into the public courses it was meant for. There are mechanisms to claw it back; one of them is the Asset Forfeiture Unit. The difficulty in the Justice Criminal System is that it may take a while and by the time the process is concluded the assets may be hidden or depleted.

My statement doesn't seek to undermine the criminal justice system, which is an important pillar of the rule of law. The point I seek to make is that having an administrative accountability earlier on may reduce some of the accountability challenges of the criminal justice system. At least one previous director of the NPA felt that it was important that the Public Protector steps in and ensures administrative accountability by making findings of maladministration and then the prosecution follows where it can. In view of the inquisitorial nature of our proceedings, we also have an opportunity to get state actors to account directly for their conduct. As you know in a court of law a matter can be concluded without involved parties ever participation directly in the proceedings.

On the question of transparency, I opened with a quote from Justice Louis Brandeis referring to sunshine being the best disinfectant. Sunshine is indeed the best disinfectant. It is worth noting that our Constitution commits us to an open and transparent democracy. PAIA is one of the mechanisms for giving effect to open democracy. The Promotion of Access to Information Act is one of the mechanisms for giving effect to open democracy.

In our work as Public Protector South Africa, we have found that there is a good link between openness and ending impunity. For example, when society knows that there has been wrongdoing, it becomes its own guardian and enforcer of corrective

action. However, if things happen behind closed doors, the people don't get a chance to be their own enforcers.

This is why institutions of the Ombudsman such as the Public Protector tend to rely on the media, in pursuit of what we refer to as moral suasion. We release our reports to the public to facilitate people's involvement. The thinking is that if society is seized with a matter, it is able to exert the necessary pressure on authorities to take the due action whereas if no one knows, things are likely to be swept under the carpet thereby creating a fertile ground for impunity.

Have you ever wondered what those who keep saying my office should shut up, are trying to hide from society? My view is that they know that sunshine is the best disinfectant. Indeed the drafters of the Public Protector Act knew that too hence the default setting in the Act is that reports must be made public unless there are compelling circumstances.

If we agree that the essence of democracy is dialogue between the people and those they have entrusted with public power and resources, those that reject facilitated public debates on these reports are therefore in my respectful view, at odds with the role of this office being there to support and strengthen Constitutional democracy as envisaged in section 181 of the Constitution.

The rule of law itself thrives where there is accountability and transparency. What is the rule of law? The world justice forum identifies four factors that must exist in a rule of law state, these are:

1. Accountable government

2. Publicized and stable laws that protect fundamental rights

3. Accessible, fair and efficient processes

4. Access to justice

In my view, it is important to distinguish between ruling through the law and the rule of law. The key requirement under the rule of law is that nobody is above the law.

Under apartheid we were familiar with ruling through the law. Incidentally, under the rule of law there should be no ruling by anyone. There should be governance because when somebody is ruling that is autocracy. That is not governing together with the people which is not democracy. Therefore the rule of law means it is the law that rules the people. Linked to this is that no one should escape accountability for their conduct no matter who they are. In other words, there should be no impunity for anyone regardless of positions or relationships. Impunity not only undermines consistency and healing for victims, it encourages cracks in the system, particularly the criminal justice system, that many step in to exploit. When that happens, the rule of law is undermined.

While on the question of the rule of law, it's important to understand that it is everybody's business to ensure that the rule of law is upheld. All of us have a duty to ensure that the rule of law and supremacy of the Constitution are upheld. For this to happen transparency is important to keep people engaged. They need to know what is happening within the institutions they have created.

I have no doubt that you already are playing your part in ensuring the rule of law. For us as the Public Protector South Africa that makes you part of the partnership against maladministration and corruption and part of the united front that will ensure that the next 20 years of democracy are free from maladministration and state affairs are handled with accountability, integrity and responsiveness. This will not only ensure that the objectives of the National Development Plan, among others, are reached but also that the Constitutional dream of a freed potential of every person is achieved in a land of improved quality of life and where opportunities are equalized for all.

Thank you and enjoy the conference.

Adv. Thuli Madonsela

Public Protector of South Africa