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Africa Law Today

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A publication of the ABA Section of International Law's Africa Committee

A Message From The Chair

Victor S. Mroczka

WHAT A YEAR!!

Whew, what a year!! As we enter the final months of the ABA committee year, I cannot help but be impressed by all that we have accomplished this year. When the Committee leadership got together at the leadership retreat last year, there was much trepidation as we questioned whether we could fill the large gap left by past-chair Edna Udobong. Nevertheless, we swallowed a big gulp, forged ahead, and set out a plan of the things we wanted to accomplish in the upcoming year. Admittedly, we shot high as, upon returning from the retreat, I realized that this was at best a wish list and not really a plan. Little did I know that we the leadership underestimated the excellence and commitment of our own Committee and actually shot too LOW. We quickly hit the ground running when Vice-Chair par excellence Roland Abeng organized a good governance program in Cameroon. This was the first in-country Africa Committee program of recent memory and received huge media exposure for both the Africa Committee and the ABA section. Then, Vice Chairs Roland Abeng and Gretchen Bellamy then decided to re-launch the Committee newsletter and turn it into the fine product you see before you today. This is the fourth newsletter this ABA year and the product just keeps getting better and better. Many thanks to Roland and Gretchen for all the fine work and making Africa Law Today what it is.

Then came the private equity program in New York. This was an instant home run program organized by members Ogechi Eto and Linda Oramasionwu on their FIRST attempt at a program. In fact, this program was so timely that it was copied almost in its entirety by another bar association approximately two months later. Imitation really is the sincerest form of flattery, no? I cannot wait to see what the two of them come up with next. Then, on the program front, came the coup de grace - the Spring Meeting. Enough cannot be said about the outstanding efforts put forward by superstars Laura Young and Vice-Chair Jacob Saah. Laura's Zimbabwe program was an Africa Committee first - a showcase program that was so hot one wondered who would NOT attend. It was the highest attended and highest profile event of the entire Spring Meeting (but I admit to maybe being a bit biased here).

CALENDAR OF EVENTS

“SHOULD WE OR SHOULDN’T WE: HARMONIZATION OF TRADE PREFERENCE PROGRAMS AND THE IMPACT ON CURRENT BENEFICIARIES

WASHINGTON, DC

JULY 14, 2009 12:00PM-2:00PM

COMMITTEE CONFERENCE CALL

JULY 15, 2009 AT 1:00PM EST

SECTION LEADERSHIP RETREAT

WISCONSIN

JULY 29-30, 2009

COMMITTEE CONFERENCE CALL

SEPTEMBER 16, 2009 AT 1:00PM EST

FALL 2009 NEWSLETTER

OCTOBER 2009

Solicitation of Contribution

Contributions to this newsletter by committee members are always welcome. In fact, we are officially requesting at least one article from all members (we are ambitious aren't we?!). Please send your articles or other news to:
roland@theabenglawfirm.com

Thank you in advance!

In the largest room in the facility, Laura packed the room and, deservedly, the panel got a prolonged standing ovation for the quality of their remarks. Let's see the other Section committees try to replicate that!! And this was quickly followed by Jacob's oil and gas panel. As a former Ghana Working Group Co-Chair, all I can say is that everyone else got to see the “Jacob work ethic” that those of us in the working group have seen and known about for years. The panel had what are now being referred to as “all the typical Africa Committee elements”: packed room, diversified interests, lively panel, insightful Q&A, and hotel staff begging attendees to leave so that they could go home. Well done, Jacob.

To close out the ABA year, by now you should all have what has become the gold star of the Africa Committee - the year in review. Led by organizer Ibrahim Bah, the Africa Committee has once again put out the year in review section that covers the most topics, the most countries, and has the most depth. Many thanks to Ibrahim for another excellent effort and to all the authors for the quality of their reports.

But so as not to be accused that we're only about newsletter and programs, our members went beyond that on many fronts. Whether it was preparing students from the Ghana Law School for the Jessup Moot Court Competition, working with Books for Africa in getting much-needed law books on the continent, conducting efforts through our working groups in Ghana, Liberia, and Sierra Leone, or deciding whether we should react to various developments impacting our colleagues on the continent in places like Niger and Cameroon, members have had their hands in all these efforts (and many more) and have continuously showcased all that the Africa Committee has to offer.

I hope you have enjoyed this ABA year as much as I have (if not, please let us know as our main purpose is to serve you, our members). And as we move into a new year with a new group of leaders (although some old names remain), I, as you, look forward to see what we can come up with next year. Thank you all for a wonderful year, and special heartfelt thanks to Gretchen and Roland for everything that they have endured from a pushy, stubborn, and demanding Chair.

See you next year!!

A Message From The Editors

Roland Abeng

AFRICA'S TREND: DYING AS HEAD-OF-STATE!

The late Gabonese President Omar Bongo Ondimba has just been buried in his home town of Franceville after 42 years at the helm of the Republic of Gabon. Prior to Omar Bongo we witnessed the death of Lasana Conte of Guinea Conakry (December 2008) and Eyadema of Togo (February 2005). There are a host of other presidents on the continent who died of natural causes while in power. Of course there are also those who die through coups like Vieira of Guinea Bissau, Kabila of the DRC, Sankara of Burkina Fasso. Finally, there also are those who are preparing to die in power like Biya of Cameroon, Mubarak of Egypt, Bouteflika of Algeria, Deby of Chad, Sassou of Congo-Brazzaville, Tamja of Niger and others who have or are about to tailor the fundamental law of their land to be at the helm until death!

Something tells me I have to go back to school to understand this new phenomenon regarding what is happening today in Africa. The behaviours exhibited by these "leaders" are not in line with any of the rule of law, constitutional law or political science principles that I learned at the University of Yaoundé. What I am witnessing today is eerily similar to what my secondary school history classes taught me about France's Louis IV and England's James III. My secondary school history teacher described such systems as monarchies and clearly explained why they were so.

The current situation in Africa, especially the francophone countries, is very disturbing when we consider that we find ourselves in the 21st century. Our African leaders and ruling classes have pushed it too far and we all know and can predict the end result - a continent plagued with conflict from North to South and from East to West.

This newsletter will be looking at this phenomenon and other related issues in a more detailed manner in its future editions but it is worth while noting here that meaningful change can only come from within the continent and from Africans themselves.

For the past 9 months this newsletter, "Africa Law Today", has kept you abreast of legal issues related to the continent and beyond and we have tried as much as possible to meet up with the standards you set for us or maybe I should say "standards set by our committee Chair, Victor Mroczka," whose eye for detail gives very little room for error.

Gretchen and I want to use this opportunity to thank all of you who have been an integral part of this newsletter for almost a year now and implore you to remain with us so that we work together to make the continent better. We continue to count on you as you prepare to send the articles that make "Africa Law Today" what it is.

In this issue, you will enjoy articles from "superstar," regular "Africa Law Today" contributor, and Vice Chair-elect *Ricardo Silva* on land use in Africa; superstar committee member and Vice Chair Jacob Saah on good governance, and *Adejoke Babington-Ashaye* makes her long-awaited debut into our newsletter with an intriguing analysis of the *WIWA vs. SHELL* case; you will undoubtedly enjoy the speech of U.S. Ambassador to Cameroon which we publish here in-extenso; and news about other miscellaneous items such as the Books for Africa Project. We sincerely thank you all for your support.

Roland Abeng & Gretchen Bellamy

COMMITTEE LEADERSHIP

Chair: Victor S. Mroczka

Vice Chairs: Hdeel Abdelhady
Roland D. Abeng
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Nene Amegatcher
Ibrahim Sajalieu Bah
Gretchen C. Bellamy
Babatunde Irukera
Jacob A. Saah

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Leigh Middleditch
Zubaida Qazi

LAND USE

Land Use And Agriculture Projects In Sub-Saharan Africa

Ricardo Silva

A recent article in a Portuguese newspaper called my attention to an issue that, due to part of my work over the years, is of great interest to me: land use in Africa. The article focused on a recent UN report on land use and agriculture on the continent.¹ The innovative part of the article and the report was that it addressed commercial agriculture. The downside was that (once again) it raised the specter of turmoil and neo-colonialism.

Historic factors and modern problems

The first necessary step to analyze land use and agriculture in Africa is to understand the residual effects of colonialism on the land ownership structure of most African countries. In many cases, the colonial power envisioned its African possessions as a valuable natural resource. This vision led the colonial powers to strongly restrict access to land and its ownership. In general terms, some of the restrictions then put in place consisted of:

- (i) Acquisition of ownership rights being restricted to nationals of the colonial powers;
- (ii) Ownership rights mainly restricted to urban property. Use of rural land could be granted through a variety of rights, but such land could not be owned by individuals or companies;
- (iii) Local indigenous communities were allowed to remain on and use their traditional land. However, relocation was possible to make way for commercial agriculture;
- (iv) Available land was either used for traditional subsistence farming by the local communities or for large scale commercial production by colonists from the colonial power or other European countries; and
- (v) The wide majority of the land remained the property of the colonial power.

This structure spilled over and had consequences in the post-colonial land use and ownership structures:

- (i) With independence, most companies and individuals involved in commercial agriculture abandoned the African countries where they had carried out their activities;
- (ii) Access of foreigners to land was heavily restricted;
- (iii) The land previously owned by the colonial power was transferred to the ownership of the new independent state; and
- (iv) The local indigenous population, due to the lack of resources or know-how, continued to carry out subsistence farming.

To complicate things, civil war also brought additional difficulties:

- (i) Abandonment of fields, as population fled to the cities;
- (ii) Landmines being placed heavily in rural areas; and
- (iii) Almost complete disruption of production.

The above factors strongly influence the way commercial agriculture looks towards Africa today, while at the same time limiting African nations' ability to "market" their agricultural potential.

African Bounty

It is undeniable that one of sub-Saharan Africa's great riches is its soil. In countries like Angola and Mozambique, it is common to hear that all you need to do is throw some seeds in the ground and the plants will grow by themselves...

But richness of the soil is not all Africa has to offer. We will also find vast stretches of abandoned available land,

large numbers of locals looking for work (many of them with an agricultural background), rural areas waiting for redevelopment, a large regional market for agricultural goods, and governments looking for investment.

Every rose has its thorn

At least from an investor's standpoint, investment in Africa's agricultural sector is a high or moderate-risk investment. Companies expect a return on their investment, and risk analysis is an important part of any business decision.

In order to convince its shareholders and board to invest in a certain project, a company has to place the pros and cons on the plates of the scale and look at the result. If the pros outweigh the cons enough to make the project interesting, it may get the go-ahead.

Therefore, to increase the weight of the "pros" plate, the investors will be looking for more than the quality of the soil, availability of land and manpower. It will require, notably, favorable financial and fiscal terms to offset the risk posed by abandoned lands and landmines, amongst other factors.

Conditions for granting of land rights

This brings us to the conditions that are offered by African countries to attract foreign investors to the agricultural sector, an aspect of foreign investment that has received the most criticism from some sectors of the international community.

Although it is true that some African nations are granting land rights to foreign investors under terms manifestly more favorable than they would obtain on other continents, it is equally true that this same strategy has traditionally been followed in the development of abandoned and frontier land in other continents; the US being a good example. Potential alone cannot justify high prices, and the host nation and the investor have to agree on an overall package that will both compensate the investor for taking the risk and contribute to development of the local economy.

In terms of land rights, although ownership of land is commonly restricted to nationals of the host country, various alternatives exist that allow foreign investors to implement their projects. Surface rights, *enfiteuse* rights in Lusophone countries, long term leases, and agricultural concessions are all viable options to structure agricultural operations.

The question we may be tempted to ask at this stage is whether the granting of medium to long-term land rights for reduced fees to foreign investors is a bad option for developing countries. In our opinion, the answer is not as simple or straightforward as some would pretend.

Local development and avoiding problems

Granting of favorable terms to foreign high-risk investment projects is not necessarily a recipe for disaster.

First, low fees due for use of the land do not necessarily imply very low revenue for the state. The host nation will benefit more from taxation of the profits of a successful project than it would from fees collected from an unsuccessful one.

Second, a "new Zimbabwe" can be avoided by balanced management of the country's land. While land should be granted to commercial agriculture ventures, land should also be set aside for local farmers. Although local farmers may not yet be ready for commercial farming enterprises, if the agriculture projects are well structured and implemented, they soon may be.

To this effect it is important that the foreign commercial projects contribute to:

- (i) Creation of local wealth, through the employment of locals and payment of decent wages;
- (ii) The education of local farmers, by training their employees in modern production methods; and
- (iii) Education of the local population in conjunction with the government.

If a project is capable of generating this added value, and the local government does its part in stimulating local entrepreneurship and granting of rights to locals, the prospect of neo-colonialism and strife should be successfully avoided, as:

- (i) Local ownership or access to land will be guaranteed;

- (ii) Jobs will be created for the local community and wealth created and distributed; and
- (iii) Local farming enterprises will flourish, as there is a real need to supply local markets.

In a nutshell, if we look at agriculture projects in objective terms, providing incentives to foreign investors may not be a bad solution. The secret to successful investment in developing countries (and African countries are no exception) is to attract foreign investors that are willing to leave something behind to add value to the local communities. Once the locals have gained access to the necessary know-how, capital and tools, they will be ready to commence their own projects. Initially these may be small and oriented towards local markets (which typically will not be of interest to the international entrepreneur), but with time they may expand to cover the national and, who knows, the international market.

¹ The article "*África. O futuro está na terra fértil arrendada ao preço da chuva*" was published in "I" Newspaper, 26 May 2009 edition. The report can be found online at: <http://www.fao.org/docrep/011/ak241e/ak241e00.htm>.

GOOD GOVERNANCE

Towards Lasting Development Through Sound Governance: Ghana's Journey

Jacob Saah

On May 16, 2009, the White House Press Office released a statement that President and Mrs. Obama would be visiting Ghana on July 10-11, 2009. Being the first visit of the first African-American President of the United States to Sub-Saharan Africa, the significance and symbolism of the visit is undeniable. Reactions to the statement came pouring from across the continent, reflecting all shades of opinion. If there was a prize to be given for the most colourful reaction, then surely the Nigerian Nobel Laureate, Wole Soyinka, would have been the winner. His reaction:

"If Obama decides to grace Nigeria with his presence, I will stone him. The message he is sending by going to Ghana is so obvious, is so brilliant that he must not render it flawed by coming to Nigeria any time soon."

What is this message and what makes it so brilliant? According to the White House Press Office, "[t]he visit is to strengthen the U.S. relationship with one of its most trusted partners in sub-Saharan Africa." More importantly, the Press Officer continued, "[t]he visit seeks to highlight the critical role that sound governance and civil society play in promoting lasting development." This is a message for all Africa including Ghana. The question that immediately comes to mind is how well has Ghana fared in promoting sound governance? An answer to this question must start with a look at Ghana's post-independence political history.

Post-independence political history of Ghana

Ghana gained independence in 1957 under the leadership of Kwame Nkrumah. Ghana's independence leader is best remembered for his pan-Africanist posture asserting on the eve of independence that Ghana's independence was meaningless unless it was linked up with the total liberation of the African continent. Ghana became a home for many Africans from the continent and diaspora, among them W. E. B. Du Bois. The irony of Nkrumah's rule was that while providing inspiration to many on the continent and beyond, he had become an authoritarian at home. Nkrumah's record and legacy is still the subject

of debate in Ghana. In early 1964, following a referendum, a one-party state was declared, but this lasted for only two years. On February 24, 1966, Nkrumah's regime was overthrown by the army and the police.

The National Liberation Council, which took over after Nkrumah's overthrow, returned the country to civilian rule under the Progress Party, led by Kofi Busia on October 1, 1969. The combined effect of inflationary pressure and devaluation led to discontent, which was taken advantage of by the military. On January 13, 1972, Kofi Busia's government was overthrown and replaced by the National Redemption Council led by Colonel Acheampong. Acheampong's administration was characterized by mismanagement, corruption and repression. He proposed the introduction of a Union Government made up of the police, military, and civil society. Acheampong's proposal was resisted by an invigorated civil society effectively led by the Association of Recognized Professional Bodies and the Movement of Freedom and Justice. Acheampong, who had by then promoted himself to the rank of General and reorganized his administration under the new name of supreme Military Council, was overthrown in a palace coup by his number two man, General Akufo, on July 5, 1978. Akufo abandoned the concept of Union Government and, after initially considering a Transitional National Government plan, initiated a plan to transfer power to a democratically elected civilian government. However, Akufo could not see his plan through to completion. On June 4, 1979, Akufo was overthrown in a violent coup by junior and non-commissioned officers. A "housecleaning" exercise within the military was announced by the new regime under the name Armed Forces Revolutionary Council ("AFRC") led by Flt.-Lt. Jerry Rawlings. By the time the "exercise" was done, eight senior military officers, including Acheampong and Akufo had been executed.

The AFRC maintained the plan to return power to a civilian government. Elections were held and won by the People's National Party and on September 24, 1979, Hilla Liman was inaugurated as the President of the first government of the Third Republic of Ghana. The Third Republic only lasted 27 months as Rawlings led a group of enlisted and retired army officers to overthrow Hilla Liman on December 31, 1981. Rawlings, following the handover of power to Liman, justified his coup on the grounds of economic hardship, corruption, and paralysis on the part of the Liman administration.

The coup ushered in the Provisional National Defence Council ("PNDC") under the leadership of Flt. Lt. Rawlings. Following a significant slide in the economy, in 1983 the PNDC, which had initially adopted a left-leaning posture, embraced a World Bank sponsored Structural Adjustment Programme. The PNDC also presided over a period of significant erosion in the rule of law, and human rights leading to pressure from civil society and the international community. In the midst of the pressure, the PNDC requested the National Commission on Democracy ("NDC"), which had been established in 1984 to study ways to create participatory democracy in Ghana, to sample the views of Ghanaians on democratic governance. The NDC found that the choice of Ghanaians across the country was for a return to multi-party democracy.

The Fourth Republic

Following the findings of the NDC, a Consultative Assembly was established to draw up a constitution for the return to multi-party democracy. The draft constitution was approved by a national referendum on April 28, 1992. A presidential election held on December 3, 1992 was won by Rawlings as the candidate of the National Democratic Congress; a party formed by the PNDC and its supporters. The parliamentary elections held December 29, 1992 were boycotted by the opposition parties, citing massive manipulation of the presidential election and a lack of confidence in the fairness of the electoral process. As a result, the 200 seat parliament was made up of members of the National Democratic Congress and parties aligned to it. Rawlings was sworn in as a democratically elected president on January 7, 1993.

In 1996, President Rawlings was re-elected with 57% of the votes cast. This time, the opposition fully participated in the parliamentary elections. A remarkable occurrence in that election was the fact that President Rawlings' then Vice-President, Kow Arkaah, stood as vice-presidential candidate on the ticket of the main opposition party. Arkaah had previously fallen out with Rawlings.

The elections of 2000 proved to be a critical milestone in Ghana's democratic evolution. Due to the term limits under the Constitution, President Rawlings was not eligible to contest the election and he chose not to travel the path of others on the continent by amending the Constitution. Equally important was the fact that his chosen successor and Vice-President, John Mills, was defeated in the elections by John Kufuor, the candidate of the opposition New Patriotic Party ("NPP"). Ghanaians had finally woken up and realized that there was another way of changing a government other than through the barrel of the gun!

President Kufuor was inaugurated as the second President of the Fourth Republic on January 7, 2001 and won a second term in the 2004 election. Presidential and parliamentary elections were held on December 7, 2008 and although Nana Akufo-Addo emerged with the highest number of votes, he did not receive the required margin of more than 50% of the votes under the Constitution to be declared as president-elect. John Mills won the run-off with the final result being declared on January 3, 2009, four days before his inauguration as President.

Finally on the right path...

This brief post-independence political historical sketch reveals that Ghana has not been immune from the interventions of the military adventurer. Equally, Ghana has had its fair share of authoritarianism, impunity, and the erosion of rule of law in its history. Despite its less than glorious political history, there is a pervading feeling that finally in the Fourth Republic the country is on the right path. We now turn our attention to the actors and factors that have, through their posture and actions, given rise to this feeling of hope for Ghana's political evolution.

The Electoral Commission

There is almost near consensus that the Electoral Commission has well represented itself in all the elections that have been held in the Fourth Republic. There is also near consensus that the Electoral Commission's handling of elections has improved progressively since 1992.

Article 46 of the Constitution provides that, in the performance of its functions, the Electoral Commission shall "not be subject to the direction or control of any person or authority." The Commission has guarded this guarantee of independence jealously. The public perception of the Commission's independence was placed under significant strain during the 2008 elections. That the election's results were ultimately largely peaceful was due in no small measure to the role played by Electoral Commission as an independent observer.

The media

The media in Ghana has shown much progress and growth during the Fourth Republic. The advent of the private media, particularly radio and television stations, has impacted positively on the conduct of elections in the country. The fact that the media houses are able to mobilize across the length and breath of the country and to relay election results from polling centers in real time has made it extremely difficult for election results to be manipulated.

A less positive side of the media emerged during the last elections in 2008. A section of the media which had aligned itself with some political parties carried unacceptable and inflammatory materials during the elections. Passions and tensions were inflamed for no good reason. It is hoped that the constitutionally-mandated bodies will take necessary steps to ensure that there is no recurrence in subsequent elections.

Civil society

The advent of the Fourth Republic has seen an increase in the number of civil society organisations active on the political landscape. These include think tanks such as the Institute for Economic Affairs, Centre for Democratic Development and the Institute for Democratic Governance, and mass movements such as the Committee for Joint Action. The think tanks in particular have a reputation for being independent and, therefore, appear to have the confidence of the people. The mass movements have also won the confidence of sections of society through their exceptional ability to mobilize people into mass action such as demonstrations.

The civil society organisations are not only a check on the government and the political process, but also, through their activities, have raised awareness among the people who now demand more accountability.

Political parties

The Political Parties Act of 2000 (the “Act”) prohibits the formation of political parties on ethnic or religious lines. The Act further provides the following conditions for the registration of political parties:

- The internal administration of the political party must be democratic and conform to the national Constitution.
- All ten administrative regions of the country must be represented on the party’s executive committee.
- The party must have branches in all the administrative regions of the country and within each region it must be organised in at least two-thirds of the administrative districts.
- It must have one founding member who is either resident or a registered voter in each of the 170 administrative districts across the country.
- The name, emblem, colour, motto, or symbol of the political party must not convey ethnic, gender, regional, religious, or other sectional connotations.

The major parties have national appeal. While the major political parties do have their strongholds referred to in popular parlance as “world banks”, they have thus far refrained from exploiting ethnic divisions, as has been the case elsewhere on the continent.

The political parties have, up to this point, displayed commendable levels of tolerance in the political process. That is not to say that there have not been inflammatory rhetoric and breaches of peace on occasion. The parties have largely refrained from adopting unconstitutional methods even where they have had misgivings. The respect the political parties have shown for the Constitution has aided democratic consolidation in Ghana.

The military

A former African “Head of State” was said to have once remarked that there were only two political parties in Africa – the military and civilians. Unfortunate as this may sound, it was an apt description of the unstable nature of politics in Africa in the not-so distant past. An American diplomat, then in Liberia, was quoted in the April 28, 1980 issue of Newsweek as having said, “[t]he real lesson of Liberia is that if it can happen here, in a country that has not had a coup in 133 years, it can happen anywhere on this continent and at any time.”

The Constitution makes it clear that the role of the military is to defend the country and to undertake such developmental work that the President may require it to do. An Armed Forces Council chaired by the President or his nominee serves as an advisory council to the President on matters relating to the armed forces. Sixteen years into the Fourth Republic, the military has kept to its constitutional role.

International community

The international community played a constructive part in bringing pressure to bear on the Rawlings-led PNDC to return Ghana to constitutional democracy in 1992. In various ways, the international community continues to play a critical role in democratic consolidation in Ghana.

International missions that have observed the five elections conducted in the Fourth Republic and have, through their independence, enhanced the credibility of the electoral process. Beyond that, the donor community has been very supportive of the Electoral Commission and other institutions and organisations in carrying out their mandates.

The people

The preamble to Ghana's 1992 Constitution affirms the inalienable right of the people to establish a framework of government which secures for them the blessings of liberty, equality of opportunity and prosperity. It also affirms the principle that all the powers of Government spring from the sovereign will of the people. Article 3 of the Constitution imposes a duty on all Ghanaians to defend the Constitution and resist any means taken to suspend, overthrow, or abrogate it.

Democratic consolidation and good governance is unattainable unless the people desire and are ready to sacrifice for it. The post-independence history of Ghana is replete with examples of trying times when people have risen up and made their voices heard.

What has become clear in the Fourth Republic is that the people want this democratic experiment to succeed. Ghanaians have clearly come to realise that the thumb is mightier than the gun. A fact which was echoed by the leader of the observer team of Economic Community of West African States ("ECOWAS"), General Yakubu Gowon, former head of state of Nigeria, who said, "[a] key reason for the success of the 2008 elections was that Ghanaians were determined to make it succeed."

...however challenging times lie ahead

A claim that democratic governance has firmly taken root would be premature given there have been only five successful elections. While elections are by themselves extremely important, good governance goes beyond successfully holding elections. What can be said for Ghana is the country finally seems to be on the right path. The country has come a long way, but there is yet a long road to be traveled.

Institutional strengthening

There are a number of institutions established under the Constitution to promote good governance. Among these are the Commission on Human Rights and Administrative Justice, the National Commission for Civic Education and the Department of the Auditor General. The scorecards of these institutions under the Fourth Republic have been mixed. Given the importance of these institutions, it is imperative that they are strengthened and given the resources to be effective.

Review of the Constitution

There are already indications that some provisions of the Constitution require amendment. It is worth noting that, during the 2008 campaign, all the major parties indicated an intention to review the Constitution if voted into power. Former President Kufuor also addressed this issue in his farewell "state of the nation" address on January 4, 2009, where he referred to the Constitutional requirement that the majority of cabinet ministers must be appointed. He remarked that "to expect a

full-time Parliamentarian can only lead to under-performance.”

It was expected that the ruling from the National Democratic Congress would keep to their promise and initiate a debate on the amendment of the Constitution.

Better handling of the transition

As indicated above, President Mills was declared winner of the 2008 election, a mere four days before his inauguration. It should be of no surprise that he has not had a relaxing time to settle into office. A slow transition is certainly an event that Ghana cannot afford. The developmental needs of the country are so pressing that a government must hit the ground running.

The more substantive issues of transition have not been resolved, appropriately leading to improvisation by the new government. In such circumstances, fringe issues, such as custody of state assets, assume much more prominence which obscure the crucial issues relating to national development. It also becomes extremely difficult to resist the urge to read political meaning into every step taken by a new Government. The heightened tensions raise the stake at subsequent elections.

The democratic dividend must be obvious for all to see

The ultimate responsibility of any government is the promotion of the interests of the people. Among the rights guaranteed under the Constitution is the right of every person to work under satisfactory, safe and healthy conditions.

The Constitution also contains a set of directive principles of state policy to guide all citizens, the Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties, and all persons in the interpretation of the Constitution. Among these principles are the economic objectives of state policy which require the State to take all necessary steps to maximize the rate of economic development and ensure the maximum welfare, freedom, and happiness of every person in Ghana. It is the extent to which the State is able to meet these objectives that will determine the stability and growth of Ghana's democracy. In other words, the dividend of democratic governance must be obvious for all to see.

Ghana has come a long way since 1992. It is no exaggeration to say that Ghana, along with others on the continent, has shown that the gift of democracy, said to be the peaceful transfer of power, is not beyond the reach of Africa. The prognosis looks good for Ghana, but there is no room for complacency.

CORPORATE ACCOUNTABILITY

Wiwa Vs. Shell: Victory For Corporate Accountability Or Justice Delayed?

Adejoke Babington-Ashaye

June 2009 marked the anti-climatic end of almost fourteen years of legal battle to assess Shell's accountability for the 1995 execution of Nobel Prize nominee Ken Saro Wiwa and eight other members of the Movement for the Survival of the Ogoni People (the "MOSOP"). The outcome was anti-climatic due not to the plaintiffs' loss before a jury but due to the plaintiffs' victory through a settlement.

By way of background, *Wiwa vs. Shell* is a series of legal cases consolidated into one trial in the United States (the "U.S.") and brought on behalf of the families of the victims under the U.S. Alien Tort Claims Act (the "ATCA"). This 1789

statute enables non-U.S. citizens to file suits in U.S. courts for international human rights violations. The plaintiffs also relied on the Torture Victim Protection Act, which allows individuals to seek damages in the U.S. for torture or extrajudicial killing regardless of the location of the violations. The plaintiffs sought to hold Royal Dutch Shell and its subsidiary, Shell Nigeria, accountable for crimes against humanity under principles of conspiracy and agency law following the Nigerian military regime's sham trial and hanging of those known as the Ogoni Nine. Represented by the New York-based Center for Constitutional Rights ("CCR") and Earth Rights International ("ERI"), the plaintiffs asserted that Shell was concerned by the negative effect of the resistance led by Saro Wiwa against environmental degradation and injustice and that the corporation "sought to eliminate that threat, through a systematic campaign of human rights violations." This campaign allegedly included soliciting and using the Nigerian armed forces to break down resistance. On the contrary, Shell maintained its innocence and dismissed the allegations as false. The case faced several legal and administrative hurdles through its thirteen and a half years of litigation.

Prior to the settlement, the plaintiffs were forced to overcome a significant legal hurdle. The New York Court of Appeals for the 2nd Circuit overturned a District Court's ruling that the plaintiffs had failed to establish that the subsidiary Shell Nigeria was doing sufficient business in the U.S. to justify trying them in U.S. courts. The Court of Appeals' decision in effect guaranteed the plaintiffs additional time -- but along came the settlement.

According to public published reports, the \$15.5 million settlement will compensate the individual plaintiffs as well as establish a trust intended to benefit the Ogoni people in terms of education and regional development. While the plaintiffs see the settlement agreement as Shell agreeing to "atone for its actions," the multinational corporation was quick to reassert its innocence and stated that the settlement was a humanitarian gesture toward reconciliation in acknowledgement of the suffering of the Ogoni people.

News of the settlement has generated mixed feelings. Though the overwhelming view is that the settlement is a victory for the plaintiffs and an indirect admission of guilt by Shell, many see this pre-trial settlement as justice delayed and, to an extent, they are correct. *Wima vs. Shell* joins the list of David vs. Goliath cases which ended through out-of-court pre-trial settlements.¹ At this stage in the development of corporate social responsibility, there is a need for judicial pronouncement on the direct human rights obligations of corporations. Such acknowledgement would enable corporate social responsibility to move beyond the rhetoric of respect for human rights to an enforceable obligation. A trial and jury verdict in this case could have answered some of these key issues.

Yet, this is only part of the story. The disappointment and expectations demonstrate the frustrations felt at the power wielded by multinational corporations. Certainly, no one case can or should be expected to solve the myriad questions which have been outstanding for years. The victims' families have endured a very public battle with Shell, carrying the expectation of the Ogoni people, the people of the Niger Delta, and the hope of small and marginalized oil producing communities around the world. Through the settlement, the families can finally have some closure. It is therefore regrettable that it took Shell almost fourteen years to make this "humanitarian gesture". Juxtaposed with a firm denial of guilt, Shell has ensured that the settlement is at best a victory for the plaintiffs with a question mark or at worst a tie. The settlement sum amounts to less than one-tenth of a percent of Shell's annual revenue and has no punitive value whatsoever. Through the settlement, Shell has avoided a judicial verdict on its activities in the Niger Delta in the 1990s. It has also insulated itself from the negative media portrayal that would have arisen had the plaintiffs had the opportunity to present all their evidence. So certainly the settlement is bitter-sweet for many observers.

What lessons can be learned from *Wima vs. Shell*? On the one hand, the settlement demonstrates that even the poor can take on multinational corporations and their sophisticated legal machines. However, *Wima vs. Shell* has offered much more than that. The case has set an example for oil producing communities utilising the ATCA against multinational corporations

where access to justice within their own countries is being denied. The case will also offer future plaintiffs guidance in determining the necessary nexus between a defendant corporation and the United States required by ATCA. In addition, in a pre-trial ruling by Chief District Judge Kimball Wood, it was affirmed that extrajudicial execution is a violation of the law of nations, as are cruel, inhuman, and degrading treatment, and prolonged arbitrary detention. Finally, the case adds through its pleadings and court rulings to the body of knowledge and experience available to address issues of corporate complicity in human rights violations and by extension environmental degradation.

The mere fact that the case existed sends a signal, not only to those in the Niger Delta but also to other communities affected by similar violations of human rights, that the doors of opportunity are now open and access to justice can be realised. For those communities such as the Erovie community in the Niger Delta whose land was polluted due to Shell's re-injection of toxic waste, the settlement can bring hope for some sort of out-of-court acknowledgement of fault. Hopefully, a final disposition will not take thirteen years.

The fact that the case was settled should also send a wake-up call to all stakeholders involved in the ongoing Niger Delta crisis, including the Nigerian Government whose ongoing extension of the deadline to end gas flaring is an enablement of environmental degradation.

Therefore, while observers assess the final outcome in *Wiva v. Shell*, it is fair to say that the race to change the face of corporate accountability is a relay and the plaintiffs have skilfully passed on the baton.

¹ See settlements in *Doe v. Gap* (D.N. Mar. I. 2002), *Doe v. Reddy* (N.D. Cal. 2004), and *Xiaoning v. Yahoo!* (N.D. Cal. 2007).

DIPLOMACY ON THE CONTINENT

U.S. Diplomat Diagnoses Almost All Of Africa's Problems In One Speech

Introduction by Roland Abeng

Janet Garvey, U.S. Ambassador to Cameroon and Honorary President of the American Chamber of Commerce (AMCHAM) in Cameroon, gave a landmark address to the chamber on the occasion of its monthly luncheon in Douala on June 9, 2009. What struck Cameroonians was the frank diagnosis of Africa's ailments by the Ambassador and the manner in which she put it. Cameroonians heard from the mouth of a foreigner what everyone acknowledges as "The Problem" with the country.

Corruption, poor management decisions, dependence on oil revenue, and poor execution of the budget were just some of the issues that Ms. Garvey explored in her speech which ended with the ultimate solution to most of Africa's problems, ***"...the biggest obstacle to Cameroon's development, the biggest obstacle that prevents Cameroon from achieving its full potential, is Cameroonians' lack of ownership for their own nation, their own government, their own communities...."***

You will agree with me that the Ambassador would still have been correct if she changed "Cameroon" in the above quotation to "Africa." Enjoy the full text of her speech below, which is being reprinted in full with permission.

"Good afternoon, and thank you for inviting me to address you this afternoon.

I am always happy to come speak to the American Chamber of Commerce because you all always eat so much better than we do in Yaoundé!

Truly, though, I am always excited to attend these meetings because it offers me the opportunity to meet with you, to hear about the successes of American business in Cameroon and, of course, to hear about the

challenges you face.

And I do not need to tell you that these are challenging times. Sometimes the news is slow to travel from the center of activity here in Douala to Yaoundé, but I can assure you that officials in Yaoundé are now recognizing just how much the global economic crisis will affect Cameroon, Cameroonian households, Cameroonian companies, and the government's ability to implement its ambitious agenda, known as Vision 2035.

You may recall that at one point some months ago, there were those in Cameroon who said that the crisis would not have an impact in Cameroon, that Cameroon was insulated from the financial crisis because Cameroonian institutions were not linked into the global financial system.

Some of these same voices are now complaining that Cameroon is suffering from an economic crisis it did not create. They say Cameroon's economic woes are not Cameroon's fault; they say Cameroon's economic problems are someone else's responsibility.

It is certainly true that Cameroon did not "create" the global economic crisis. And I think we all recognize that U.S. economic problems have had a broad-reaching impact. President Obama has spoken about the failure of responsibility in managing the U.S. economy, and he has called for a "new era of responsibility" in the United States.

In his inaugural address to the nation, Obama said:

"What is required of us now is a new era of responsibility -- a recognition on the part of every American that we have duties to ourselves, our nation, and the world, duties that we do not grudgingly accept but rather seize gladly, firm in the knowledge that there is nothing so satisfying to the spirit, so defining of our character, than giving our all to a difficult task."

President Obama has returned repeatedly to the theme of responsibility. He did so again last week, in his speech in Cairo. He has not sought to find excuses or scapegoats for the economic crisis and he has emphasized that we each bear responsibility for our own lives.

So how would we apply this call for responsibility to Cameroon?

First, we should be adamant that poor management decisions and irresponsibility in the U.S. do not excuse poor management decisions and irresponsibility in other countries, including in Cameroon.

A message of responsibility in Cameroon would emphasize that Cameroonians--in government, in business, in civil society--are ultimately responsible for the destiny of their country.

On the economic front, Cameroonians have the ability to make their economy more diverse and less dependent on oil revenues. Cameroonians have the ability to orient the economy towards its neighbors, to protect it from the inevitable swings in the global economy and commodity prices. Cameroonians have the ability to demand that their budget be transparent and well-spent.

For the last several years, the Cameroonian Government has spent less than 75% of the money it has budgeted for investment. The money is there, the needs exist, so why are these funds not being spent and, more importantly, what are Cameroonians in and out of the government doing to change the situation?

The World Bank's Doing Business report has shown that the business climate in Cameroon has gotten worse over each of the last few years, at the same time that Cameroon's peers were making tremendous

improvements. This trend cannot be blamed on the economic crisis!

All this is to say that, if the economic crisis is beyond Cameroonians' control, no one but Cameroonians can take responsibility for Cameroon's economy. In my view, there are steps that Cameroon can take, of its own accord, to strengthen the economy during these difficult times and to prepare it for the economic rebound when it does happen.

And the rebound will happen. That is something I think many people miss. The time to think about the economic crisis is not now. Now, it is too late. The time to think about this crisis, in Washington and in Yaoundé, was five years ago, when prices were high. Now is the time we should be thinking about the rebound. In Cameroon, that means thinking about how to position Cameroon to benefit from the rebound when it occurs, because it most certainly will. The price for aluminum will likely rise again. The demand for timber will rise again. The demand for rubber will rise again. What are Cameroonians doing, now, to prepare to be sure Cameroon is well-positioned for the next five years?

Cameroonians can influence the policies their government enacts to shape the economy. Cameroonians can control their country's preparedness to take advantage of global economic good times and to ride out global economic bad times.

Notice I say "Cameroonians" and not "the Government of Cameroon." I am saying that on purpose, to emphasize the fact that Cameroonians are the master of their own destiny. We all know the imperfections of Cameroon's democracy, which I will not dwell on today. Nevertheless, the Government is responsive, even if imperfectly, to the demands of Cameroonian stakeholders, whether they be university students, labor unions, taxi drivers, or the business community, which includes you, the American Chamber of Commerce.

Too often, people coming to the Embassy ask us what we are doing to fight corruption, to build roads, to improve infrastructure and education.

I will increasingly respond with a question of my own: What are you doing? What is the American Chamber of Commerce doing to make its views known to the Government regarding the pressing need for infrastructure improvements?

You will notice a common theme in the public statements that I and other U.S. officials will make in Cameroon over the coming year. We are going to focus on this theme, that Cameroon belongs to Cameroonians, that Cameroonians possess the power to shape the course of their own nation, that Cameroonians should stop talking about their country as though it is separate from them, their government as though it is not their own.

Often, when the Government of Cameroon takes a particular decision, we receive phone calls, emails, letters and personal entreaties asking us to pressure the Government of Cameroon to change its decision or to take a new decision.

Cameroonians call on the U.S. Embassy as though we are the appropriate way to influence their own government, as though we should be the ones to speak and act for them.

That is not to say that we do not take an interest in the challenges that confront the Cameroonian people. We are proud of the strong and growing friendship between Cameroon and the United States.

But the biggest obstacle to Cameroon's development, the biggest obstacle that prevents Cameroon from achieving its full potential, is Cameroonians' lack of ownership for their own nation, their own government,

their own communities.

This is not a dilemma unique to Cameroon. Barack Obama reenergized the United States with his determined insistence that “Yes, We Can.” “Yes, We Can” is more than a partisan political slogan, and its significance is more lasting than a presidential campaign. It is an affirmation of hope, of responsibility, of ownership. When we say “yes, we can,” it means also, that yes, we should, and yes, we will.

I am troubled by the spirit of resignation, almost of despair, that seems to prevail among many of my Cameroonian friends these days. Like everyone else in Cameroon, I was disappointed that the Indomitable Lions did not notch a victory in Ahmadou Ahidjo Stadium last Sunday. But I was amazed to see how many people were ready to give up, to say that it is all over, that Cameroon is finished. There are still four games remaining, and Cameroon’s prospects are still very much alive. I am looking forward to the next match, with a spirit of “Yes, We Can!”, and I believe Cameroon should still be aiming to be a part of the World Cup next year in South Africa. I hope that Cameroonians—the players on the pitch and the supporters cheering them on—will adopt the same attitude, not just for football, but for all of the challenges that confront Cameroon today.

I know the obstacles that exist in Cameroon as they do in every country around the world. After almost two years in Cameroon, I *know* about the *problems*, but the problems do not interest me any longer. I am more interested in learning what Cameroonians have in mind as solutions, how Cameroonians intend to take charge of their country’s destiny.

It was the great American businessman, Henry Ford, who said “Whether you think you can, or think you cannot, you will be right.”

This is a message I hope to deliver throughout Cameroon over the coming months, and I deliver to the American Chamber of Commerce today.

Your membership represents diverse nationalities and a broad range of sectors, but you have a shared stake in the future of Cameroon and a shared responsibility to do what you can to help Cameroon recognize its potential.

The global economic crisis has, in fact, presented you with an opportunity that I hope you will seize. With a renewed focus on how to jumpstart economic growth and create jobs, Cameroonian decision makers will be more open than ever to the recommendations of the business community. The AMCHAM, this room, is filled with leaders who possess invaluable knowledge, who can provide wise advice about what steps are needed to put Cameroon on better economic footing. What are you doing to be sure your wisdom is heard? What are you doing to be sure Cameroon is better positioned for the next global economic swing, whatever it may be?

I will admit: I am not coming to you with solutions. I am coming instead with a call to action. The AMCHAM has a responsibility to advance American business interests in Cameroon, but that entails a broader responsibility, to help Cameroon recognize its potential as a leader in the region. The AMCHAM can play a crucial role in shaping Cameroon’s future for the better. I hope you all will take on that responsibility. Thank you.”

SOCIAL RESPONSIBILITY

Support Literacy In Africa Through Online Book Purchases

Lane Ayers

Better World Books (www.betterworldbooks.com), an online book seller, is the primary supporter of Books For Africa, a US-based NGO. Books For Africa ("BFA") is the largest supplier of books to the continent of Africa, having sent over 21 million to schools and libraries in 40 African countries over the last 20 years. Through its new "Law and Democracy Initiative," BFA sends books regarding law and human rights to African law schools and other legal entities. The ABA Section of International Law partnered with BFA and West, a Thomson Reuters business, to send over 1,500 new law books to the Grimes School of Law in Monrovia, Liberia, which arrived in January 2009.

Better World Books collects and sells books online to fund literacy initiatives worldwide. The organization has collected more than 16 million books through book drives at over 1,800 colleges and universities and has partnered with over 1,400 libraries to collect books. Collected books are sold on 18 different marketplace websites, including BetterWorld.com, with a portion of each sale assisting literacy around the globe.

Since 2003, Better World Books has:

- Raised more than \$1.7 million in unrestricted funding for BFA;
- Provided BFA with nearly 25% of their cash budget for fiscal year 2008;
- Directly sent more than 1 million books to Africa; and
- Established the Better World Books Fund to finance specific shipments through Books For Africa, which financed the delivery of thirty-six 40-foot sea containers to 17 countries in Africa. This equates to 922,000 books valued at \$6.7 million. More shipments are scheduled in the coming months courtesy of this collaborative effort.

Support Books For Africa:

If you are a student and are interested in leading a book drive on campus, e-mail reusefirst@betterworldbooks.com. Also, shopping on BetterWorld.com for all your literary needs helps provide Books For Africa with a sustainable source of funding for operations.

GIVING BACK: ZIMBABWE

International Senior Lawyers Project Proposal For Zimbabwean Lawyers

Leigh Middleditch

Representatives of the International Senior Lawyers Project (the "Project"), co-presidents Tony Essaye and Robert Kapp, and Leigh Middleditch met with four Zimbabwean lawyers at the Spring Meeting of the Section of International Law in Washington on April 15, 2009. The Project assisted with securing sponsorship for these lawyers to travel to the U.S.

Thereafter, a proposal was made to Otto Saki of the Zimbabwe Lawyers for Human Rights which outlined three pro bono areas which the Project might be of assistance: 1) Media Law Reform, 2) Constitutional Reform, and 3) Commercial Law Training. The Project looks forward to hearing from Mr. Saki to determine how this offer might be implemented.

GIVING BACK: LIBERIA

The Section Sends Law Books To Liberia

Zubaida Qazi

The Section of International Law, in conjunction with the Africa Committee, has partnered with West, a division of Thomson Reuters, and Books For Africa (BFA) to provide legal books to African law schools, universities, bar associations, and civic groups. This partnership is one of the initiatives stemming from the Section's 2007 International Legal Exchange (ILEX) trip to West Africa.

During the trip, which included visits to Ghana, Liberia, and Sierra Leone, one specific need that was brought to the ILEX delegation's attention was the shortage of modern law school textbooks available for law students and faculty, particularly in Liberia and Sierra Leone. The ILEX delegation, with the assistance of BFA, volunteered to be of assistance.

BFA is a nonprofit organization based in Saint Paul, Minnesota, with the singular goal of ending "the book famine in Africa." Created in 1988, BFA has already sent over 20 million books to 38 countries on the continent. Today, BFA is the world's largest shipper of primary, secondary, and university school books to the African continent.

In June 2008, BFA launched a new initiative to further the rule of law in Africa by addressing the continent's scarcity of law and human rights books. Named after the federal magistrate judge and BFA board member, the Jack Mason Law and Democracy Initiative is co-chaired by former UN Secretary-General Kofi Annan and former Vice President Walter Mondale. Lane Ayres, director of the initiative, is an attorney and active member of the Section's Africa Committee. He has been on the board of and a volunteer with BFA for many years.

The first shipment by the Law and Democracy Initiative was made to the Louis Arthur Grimes School of Law at the University of Liberia in Monrovia in late 2008. The Section of International Law—with special thanks to Salli Swartz, Victor Mroczka, Edna Udobong, Marilyn Kaman, and Cara Lee Neville for their efforts—financially supported this shipment along with the Indiana University School of Law in Bloomington.

The initiative is in large part a partnership with West, the law book publishing arm of Thomson Reuters. West is donating the latest edition of new books—including law-teaching books, legal treatises, human rights, and rule of law books—to be sent to Africa. For the shipment to Liberia, West donated a total of 1,500 books—50 copies each of titles for 23 subjects, along with a resource library of more than 200 separate titles that span the breadth of U.S. law, including several human rights subjects, a set of American Jurisprudence, and a set of American Law Reports. West is also donating law books for a shipment to Sierra Leone, one of the countries visited by the ILEX delegation to West Africa.

BFA has requests for books from several other African schools and bar associations and is currently raising funds for a shipment to the Law Association of Zambia. Although the books are all donated by West, BFA needs continuing support from law firms, law schools, and individuals for shipping and related costs, so that the shipment to Liberia is the first of many each year to law faculty and bar associations across the continent.

For more information on how you or your firm can be involved with the Jack Mason Law and Democracy Initiative,

visit www.booksforafrica.org/initiatives/law-democracy.html or contact Lane Ayres at lanebfa@gmail.com.

Visit the Section's website to read about the ILEX trip to West Africa in the summer 2007 issue of ILN. ✦

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OTHER NEWS AND USEFUL INFORMATION

Other Projects

- Outreach efforts to work with local human rights groups and law societies in Kenya and Zimbabwe in response to crises in each country
- Advice and consideration situation in Niger

Join the Africa Committee:

https://www.abanet.org/ome/front/form/ome_main.cfm?JoinType=m&sc=RMM8ILEF

Committee Website: <http://www.abanet.org/dch/committee.cfm?com=IC805000>

Conference Calls: dial-in information is provided a few days prior to the conference call

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| July 2009 Call: | July 15 at 1:00 pm |
| August 2009 Call: | No call—Enjoy your vacation! |
| September 2009 Call: | September 16 at 1:00 pm |

Useful links

Ghana Working Group: <http://www.abanet.org/dch/committee.cfm?com=IC550555>

Liberia Working Group: <http://www.abanet.org/dch/committee.cfm?com=IC550553>

Sierra Leone Working Group: <http://www.abanet.org/dch/committee.cfm?com=IC550554>

The Liberia Working Group also works with the International Legal Resource Center in implementing its projects. If you have particular subject matter expertise, you can become a member of the ILRC database by registering at www.abanet.org/intlaw/intlproj/ilrc