KAZAN JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

КАЗАНСКИЙ ЖУРНАЛ МЕЖДУНАРОДНОГО ПРАВА И МЕЖДУНАРОДНЫХ ОТНОШЕНИЙ

SOUTH AFRICAN ASSOCIATION OF INTERNATIONAL LAW

RUSSIAN ASSOCIATION OF INTERNATIONAL LAW

SPECIAL ISSUE

2016

ISBN 978-5-93593-229-9

FOUNDERS:

Russian Association of International Law
Ministry of Justice of the Republic of Tatarstan
The Supreme Court of the Republic of Tatarstan
Ombudsman for the Republic of Tatarstan
University of Management "TISBI"
Members of the Editorial Board

CONTACT INFORMATION:

***Mailing address: 420012, Kazan, Mushtari street, 13. University of Management "TISBI."**
Faculty of Law. Department of International Law. Head of the Department Dr Prof A.Mezyaev
*** E-mail address: alexmezyaev@gmail.com**
*** Fax: +7 - (843) - 294-83-33**
*** Phone: +7 9050-21-49-67**
*** Website: www.kjil.ru**

KAZAN JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

Special issue published by
Russian and South African
Associations of International Law

(2016)

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SOUTH AFRICA & RUSSIA
SOUTH AFRICAN AND RUSSIAN ASSOCIATIONS OF INTERNATIONAL LAW

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SOUTH AFRICAN ASSOCIATION OF INTERNATIONAL LAW

Professor H.Strydom,
President of South African Association of International Law

When South Africa emerged from international isolation in 1994 the new era opened up exciting opportunities for international law scholars in South Africa to reconnect with their peers in other parts of the world and to participate freely in international law scholarship. New opportunities for research also emerged as a result of South Africa's membership in a range of multi-lateral treaties after 1994, as well as the country's post 1994 role in international and regional fora. Aware of the significance of these developments for the study and practice of international law, international law scholars decided at the time to establish a South African Branch of the International Law Association (SABILA) which has grown steadily in membership over the years and which allowed South African scholars for the first time to participate in the academic work of the ILA. As the fourth President of SABILA I want to use this opportunity to convey to our Russian counterparts our best wishes and to congratulate them, and especially Prof Alexander Mezyaev, who I had the opportunity to host in South Africa, with the publication of this special edition.

RUSSIAN ASSOCIATION OF INTERNATIONAL LAW

Professor A.Kapustin,
President of Russian Association of International Law

Dear colleagues!

Allow me, on behalf of the Executive Board and all the members of our Association to express the warmest feelings of professional solidarity to our colleagues from the South African Association of International Law, here on the pages of the *Kazan Journal of International Law and International Relations*, one of the most authoritative periodicals, published under the auspices of the Russian Association of International Law.

There are big differences between Russia and South Africa that objectively determined by our geographical position. Russia is located in the northern part of the vast continent – Eurasia, while South Africa – in the southern part of the majestic African continent. Despite this, we believe that we are united by a belief in the rule of international law and its continuing importance for the development of modern international relations in a civilized and equitable way.

The South African Association of International Law attaches great importance to the study of climate change issues in the light of international law, the fragmentation of international law, collective security and the study of specific international legal issues of development of inter-African relations, including those that develop in the framework of the African Union.

Russian Association of International Law unites Russian citizens in its activities also involved scientists from other countries. The main objective of the association is to promote the development of international law in order to promote international security and international cooperation, solving global problems and the creation of the international legal community of nations. The Association promotes research on pressing issues of international public and private law and bringing legislation of the country in line with international commitments.

The terms of research interests of the Association is wide enough, at the annual meetings, involving more than a thousand participants, discusses the role of the UN and other international organizations in modern international relations, the problems of international criminal law and international criminal tribunals, the legal challenges of regional integration processes, regional and problems collective security, peaceful settlement of disputes, international human rights law, international humanitarian law, the development of the basic institutions of private international law, and many others. Russian Association of International Law and is the successor of the Soviet Association of International Law, established in 1957 on the initiative of leading international jurists of our country (G.Tunkin, V.Vereshchetin, S.Chernichenko, R.Bobrov, D.Feldman et al.).

It is hoped that a special issue of the *Kazan Journal of International Law and International Relations*, will allow us to better know each other and to expand mutual scientific cooperation and exchange of ideas.

With kindest regards,

President of the Russian Association of International Law

Professor Anatoly Kapustin

DOCUMENTS

The publication of this Special issue of «*Kazan Journal of International Law and International Relations*» is a manifestation of the new level of relations and cooperation between the Republic of South Africa and Russian Federation which now qualify as *comprehensive strategic partnership.* This level of relations was established by the signing of the Joint Declaration in 2013 by Russian President Vladimir Putin and South African President Jacob Zuma.

JOINT DECLARATION
ON THE ESTABLISHMENT OF A COMPREHENSIVE STRATEGIC PARTNERSHIP BETWEEN THE RUSSIAN FEDERATION AND THE REPUBLIC OF SOUTH AFRICA

The Russian Federation and the Republic of South Africa (herein after referred to as the "Sides",

being guided by the desire to further consolidate for mutual benefit their traditionally close and friendly ties based on mutual understanding and deep-rooted confidence in each other and by the rich and fruitful experience of cooperation in different spheres accumulated over the period of struggle against apartheid as well as the years since establishment of diplomatic relations between them,

emphasising their commitment to the Declaration of Principles Concerning Friendly Relations and Partnership, signed by the President of the Russian Federation and the President of the Republic of South Africa on 29 April 1999

conscious of Russia-South Africa Strategic Partnership that was affirmed during the signing of the Treaty of Friendship and Cooperation by the President of the Russian Federation and the President of the Republic of South Africa on 5 September 2006

recalling the decision of the President of the Russian Federation and the President of the Republic of South Africa on 5 August 2010 to reaffirm Russia-South Africa Strategic Partnership and convene Presidential Summit meetings at least once every two years

seeking to impart a qualitatively new character and long term perspective to their multifaceted bilateral relations and to actively develop them in political economic, trade, scientific, technological, cultural and other fields,

convinced that further comprehensive development of their bilateral ties would promote progress and prosperity of both states and the consolidation of positive trends in the world as a whole, and

proceeding from the conviction that it is necessary to build a more just system of international relations based on the sovereign equality of all states and peoples and supremacy of the law under the central role of the United Nations Organization,

declare as follows:

Both sides hereby formally proclaim the establishment of relations of strategic partnership between them which envisages the elevation of varied and multifaceted ties between them to a higher and qualitatively new level as well as imparting them with a special character of close and dynamic cooperation, both in the bilateral field and in the international arena.

This strategic partnership between the Sides is based upon the principles of sovereignty, equality and territorial integrity of States, non-interference in their internal affairs, mutual respect and mutual benefit and includes enhanced cooperation in the following fields:

1. Political:

The President of the Russian Federation and the President of the Republic of South Africa will meet at least once every two years for the purposes of promoting and guiding political and economic cooperation in order to enhance mutual understanding and support for each other on issues of mutual interest;

The Minister of Foreign Affairs of the Russian Federation and the Minister of International Relations and Cooperation of the Republic of South Africa shall meet at least once a year to review bilateral relations;

Closer cooperation at the United Nations and striving for coordination of approaches, including its specialized agencies and institutions, at other international and regional fora;

Further intensifying the work aimed at creation of regular consultations mechanisms on regional and international security issues;

Informing each other of planned foreign policy initiatives in the international arena;

Non-participation in any military-political or other alliances, associations or armed conflicts directed against the other Side, or in any treaties, agreements or understandings infringing upon the independence, sovereignty, territorial integrity or national security interests of the other Side;

Deepening cooperation within the framework of BRICS to elaborate concerted approaches and effective solutions to crucial problems of the international relations and global development, strengthening significance of both countries in formulating the global agenda.

2. Trade and Economic:

Increasing close cooperation within the framework of Russian-South Africa Inter-Governmental Committee on Trade and Economic Cooperation (ITEC), Business Council, other joint bodies of business and industry representatives as well as through chambers of commerce and industry with a view to expand trade and economic relations.

Deepening and diversifying cooperation in priority sectors such as trade and investment and banking cooperation, mining and mineral resource beneficiation, energy, including nuclear power, transport, including aviation, maritime and rail, communications, metallurgy, aviation industry, agriculture, infrastructure development, innovative and high technologies, tourism;

Defining ways and methods as well as guidelines for expansion of bilateral trade, establishment of trade missions;

Encouraging contacts between regions of both countries with a view to promoting trade and economic cooperation;

Mutually beneficial exploiting new opportunities arising out of integration processes underway in the world economy;

Deepening cooperation and coordination at international trade, economic and financial bodies.

3. Parliamentary cooperation:

Regular inter-parliamentary exchanges, widening contacts at high level between relevant chambers and committees will take place.

4. Defence:

Deepen cooperation in the military field, including military and military-technical cooperation on a long-term basis and other kinds of interaction between armed forces of both countries.

5. Science and Technology:

Promoting existing and search for new forms of cooperation in fundamental and applied scientific research;

Expanding exchanges of specialists and scientific information, establishing and developing direct ties between scientific research/higher educational institutions;

Forming in perspective a modernisation and technology alliance.

6. Humanitarian Cooperation:

Further promoting cultural cooperation and a wider exposure to each others' cultural heritage and achievements of both states, expanding the studies of national languages, holding regular mutual cultural seasons;

Activate contacts between people and organisations as well as exchanges including in the fields of culture, education, mass media, youth and sports.

Activities to preserve the historical memory of cooperation in the struggle against apartheid and education of young generations of both countries in the non-racial spirit;

Joint activities on organizing exhibitions and protecting monuments.

7. Cooperation between integration organizations:

Promote cooperation between the Eurasian (Customs Union, Common Economic Space, – Eurasian Economic Union) and African Regional Organisations (African Union, Southern African Development Community, Southern African Customs Union).

8. Other fields:

Cooperating in the fight against international terrorism, separatism, organised crime, illegal trafficking in narcotics.

The strategic partnership between the Sides is not directed against any other State or group of States, and does not seek to create a military-political alliance.

Done in Durban on 26 March, 2013

INTERVIEW

Thabo Mbeki

President of the Republic of South Africa (1999-2008)
His Excellency Thabo Mbeki

Interview to
"Kazan Journal of International Law & International Relations"

KJIL&IR (A.Mezyaev): Your Excellency Mr. President! Nowadays we are celebrating 22 years of democracy in South Africa and you are the key figure in South African history, who took part in making this democracy. So could you tell us about the road to freedom in South Africa. What was your personal look and role in this long road?

President T.Mbeki: It was a very long road indeed… You know, in the Program of the South African Communist Party in the early 60s it was said that what we face in South Africa is a Colonialism of a Special Type. That was a Communist Party position but in reality this characterization of the nature of the oppression in South Africa was adopted by the broad liberation movement including the ANC. It had certain implications. One implication of it was that the struggle against this Colonialism of a Special Type had necessarily two elements in it. One of them, as in any other anticolonial struggle, is the struggle for independence. But the challenge in the South African case was that the colonizer was within the country, not outside. It therefore meant that one of the objectives of the struggle was to start the transformation of South Africa itself. So the struggle of the South Africans against the Colonialism of a Special Type in fact meant that you had to transform the society right from the beginning. It was not the same as other liberation struggles on the Continent. That is why for instance in 1955 the Congress of the People here in SA adopted the Freedom Charter. This Charter visualized the democratization of the country first of all and then all sorts of changes that essentially aimed at the eradication of the legacy of colonialism and apartheid. We had to change the political relations by democratizing the country. We had to change the economy by deracializing it. For many decades the preference within the liberation movement was that the changes visualized for South Africa would come by peaceful means. The ANC therefore kept insisting that it is possible to

change the situation in South Africa by peaceful means and called for the convening of a National Convention which would represent all the people of South Africa. This was the position of the ANC for a very long time. But in the end the regime responded to that by the use of force, by banning the ANC, banning the PAC, by extreme repression. So it became clear that the road to the peaceful resolution of the problem was blocked. Then ANC then said that we have to fight the struggle on four fronts. First, we must mobilize millions of our people in the country to fight against the system of apartheid through mass mobilization and the mass engagement of the people. Second, we must ensure that the ANC, though it was banned that time, continues to exist underground as an organized formation, because it had a continuing responsibility to help lead this mass struggle. The third front was the armed struggle against the regime. And the fourth front was international mobilization to get the rest of the world to come to our side to fight together against apartheid. So these were the four fronts on which the integrated struggle was then conducted for many years. In the end we came back to the original position of the ANC on the preference for the peaceful resolution of the problem. In the end, as the result of our success on all of these four fronts, the government had no choice but to negotiate. Therefore we came back to the original idea the ANC had suggested of a National Convention. These negotiations in the 1990s led to the democratic South Africa that we have today. So that was the struggle.

As for my part in the struggle… I joined the ANC Youth League in 1956. So I was 13 years old at that time. In 1975 I joined the National Executive Committee of the ANC. As a member of the NEC meant that I joined the rest of our leaders in this echelon to take responsibility for all elements of the struggle – the armed struggle, the underground, mass mobilizasion, everything… We also had particular responsibilities. I was appointed as Political Secretary to the President of the ANC – at that time Oliver Tambo. Later I was appointed as Secretary for Information and Publicity, and later still as Secretary for Iinternational Affairs. But of course I also had to do other things.

In 1973 the ANC had its headquarters in Lusaka. And that was the closest to South Africa. But from 1973 we said let us try to move closer to South Africa in terms of our visible presence nearer to the country. We wanted to move closer to South Africa so that we could facilitate contact between us and people at home. So we tried this with regard to Botswana. In 1973 and 1974 I spent a lot of time in Botswana trying to establish a legal presence of the ANC in that country and also to build contacts with our people at home. In 1975 when Mozambique won its independence it became possible for us to travel through Mozambique to Swaziland. I spent 1975 and a bit of 1976 in Swaziland doing the same thing that we had done in Botswana, trying to establish the legal presence of the ANC in Swaziland. But at the same time we were working with the people inside the country to set up the underground ANC structures, to participate in the mobilization of the people and so on. When Zimbabwe became independent in 1980 one of the things I had to do was to join Oliver Tambo to try and set up an ANC presence in Zimbabwe. So by 1976 we had an ANC presence in all the neighboring countries including Lesotho.

Because of the struggle within South Africa and the international anti-apartheid campaign, in 1985 the USA *Chase Manhattan* bank, which had lent money to the South African government, decided that money had to be paid back. South African government did not have the money and they could not borrow from anyone because of the anti-apartheid struggle. *Chase Manhattan*'s immediate reason for their action was the boycott campaign in the USA. Americans said to Chase Manhattan, that if you continue to do business with apartheid South Africa, we the Americans, are going to take our money out of your bank. So *Chase Manhattan* had to choose whether to keep the American customers or keep the SA government as their customer and of course they said: our future lies with American customers and not with apartheid regime in South Africa. This reflected an intensification of the international campaign against apartheid and others followed *Chase Manhattan*. Then *Barclays Bank* in England took the same position. And then the political language from some of the Western countries began to change. The white South Africans began to realize that they could not continue with the system of apartheid. A solution had to be found. And therefore they had to talk to the ANC. So they started the movement that was called "Talking to the ANC". A lot of people from inside the country wanted to visit the ANC outside the country because this was the visible ANC. We had underground structures in South Africa, which were illegal. So those are people who could not say

"go and see comrade so and so" because they were underground. So they would come outside. The first delegation was a business delegation. Big South African white business came to see us in Lusaka. So we met them to discuss the future of the country. After them we met lots of other people: business, church, sports, youth, students, women, everything and everybody. The strength of these meetings was that they were moving important sections of the population away from support of apartheid towards the change perspectives which the ANC had pursued for many decades. They began to understand that the ANC was not what they had been told by the apartheid regime. This became part of the process that led to negotiations in 1990s. Because of this interaction between ANC in exile and people at home, discussion started between us and sections of the Afrikaner leadership that led directly to our talks with the government. I was ANC Secretary for the International Affairs but I was also involved in these engagements with the people from inside South Africa.

KJIL&IR: Because we are Russian journal I couldn't not but ask you about your vision of the role of the Soviet Union in your struggle. And could you also tell us about your visit to USSR in the beginning of 1970s?

President T.Mbeki: The Soviet Union was one of the principal allies in our struggle. This was from the 1960s or maybe even before. Before the 1960s these relationships were mostly between Communist Party of the Soviet Union and the South African Communist Party. But later, from the 1960s the relationships were broadened and included ANC. At the end, globally the Soviet Union became the principal supporter of the ANC in many respects. For instance when the British and American Governments and others claimed that ANC was a terrorist movement, USSR clearly said that ANC was a leading movement of the people of South Africa who were struggling for their liberation

The Soviet Union was our principal supporter in terms of the supply of weapons to conduct the armed struggle. This support also included military training. It also helped in the education of our students in many different fields, other than the military. We sent the first batch of students to the Soviet Union in 1962. The very first group of students was sent formally by the ANC. A lot of our people were trained there. The idea was that after liberation we would need people with various specialties to be able manage the democratic South Africa. So the USSR trained a lot of our people at the Universities. We also had a lot of humanitarian assistance, food, clothes which came from Soviet Union.

It is important to stress that the relationship between the USSR and the ANC was interlinked with the support of Soviet Union extended to FRELIMO in Mozambique, to the MPLA in Angola, to SWAPO in Namibia, to ZAPU in Zimbabwe, plus of course the relations that Soviet Union maintained with many Frontline States such as Tanzania and Zambia. That whole complex of relations with the USSR was very important because of the interconnectedness of the struggles in Southern Africa.

As for my visits to the USSR, there were a number of these. I also came to Moscow in 1969. For a year or so I was a student of the so-called Lenin School, which was a party school where we were sent by the South African Communist Party. We mostly learnt Marxism there but there was also a small programme of underground training. I also have to remind you that because of the pressure from the apartheid regime at some point, the ANC had to withdraw its military cadres from some countries in Southern Africa. I think the most dramatic case was when the Mozambique Government signed with apartheid South Africa the so-called "Nkomati Agreement". One part of that Agreement contained a provision according to which most of our people had to leave Mozambique. Later the same thing happened in Angola connected to the Agreement with led to the withdrawal of the apartheid armed forces from that country. At some point this pressure reached Tanzania where we had quite a lot of people and they were ordered to leave too. So in 1969 we appealed to Soviet Union to accept our people. And USSR accepted them. Many of them had been trained in the Soviet Union before but they had to return to the USSR. When I finished my course at the Lenin School in 1970, I then joined our military people who were re-training outside Moscow. Of course I also been in USSR many more times later for all sorts of things, but those are the two years that I spent there continuously.

KJIL&IR: I have a special present for you from that time. This is a medal of Lenin issued in dedication of his hundred years jubilee, and it was exactly in 1970. So it's a present from your times in Soviet Union…

President T.Mbeki: Oh, yes, there was a celebration of Lenin in 1970! Thank you.

KJIL&IR: You became the first Vice-President of the democratic South Africa, then President of the Republic. So you were in at the beginning of the construction of foreign policy in democratic South Africa. Could you tell us the story how this South African foreign policy was established?

President T.Mbeki: The first thing we had to do was to normalize relations with everybody in the world, but first of all in Africa. We had to join the Organization of African Unity and the Commonwealth, and normalize our relations with the United Nations. We opened our Embassy in Russia. We also decided that Africa had to take central place in terms of our foreign policy. The reason for that was very simple – South Africa is an African country. It had been isolated from the rest of the Continent and the rest of the world because of apartheid. So we needed to normalize relations with the rest of the Continent first, but second we had to do something to contribute to ensuring that Africa plays its proper role in terms of the system of international relations. So we understood that we have to interact with the rest of the world as an equal partner, but at the same time we had to deal with our own domestic problems.

Well one of the most unfortunate things that happened in terms of the foreign policy was the genocide in Rwanda which started on the 7th of April 1994 – just 20 days before our first democratic elections here. The consequence of that was that we actually did not pay as much attention to that genocide in Rwanda, as we otherwise would have done, because we were preoccupied with our own transition process here in South Africa. We did try to stop that genocide because the Rwandan Patriotic Front sent a delegation before our elections to say to us that there were arms that are coming from South Africa to arm people in Rwanda in order to carry out the genocide. We intervened to stop that. But it was with the old government. We got spoke to them and got the Rwandans to speak with them and so on. They confirmed that yes, people from Rwanda were buying weapons. But the apartheid regime treated all this as a matter of business – they were just making money. They said if Africans want to kill themselves it is their own business. We tried to stop that but we didn't succeed. But as I said we didn't pay as much attention to the Rwandan genocide as we would otherwise have done, because we were so preoccupied with our own transition here. But I mention this because afterwards, as part of our response to the African challenges, we then indeed did pay particular attention to Rwanda. We were the first African country which decided that we would allow any number of Rwandan students to come to South African universities and to study under the same conditions and the same cost and so on as South African students. I think at some point there were 600 Rwandan students here. We also signed an agreement aimed at helping to rebuild the stock of cattle in Rwanda. When the fighting started in the Congo, when the old Kabila was leading an offensive against Mobutu, we intervened quite early to see whether we could stop the fighting and help to bring about the necessary changes in the Congo. So South Africa established various pillars of our foreign policy relating to Africa, including that we would help to end the armed conflicts; we would support the process of the democratization of the Continent; we would support the process of raising the rates of economic growth and development; and help to address matters of inequality and so on and engage a whole range of issues on the Continent. But globally we were very interested that Africa must play its rightful role in the rest of the world and that the African voice was properly represented in the ordering of global affairs. We were very vocal on issues like the transformation of the United Nations, especially the Security Council, and other multilateral organizations. We were very sensitive to issue of the construction of a new neo-colonial relationship between the African countries and the rest of the world. We opposed that.

So this is how South African foreign policy was generated.

But I think that in some instances we did not continue particular relationships with all our friends. By this time the Soviet Union was gone, but in fact a lot of Russians had not forgotten the relationship that has been built between the Soviet Union and ANC. As you know we re-equipped the South African National Defence Force, including with new fighter planes and so on. But before

that we had some old French "Mirage" fighter planes. Our then Minister of Defence was very keen that we should do something with these old planes to improve their performance. So what happened was that one of the Russian Deputy Prime-Ministers in the government of President B.Yeltsin actually arranged to export engines of the MIG-29 to South Africa to fit into these "Mirage" planes. This was not authorized. He did not get permission from the Russian government to do this. But the Deputy Prime Minister was one of the people who knew the ANC from the Soviet times and recognized that we were old friends. So he just sent us the engines of the MIG-29 which were than attached to two of these old French "Mirages". He actually came here when we tested the re-equipped plane, which performed very well. Thus our old planes became super modern because of the engines of the MIG-29.

President Thabo Mbeki and Editor-in-Chief of Kazan Journal of International Law and International Relations Professor Alexander Mezyaev during the interview

Here is another story concerning our relations with the Russian Federation. Once when I was in Moscow I talked to the people at the Russian Academy of Science. These people, members of the Russian Academy of Science, had developed technology to re-mine the mine dumps. It was very important for us to get that technology because we in South Africa had used old technology, which meant there was a lot of gold left in the mine dumps. With the new technology we could recover a lot of gold. And so we wanted to work with the Russians so that this could be done. But this cooperation did not happen. I think that this was because people here in our gold mines had never worked with any Soviet counter-party and therefore there was no follow-up to the cooperation we sought with the Russian scientists. So as you see there were very close relations between Soviet Union and the ANC. But we have not seen this replicated in the relations between the Russian Federation and democratic South Africa. This was the same story with Sweden which had helped the ANC and our struggle very much. When it came to state-to-state relations during the post-apartheid period these did not become as strong as they should have been. So I think that this reflects some weaknesses in the formation and implementation of our foreign policy.

It is also important to ensure that our main minerals are marketed in a proper way. At some point we were discussing with the Russian Federation that Russia, South Africa and Zimbabwe could form a kind of "OPEC" for platinum. But again these discussions did not go anywhere. So there were some weaknesses of that kind in the formation and implementation of our foreign policy. But fundamentally the main directions were successfully implemented.

KJIL&IR: In 1998 South Africa decided to sign the Rome Statute of the International Criminal Court. What were your expectations that time when you decided to be the part of ICC and what is your position now?

President T.Mbeki: When we got involved in the negotiations for the creation of the International Criminal Court (ICC) and then signed the Rome Statute we were very much influenced by what had happened in Rwanda and the Democratic Republic of Congo. We felt that there must be some means by which you deal with challenges like that. That time our understanding of the ICC was that this court would be formed equally by all nations of the world and would function under the governance of all nations of the world.

But what happened later was different from what we expected. When we were involved in the negotiations to end the conflict in the Democratic Republic of the Congo, the ICC sought to prosecute some persons in the DRC. We maintained contact with Prosecutor L.Ocampo. We asked him, "Please, don't prosecute these people, because we need them in the peace process in order to stop the killings and the shootings in DRC". We needed those people in the negotiations. Without them it would not have been possible to end the violent conflict. And I must say that at that time the ICC did listen to what we said.

The problem is that most of the crimes the ICC sought to prosecute were committed in the context of conflicts, and these conflicts needed to be resolved through negotiations. So in almost every case issues of peace and of justice went in parallel.

I am sure that the prevailing opinion on the Continent now is that actually it is better for Africa to build the capacity to try war crimes, crimes against humanity etc, and let the ICC remain a court of last resort. We should try these cases ourselves here on the Continent, such that there should be nobody who could say that we "don't have the capacity" or that we are "not willing". We must have the capacity and the will. If we try these cases here on the Continent, then it would be possible to strike the proper balance between the issues of peace and justice and to approach these issues correctly. Nobody on the Continent claims that you can commit genocide or war crimes and just get away with it. But there must be a proper way to respond to that. There must be the possibility of ending those conflicts, and therefore preventing the situation where more people die. We may have one person to be arrested and then hundreds and thousands of people will die just because you got one person jailed. It is not rational. Now it is clear that we want to deal with ICC in a different way.

KJIL&IR: Your Excellency, you are well known in an intellectual attempts to conceptualized the program of economic and social transformation of Africa, for example, the idea of African Renaissance. Some short time ago you suggested the idea of African Progressive Movement. Could you explain your last idea in more details?

President T.Mbeki: I am sure we all fully aware of the fundamental challenge all of us face that we must successfully and urgently address, namely, the interconnected phenomena of the eradication of the poverty of the billion African masses and the underdevelopment of the African Continent. At the same time, I am certain that all progressive persons throughout the world agree with Africa that it is imperative that our Continent must engage in the fundamental social transformation processes that must end this pervasive poverty and underdevelopment. I would also like to believe that all Africans throughout our Continent are fully aware of the specific challenges all of us face relating to these interlinked tasks of the eradication of African poverty and underdevelopment. Accordingly, it must therefore be that the principal task we face is to answer the critical question – what must be done to achieve the objectives which all Africans and progressive humanity accept as being of fundamental importance to the renewal and renaissance of Africa! Everybody familiar with the fundamentals of African history over at least the last half-a-century knows that central to the ebbs and flows in the evolution of independent Africa, in all its elements, has been the task of successfully responding to the fundamental social transformation to which I have referred. To name the main elements of the African progressive agenda, these include: establishing genuinely democratic systems of government, including accountable State systems; entrenching peace, security and stability; achieving national and social cohesion as well as social development; eradicating poverty and underdevelopment through sustained and sustainable economic growth and equitable economic development; ensuring African

integration and unity; and securing that Africa takes her rightful place among the world community of nations.

All these outcomes, which are critical to the realisation of fundamental social transformation, can only be achieved through conscious, purposeful and concerted action by Africans. I argue and firmly propose that these goals constitute the core of the contemporary African progressive agenda. It therefore follows that to achieve them, demands of the African progressive forces that they discharge their responsibilities to ensure their realisation. Naturally, if this has not been done already, these progressive forces within each of our countries would have to detail how the goals of the African progressive agenda would be achieved, taking into account the national conditions.

Each of the elements needs some commentary but I need a special lecture to do that. Taking into account that you are international journal I would limit myself to a more detailed comment on the last point – Africa's place in the world. In this context we cannot over-emphasise the fact that to achieve our goals in this regard will require the united action of our Continent. I emphasise the need to have a strong African Union capable of defending, representing and advancing the interests of our Continent. We are also faced with the critical importance both of helping to build strong and effective multilateral institutions and the transformation of these institutions so that they are properly representative of the developing countries, including Africa. The collapse of the Soviet Union and the European socialist countries, and therefore the end of the Cold War, meant a radical redistribution of global power and the emergence of what was called 'a unipolar world'. More recently, and certainly as this relates to Africa, this has translated into what seems to be a 'new reality' that the major Western powers feel that they have the freedom to act individually or collectively to determine the destiny of Africa. They are therefore ready to intervene anywhere on our Continent regardless of our views as Africans. They view the involvement in Africa of other countries, and especially China, as a strategic threat to their interests, which include unfettered access to the ever-expanding proven reserves and deposits of natural resources on our Continent. And they would like to use the historical relations between our countries and themselves, including those imposed on Africa during the colonial period, to preserve our Continent as their exclusive sphere of influence, in their interest. We should add to this the fact that the process of globalisation, driven by dominant Western drivers, has resulted in the further unequal integration of Africa within the global community on terms and conditions that are essentially defined by the West.

In summary I would suggest that for it successfully to help address the historic challenge to secure Africa's rightful place among the world community of nations, the African progressive movement must attend to such challenges as strengthening the AU, to enable Africa effectively to act as a united entity capable of advancing its interests; implementing the agreed African socio-economic development programmes, as represented for instance in NEPAD; acting to defend the right and possibility for us, the peoples of Africa, individually and collectively, freely to determine our destiny, consistent with international law which prescribes the right of nations to self-determination; strengthening and democratizing the multilateral institutions, to ensure respect for international rule of law even by the most powerful countries in the world; constructing equitable North-South relations especially as these relate to Africa; and enhancing South-South cooperation.

To achieve all these goals, the question arises – who constitutes this African progressive movement? Throughout the years of the African struggle for liberation against colonial rule it was not difficult to define both the African progressive liberation agenda and the African motive forces – the African progressive movement – which would engage the offensive to achieve the objectives specified in this African liberation agenda. The historic African victory which caused the complete global collapse of colonialism and therefore the independence of all nations, posed new challenges. I would like to insist that the task to achieve the fundamental social transformation of our Continent – its renaissance – belongs to the African people as a whole, led by a properly organized and conscious progressive movement rooted among the people.

INTERNATIONAL LAW:
VIEW FROM SOUTH AFRICA and RUSSIA

STATE AND SUB-STATE TERRORISM IN AFRICA

Hennie Strydom[1]
Swikani Ncube[2]

1. INTRODUCTION

Two years after the 9/11 terrorist attacks in the US, the Commission of the African Union convened a meeting of experts on terrorist-related issues in Addis Ababa[3] with the purpose of assisting the Commission in developing a roadmap for the implementation of a Plan of Action on Terrorism in Africa. The Plan of Action originated from a meeting of AU member states between 11 and 14 September 2002 in Algiers in an attempt to take joint action in establishing a counter-terrorism cooperation framework in Africa.[4] On December 6, 2002 the 1999 Algiers Convention on the Prevention and Combating of Terrorism entered into force and in 2003 the Assembly of African Heads of State and Government endorsed the 2002 Plan of Action[5] which was seized upon by the AU Commission with the road map initiative referred to above.

It is tempting to link these developments, and others at the time, to the dramatic and devastating events of 9/11 and other incidents of international terrorism that occurred at the turn of the century. Although the impact of these events and the subsequent anti-terrorism measures imposed on the international community by the UN Security Council explain much of the urgency with which African states reacted to the threat of terrorism, it tells only half the story. Between 1990 and 2003, 6 percent of international acts of terrorism occurred on African soil, making it the fifth most targeted region after Latin America, Western Europe, Asia and the Middle East.[6] Alarming too are the casualties: more than 6000 people perished from 296 acts of terrorism during the period.[7]

However, more recent events have further exposed the vulnerability of African states, especially in the West and East African regions. In West Africa an intensification of terrorist activities has followed on the escalation of the Niger Delta conflict in 2006 and the resurgence of the Islamist sect Boko Haram in 2009 who are responsible for a long list of violent attacks aimed at the establishment of an Islamic state in the north-eastern parts of Nigeria. In its quest for the supremacy of Islam, it is estimated that Boko Haram has killed more than 11 000 people since 2009 with the period between

[1] ***Hennie Strydom*** – Professor in Public International Law and holder of the National Research Foundation (NRF) Research Chair in International Law, University of Johannesburg, South Africa.

[2] ***Swikani Ncube*** – LLD Candidate, NRF Research Chair in International Law, University of Johannesburg.

[3] Report of the Meeting of Experts to Consider Modalities for the Implementation of the AU Plan of Action on the Prevention and Combating of Terrorism in Africa, Report/Terr/Expts/Oct. 2003.

[4] AU High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa, Algiers 11 – 14 September 2002, AU Doc Mtg/HLIG/Conv.Terror/Plan.(I).

[5] Assembly/AU/Dec.15 (II).

[6] A Botha "Africa's vulnerability to terrorism and its ability to combat it" in W Okumu & A Botha (eds) *Understanding Terrorism in Africa: In search for an African voice* Institute for Security Studies (2007) 26.

[7] J Cilliers "Terrorism in Africa" 12 (4) *African Security Review* (2003) 93.

June 2013 and June 2014 proving the deadliest (casualties estimated at over 7000).[1] In East Africa parts of rural Somalia are still under the control of the militant, and Al Qaeda-linked, Al Shabaab group, known also for its violent attacks in neigbouring states such as Uganda and Kenya. And along the coasts of both these regions communities and the crews of commercial shipping vessels have to battle with modern-day pirates armed to the teeth and scornful of the law enforcement abilities of the coastal states.

This contribution will first highlight the factors that contribute to an environment in Africa favourable to the growth of terrorist activities, secondly, it explores state terrorism, a phenomenon that finds particular relevance in the context of African governments and their style of leadership. Lastly, it provides an overview of the main responses in the region to the terrorism threat and briefly outlines challenges to the effective implementation of the AU's anti-terrorism framework.

There is no intention here to enter the debate on the definition of terrorism, a matter that is still holding back the finalization of a comprehensive international convention on the combating of terrorism. For purposes of this contribution the point of departure will simply be that terrorism involves intentional acts of violence against civilians and civilian property to put fear into, force, coerce or intimidate a government, institution or the general public or segments thereof to perform or to abstain from performing any act; to disrupt a public service; or to cause a general insurrection in a state.[2] It is also our view that when a government or security forces make use of the same tactics against its own citizens – usually done in the name of preserving state/regime security – the state commits terrorism.[3] This broadened view of terrorism is of particular relevance in the case of Africa.[4]

2. TERRORISM IN AFRICA: A BRIEF ACCOUNT

Commentators have pointed out that terrorism in Africa is not only widespread, but that for long it has been overwhelmingly of a state and sub-state (domestic) nature which has affected millions of people. By this is meant that both government forces and insurgent movements "have adopted practices that rely heavily on the use of fear and terror".[5] Many of the conflicts on the African continent, including cases of internecine strife, bear the hallmarks of these methods. Volumes of present-day testimonies and recorded gross violations of international humanitarian and human rights law in several strife-torn African societies bear testimony to the ongoing nature of fear and terror tactics by government and insurgent forces alike.[6]

However, since the 1990's international terrorism started spreading to Africa when the veterans of the war in Afghanistan returned to the Middle East and North Africa after the Soviet withdrawal from Afghanistan in 1989. Soon the liberators of Afghanistan would coalesce around another global target, namely the United States and its allies, helped along by the benefits of globalization that followed on the demise of the Cold War. A new wave of radical fundamentalism spread rapidly over North Africa eagerly funded by Saudi Arabia, amongst others, and later by Osama bin Laden. In all of this Algeria presented a special case in the spread of terror. Key forces behind this were the return of large numbers of Algerian fighters, bent on Islamic militancy, from the Afghan war towards the end of the 1980's and the growing internal dissent that developed into a full-scale civil war after the

[1] See N. A Peter. M Lewis and H Matfess "The Boko Haram Insurgency, by the numbers" available at https://www.washingtonpost.com/blogs/monkey-cage/wp/2014/10/06/the-boko-haram-insurgency-by-the-numbers/ (last accessed 03 December 2015).

[2] See also UN General Assembly resolution 54/110, 9 December 1999.

[3] The following definition referred to by a former UN General Secretary, Kofi Annan, is susceptible to such an interpretation: "The Panel calls for a definition which would make it clear that any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from any act" (UN Press Release SG/SM/9757, 10 March 2005, 2).

[4] See also A Botha "Challenges in Understanding Terrorism in Africa" *African Security Review* 17.2, Institute for Security Studies (2008) 28, 29 – 31.

[5] Cilliers (above) 92; Botha (above) 36.

[6] See for instance Human Rights Watch "I Can Still Smell the Dead: The Forgotten Human Rights Crisis in the Central African Republic" (2013); Amnesty International "Central African Republic: Action Needed to End Decades of Abuse" (2011); see also A Abass, 'The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia', *54(3) Netherlands International Law Review* 415 (2007) pp.420-423.

annulment of the Islamic Salvation Front's election victory in 1992. However, the internal dissent was long in the making and part of Algeria's post-independence history during which time a number of factors combined to prepare the ground for the extremism and brutal tactics of the 1990's. They include deteriorating socio-economic conditions, urbanization, single party rule backed by a military elite, and society's increasing return to Islam and resultant confrontation with the Marxist and leftist elements in government.[1] But when counter-terrorism strategies and military offensives started to make life difficult for these extremist groups in North Africa, repositories of violence and terror were simply established in other parts of the world, most notably in Europe, the United Kingdom and Canada with the help of existing terrorist networks and international criminal organisations.[2]

Rather than extraordinary or isolated, the above combination of factors and the causal relationship between them usually drive acts of violence and terror in much of Africa. Although not all of this will strictly fit the definition of terrorism, the conditions created thereby are a fertile breeding ground for discontent that can easily translate into violent reaction in the true form of terrorism. The following excerpt sums it all up:

A repressive state … or authoritarian and corrupt system that denies individual space … increases the risk of violent disaffection including terrorism. Economic decline and rising inequality massively compound the associated risks. But the relationship is a distant one. It requires appropriate structural conditions that are politicized by relative deprivation or other social change. It requires an appropriate motivational context and any number of triggers or incidences that focus action towards violence. It requires leadership, recruitment, mobilization and organization. Finally it requires a facilitating environment including resources and targets.[3]

With this in mind the focus should shift to some of the factors on the African continent that enhance terrorism's threat potential and highlight the challenges African states face in particular in playing their role as part of the international efforts in combating terrorism.

3. CAUSES OF SUB-STATE TERRORISM

Weak States. Weak states pose a danger not only to their citizens but to entire regions and the world in general. Despite definitional contentions on what constitutes a failed state and of late a debate on whether the appropriate term is 'failed states' or 'fragile states' there is unanimity that these states 'exhibit a vacuum of authority'[4] and are a serious peace and security threat. Where a state fails to fulfill its obligations in relation to security institutions it opens up space to all kinds of illegal groups to operate as there is extensive lawlessness and criminal organisations are attracted by the low risk of being prosecuted. Years of civil wars in several African states have resulted in weak governments who are unable to exert meaningful control over all of their territories. These state weaknesses are often manifested by the erosion of authority which can be revealed in protests or radical opposition movements as well as the state's complete loss of control of its governmental institutions.[5] Where these survive, they are reduced to ineffective institutions with neither the political will to fight terrorism nor the resources to do so. Once state institutions fail, the government loses its monopoly on the use of force and this inevitably leads to widespread violence as militias or armed groups emerge thereby establishing competing centres of power.

It has also been observed that states that are experiencing state failure are more predisposed to transnational terrorist attacks and further contribute to transnational terrorism that targets other

[1] For an extensive account of these developments see A Botha *Terrorism in the Maghreb: The Transnationalisation of Domestic Terrorism* Institute of Security Studies Monograph Series No 144 (2008) Ch 2.

[2] See International Institute of Strategic Studies "Strategic Comments: Algeria and Terrorism" vol 9 Issue 6 August 2003; M Boudjemaa "Africa and Terrorism, Joining the Global Campaign" Institute for Security Studies Monograph Series No 74 (2002) Ch 6.

[3] Cilliers (n 5 above) 97.

[4] R. I Rotberg "Failed States, Collapsed States, Weak States: Causes and indicators" in R. I Rotberg (ed.) *State Failure and State Weakness in a Time of Terror* (2003) 9.

[5] For detailed discussions on the threat weak states pose to peace and security see A Hailu "The State in Historical and Comparative Perspective" in J Davies (ed) *Terrorism in Africa: The evolving front on the war on terror* (2010); J Piazza "incubators of Terror: Do Failed and failing states Promote Transnational Terrorism?" 52(3) *International Studies Quarterly* (2008); A Yusuf "Government Collapse and State Continuity: The case of Somalia" *13 Italian Y.B. Int'l L.* 11 (2003) 11.

countries.[1] In Africa, Somalia is often referenced as a textbook example of a failed state. Years of civil war have turned the country into a territory ruled by warlords and street gangs and this has reduced it to a haven for terrorists and radical extremists. The militant group Al Shabaab controls significant parts of the country and is able to coordinate attacks because the state security institutions are too weak to mount a challenge. In the Central African Republic (CAR) the on-going violence also has signs of a failing national security system. Not surprisingly, in 2014 the UN warned that the CAR government is overwhelmed and needs international support to assert control.[2] The 2014 Fragile State Index (FSI) paints a picture of gloom for Africa. Of the five states deemed most fragile in the world, all are on the continent[3] including the AU's latest member South Sudan which achieved the unenviable fit of replacing Somalia as the world's most fragile state, the latter having been ranked the worst for 10 straight years.[4]

Poverty. Poverty can be a cause of terrorist violence. That Africa is home to some of the worst cases of poverty is common cause. Poor infrastructure, food shortages, lack of basic services and chronic unemployment are all problems that African states are struggling with. The danger that poverty poses is that groups mired in poverty may be tempted to engage in political violence aimed at overthrowing a given political order perceived to be ignoring or worsening their plight. Such groups engage in acts of violence hoping that a change in the central government will bring with it an improved standard of living. In Nigeria economic exclusion and deprivation are behind the volatility of the Niger Delta as Indigenous groups accuse the Federal government and oil multinationals of exploitation, neglect and environmental degradation and use this as the springboard for engaging in terrorist violence.[5] Cyril Obi argues, correctly so, that "had Nigeria, known for its immense corruption, not squandered billions of dollars it earned from selling oil, the people of the Niger Delta, for the most part ignored by the government and living in squalid poverty, might not have resorted to kidnapping foreign nationals."[6]

To put this into perspective, the formation of the Movement for the Survival of the Ogoni People (MOSOP) in the 1990s was driven by the need to campaign for a greater share of resources for the Ogoni people. After its formation, the Movement presented its demands through the Ogoni Bill of Rights (OBR) which was based primarily on the right of the Ogoni people to control and use a fair share of the Ogoni economic resources for Ogoni development. Unfortunately, the movement was crushed and in 1995, its leader Saro-Wiwa and eight other activists were hanged. However, because of the deep underlying causes of discontent, this has failed to stem protests for the control of resources (oil) in the region. Groups such as the Movement for the emancipation of the Niger Delta (MEND), the Martyrs Brigade and the Niger Delta Volunteer Force surfaced to champion the same cause.

There is no denying the fact that poverty causes frustration which in turn makes people prone to engaging in violence more so in instances where blame can be attributed to an obvious target. Gani Yoroms calls this a "situational pressure" and argues that because it is often a temporal action, failure by the authorities to address grievances may turn it into revolutionary pressure which results in class based conflicts.[7] On the contrary, development will in general increase the standard of living, reduce unemployment and improve basic services. This in turn calms public anger against authorities and makes it difficult for terrorist organizations to recruit. That said, while it would not be very accurate to say poverty directly causes terrorism, it is fair to argue that poverty makes it easier for terrorist groups to channel this frustration into religious fanatism or political fascism.

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[1] Piazza (above) 483.

[2] See United Nations, "Central African Republic marked by rising hatred, violence and trauma" available at http://www.un.org/apps/news/story.asp/story.asp?NewsID=47453&Cr=Central+African+Republic&Cr1=#.UzhFAqJLXIU (accessed 5 March 2015).

[3] Fund For Peace (FFP) "The Fragile States Index 2014" (2015) 4.

[4] Ibid.

[5] C L Obi "Terrorism in West Africa" in J Davis. *Terrorism in Africa: The Evolving Front on the War on Terror* (2010) 65.

[6] Ibid.

[7] G Yoroms "Defining and mapping threats of terrorism in Africa" in W Okumu & A Botha (eds) *Understanding Terrorism in Africa: In search for an African voice* Institute for Security Studies (2007) 6.

Religion. Religion is a powerful element in any society. History records that in the olden days there was no distinction between governing authorities and religious leaders. While there has been a significant shift in terms of current trends religion still plays an important role in several states. Some countries identify themselves as Christian states, others as Islamic states while Israel is a well-known Jewish state. A sense of superiority by one religious group over another can lead to hatred and violence. As observed by Robert Feldman, followers of one religion "may describe those of another as apostates, heretics, or infidels; words that dehumanize and make it easier to justify their killing" or abuse of any kind.[1] It is argued that although there were other issues involved besides religion in the Second Sudanese Civil War, it pitted the predominantly Muslim North against the predominantly Christian and Animist South.[2] Similarly, the fighting in the Central African Republic has also taken a religious dimension as Muslim Seleka rebels are largely blamed for the chaos and this has caused divisions between the anti-Balaka Christian militias and the predominantly Muslim Seleka rebels.[3]

North, East and West Africa have large Muslim populations and this makes them prone to terrorism. Radical or extremist groups within these populations may identify or sympathize with other Islamic terrorist groups such as Al Qaeda and the Islamic State (IS) leading to mergers or common purpose violence. That Al Qaeda carries its operations in the name of the Islamic religion makes countries in these parts of Africa vulnerable. The invasion of Iraq, the war in Afghanistan and the killing of Osama Bin Laden who is viewed as a hero in some sections of the region are events that are used in fueling emotion in radical Muslim communities thereby enabling terrorist groups to recruit.

On 23 March 2014, masked gunmen attacked a church in the Kenyan town of Likoni.[4] While there is no direct evidence to suggest that the attack was based on religious differences the choice of victims by the attackers can be taken as sign that the perpetrators were non-Christians. Attacks such as these have the potential of fueling tensions between the religious groups involved thereby easily degenerating into serious violence.

It is important to note however that Islam on its own is not sufficient to give rise to terrorist activities. Radical movements and extremists are the catalyst that result in terrorist acts in the name of the religion. Muslim scholars challenge the use of the phrase 'Islamic terrorist' arguing that this tarnishes the image of the religion as the Islamic faith preaches peace and compassion and is opposed to violence and terrorism.[5] There is however no denying the fact that terrorism is more prevalent in predominantly Muslim regions and that it is groups from these areas that export acts of terrorism to other countries.

Poor Governance. The relationship between those in government and the general populace is an essential element in understanding why people resort to violence where terrorist tactics may be used.[6] Racial discrimination, unequal economic opportunities and apartheid were the main causes of wars of liberation across Africa. Poor governance by the colonizers gave birth to several liberation movements most of whom were termed terrorist groups. Sadly, post-independence Africa has not witnessed any significant change in the type of leaders across its 54 countries. Corruption, tribalism, nepotism and state terrorism continue to drive populations to dangerous levels of frustrations creating fertile grounds for explosive violence. The routine abuse of opposition parties and vote rigging constrict the space for democratic processes leaving violence as the only alternative.

For example at its formation, the Algerian Salafist Group for Preaching and Combat (GSPC) aimed at participating in open elections despite its intention to install an Islamic leadership. However,

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[1] R L Feldman "The Root Causes of Terrorism: Why Parts of Africa Might Never Be at Peace" 25(4) *Defense&Security Analysis* (2009) 361.

[2] Ibid.

[3] See for example United Nations "Central African Republic marked by rising hatred, violence and trauma" available at http://www.un.org/apps/news/story.asp/story.asp?NewsID=47453&Cr=Central+African+Republic&Cr1=#.UzhFAqJLXIU (Last accessed 10 March 2015).

[4] J Akwiri "Gunmen kill four in 'terrorist' attack on Kenyan church" available at http://uk.reuters.com/article/2014/03/23/uk-kenya-attacks-idUKBREA2M03I20140323. (Last accessed 5 March 2015).

[5] See for example M T Ahmad *Murder in the name of Allah* (1989) 104. He concludes that the Islamic teachings do not support killing and hatred and as such those who case out these acts in the name of the religion have no support from the teachings of the Islamic faith.

[6] Botha (above) 31.

after registering significant victories in national elections in 1991, the group was subsequently banned and its leaders imprisoned[1] and this led to a civil war in Algeria. The failure to open up the political space and to allow a multi-party system led to the sprouting of militant groups that attacked government posts, soldiers, the police, as well as civilians; all this as a way of expressing their displeasure with the governing authorities. In 2006, the GSPC joined Al Qaeda and changed its name to Al Qaeda in the Islamic Maghreb (AQIM), a change that internationalized the group as it now operates in Morocco, Tunisia, Mali and Mauritania.

Most recently in 2013, the Muslim Brotherhood in Egypt was banned and declared a terrorist organisation by the Egyptian government after the ouster and arrest of its leader Mohammed Morsi who was the country's President at the time.[2] Of importance in this regard is the fact that Morsi was elected through a public ballot and as such the grievances of his followers relate to the supposedly unconstitutional manner in which he was ousted. While there is no evidence that the Muslim Brotherhood has resorted to terrorism as a way of expressing their frustration, such occurrences can easily act as a trigger event for the organization to adopt terrorist tactics. Where groups with political aspirations are banned or prevented from organizing themselves publicly and within the law they are left with no option but to go underground. Apart from being a direct cause of terrorism poor governance can indirectly aid terrorism as terrorist safe havens survive in areas that are ungoverned, under-governed or ill-governed. The inadequacy of governance capacity, political will or both results in porous systems that present terrorist networks with just the right environment to flourish.

4. STATE TERRORISM IN AFRICA

The focus on Africa's peace and security woes since the end of the cold war has been limited to human rights abuses as a result of either civil wars or autocratic regimes. What has been overlooked in this discourse is to what extent some violations of human rights amount to state terrorism. Academic interest in state terrorism is largely premised on states harboring and funding terrorists or countries encouraging transnational terrorism to promote their own agendas.[3] However, in Africa state agents are notorious for resorting to the abuse of national resources to intimidate civilians and perceived opponents. Because of their fear of the people, authorities, most of whom are rogue states focus on regime security and security agents conduct themselves in a manner that make the state an agent provocateur.[4] For this reason, state terrorism in the context of this contribution means the unlawful use by a state of measures aimed at intimidating and controlling the public through destroying the structures of resistance.[5] This systematic and intentional use of violence by state agents or their proxies against individuals or groups for purposes of intimidating or frightening a broader audience is more often disguised as law enforcement.[6] While states have a right and an obligation to utilize national resources and all available legal instruments in the fight against crime, including terrorism, such methods should be within the confines of internationally accepted standards of human rights. The rationale for this assertion is obvious, by virtue of having at their disposal far greater coercive resources than non-state actors it is imperative that high standards of accountability be imposed upon states as the potential damage that can result from the abuse of state resources is substantial.

Ethiopia and Nigeria are clear examples of states that have either condoned or encouraged state terrorism in their fight for regime security and against terrorism respectively. In 2009, Ethiopia adopted an Anti-Terrorism Proclamation (ATP) which was followed by legislation in 2011 that designated the groups Al Qaida, Al-Shabaab, the ONLF, OLF and Ginbot 7 as terrorist organisations. Based on the ATP, Ethiopia has embarked on a campaign of state terrorism arresting and imprisoning opposition figures, journalists and human rights activists who while in custody are subjected to tor-

[1] M A El-Khawas "Terrorism in North Africa: An increasing Regional Threat" in J Davis, *Terrorism in Africa: The evolving front on the war on terror* (2010)75-80.

[2] See for example "Muslim brotherhood declared a terrorist group by Egypt" available at http://www.cbc.ca/news/world/muslim-brotherhood-declared-a-terrorist-group-by-egypt-1.2476226 (Last accessed 10 March 2015).

[3] See L Pettiford & D Harding, *Terrorism: The New World War* (2003) 148.

[4] Yoroms (above) 6.

[5] See J Gearson, 'The Nature of Modern Terrorism' in L Freedman (Ed) *Superterrorism: Policy responses* (2002) 10.

[6] R Jackson, E Murphy, & S Poynting (eds) *Contemporary State Terrorism: Theory and Cases* (2009) 3.

ture and other forms of cruel and inhuman treatment. Just a year after the adoption of the ATP, the UN Committee Against Torture expressed deep concern over;

the routine use of torture by the police, prison officers and other members of the security forces, as well as the military, in particular against political dissidents and opposition party members, students, alleged terrorist suspects and alleged supporters of insurgent groups.[1]

The Committee further noted that cases of torture were not investigated and there were no prosecutions of alleged perpetrators. Similarly, a panel of UN Human rights Experts in a joint statement voiced their concern over the spread of fear through detentions premised on the anti-terrorism laws and warned that while confronting terrorism is important, it should be done in adherence to international human rights to be effective.[2] The Special Rapporteur on counter-terrorism and human rights, Ben Emmerson, added his voice to the crisis and underscored the importance of clearly defining the country's criminal laws to ensure that they do not go counter to internationally guaranteed human rights.[3] This was followed by a resolution of the African Commission on Human and people's rights which expressed concern over the imprisonment of journalists and individuals perceived to be against the government noting that these individuals, many of whom were charged with terrorism and other serious offences such as treason were victimized merely for "exercising their peaceful and legitimate right to freedom of expression and association".[4]

In Nigeria, the federal government's efforts to quell the terrorist violence of the Islamic militants Boko Haram have seen state agents resorting to terror tactics. A Joint Task Force (JTF) established in 2011 and recently replaced with the AU MNJTF was accused of serious violations of human rights against civilians in the country's north-east. In 2012, a Presidential Committee inaugurated to look into the security situation in areas affected by boko haram violence noted allegations against the JFT "bordering on rape, destruction of property belonging to sect members, extrajudicial killings and harassment and intimidation of Maiduguri residents."[5] In the same year, amnesty international levelled similar allegations.[6] The danger that these acts of terrorism pose to the conflict which has now spilled into neighbouring Chad, Cameroon and Niger is obvious. Any perceived heavy handedness by the state will play into the hands of Boko Haram as it will alienate civilians and create conducive conditions for the terrorist group to recruit.

The cases of Nigeria and Ethiopia are just but two of the many cases of state terrorism in Africa. Zimbabwe, the Democratic Republic of Congo (DRC), Libya and the Central African Republic (CAR) are some of the countries were state terrorism is a worrying phenomenon. However, because orthodox terrorism studies remain largely focused on non-state actors, all anti-terrorism measures present on the continent focus on the protection of the state from terrorist groups. While addressing Africa's peace and security challenges from a human rights and peace building perspective is ongoing, it is also important that state excesses be condemned as terrorism were these are conducted with the intention to spread terror. The labeling of state excesses as terrorism serves an important function of attacking a state's credibility and has a normative effect that can go a long way in promoting human security.

5. AFRICA'S COUNTER-TERRORISM FRAMEWORK

5.1. The OAU Convention on the Prevention and Combating of Terrorism, 1999. In the year of its last breath, the OAU responded to the threat of terrorism in the form of this Convention, expressing concern about the scope and seriousness of the threat and the danger it poses to the security and stability of states while endorsing the global view that terrorism cannot be justified under

[1] See concluding observations of the United Nations Committee Against Torture 45th Session, 1-19 November 2010. CAT/C/ETH/CO/1 para 10.

[2] UN experts urge Ethiopia to stop using anti-terrorism legislation to curb human rights available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E (last accessed 5 March 2015).

[3] Ibid.

[4] Resolution 218, Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia, adopted by The African Commission on Human and Peoples' Rights (the African Commission), meeting at its 51st ordinary Session held in Banjul, The Gambia from 18 April to 2 May 2012

[5] White Paper on the Report of the Presidential Committee on the Security Challenges in the North-East Zone of Nigeria, May 2012.

[6] Amnesty International "Nigeria: Trapped in The Cycle of Violence" (2012).

any circumstances and that terrorism and organized crime are increasingly locked in a symbiotic relationship. Currently, the Convention has 41 ratifications.

The Convention even attempted a definition of terrorism stating that terrorism is: any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a standpoint, or to act according to certain principles; or disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or create general insurrection in a State.[1]

The Convention lists a wide range of measures states parties must undertake in preventing and combating terrorism all of which have become customary especially after 9/11. These include legislative and other measures against the organizing, support, financing and commission of terrorist acts and against providing safe havens for terrorists including the provision of weapons and the issuing of visas and travel documents.[2] Inter-state and trans-border cooperation and monitoring also feature strongly in the Convention[3], matters that depend heavily on the capacity and political will of the parties to comply.

The authors of the Convention seem to have realized that inter-state cooperation is an essential ingredient in any strategy for the combating of terrorism. Hence, much emphasis is placed on extradition and mutual legal assistance. States parties undertake to extradite persons suspected of terrorist activities carried out on the territory of another state when so requested, provided that states, at the time of ratification, may notify the Secretary-General of the OAU of the grounds on which extradition may be refused in accordance with national law or international conventions to which the requested state has become a party.[4] It stands to reason that conflicting provisions in the different national jurisdictions on grounds for refusal may seriously undermine the commitment to cooperate which calls for concerted efforts by states parties to harmonize their laws in this regard. The extradite or punish rule the Convention adheres to[5], further underscores this, since, if the requested state is prevented by its national law to extradite a suspect, it has the obligation to proceed with a prosecution against the suspect irrespective of where the offence was committed, and to do so effectively, it will have to rely on the cooperation of the state where the offence was committed. In the latter instance, there is the general enabling provision allowing for cooperation in criminal investigations on the territory of another state in respect of the examination of witnesses, the initiation of investigation processes, the collection of documentary and other evidence, the tracing of assets, the execution of searches and seizures, and the service of judicial documents.[6] Furthermore, the request for an extraterritorial investigation shall not be rejected on the grounds of confidentiality of bank operations or financial institutions.[7]

While the Convention contains what is expected of a counter-terrorism instrument, it is weak with regard to re-enforcing human rights guarantees states must adhere to in giving effect to their convention obligations. The habitual deference to 'national law' which must guide state conduct in many of the provisions, without further specification, is cold comfort to suspects of terrorist activities, especially in countries known for their non-conformity to internationally acceptable standards in criminal law enforcement. A small concession to fears about potential abuse by law enforcement agencies is to be found in article 7. According to this provision a person who is investigated for alleged terrorist activities under 'national law' or whose presence at the criminal proceedings must

[1] Art 1(3)(a) and (b). Also Included in the Convention's definition is any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to an act of terrorism.

[2] Art 4(1).

[3] Art 4(2).

[4] Art 8(1) and (2).

[5] Art 8(4).

[6] Art 14.

[7] Art 16.

be ensured in accordance with 'national law' is entitled to communicate without delay with the nearest appropriate representative of the person's state of nationality; to be visited by a representative of that state; to be assisted by a lawyer of his or her choice; and to be informed about these rights. However, the exercise of these rights is made subject to their conformity with the national laws of the territorial state on condition that such laws "must enable full effect be given to the purposes for which the rights … are intended".[1] It must be noted that according to this wording, it is not the rights in themselves that must be given full effect, but the *purpose* for which they are intended. Potentially, this formulation paves the way for a range of interpretations regarding whether there was indeed compliance with the convention provision, or not.

Just over a month after the 9/11 terrorist attacks in the USA the Heads of State and Government of twenty eight African states issued the Dakar Declaration against Terrorism condemning the attacks in the USA and elsewhere and expressing concern about the extent and gravity of terrorist activities worldwide. The Declaration also expressed (rather ambitiously) the necessity to make Africa a terrorist-free continent and to strengthen inter-state cooperation and coordination in the fight against terrorism.

5.2. The AU Action Plan for the Prevention and Combating of Terrorism. In 2002, the threat of terrorism was taken up by the African Union (AU) at a High Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa from 11 – 14 September in Algeria's capital Algiers. This resulted in the Plan of Action of the African Union for the Prevention and Combating of Terrorism.[2] The Plan of Action identifies six areas for action by the members of the AU, namely ratification and full implementation of the OAU and all international conventions concerning terrorism; the improvement of police and border control and surveillance; the adoption and harmonization of legal frameworks pertaining to the prevention and combating of terrorism; the suppression and criminalization of terrorist financing; the exchange of information; and the coordination of their actions at the regional, continental and international levels. The Plan also provides for an annual reporting duty to the AU Peace and Security Council on steps taken to prevent and combat terrorism. The Peace and Security Council is also the body tasked with the implementation of the different terrorist conventions and with the harmonization and coordination of efforts at the regional and continental levels.[3]

A further outcome of the AU Plan of Action was the decision to establish an African Centre for Study and Research on Terrorism.[4] The Centre came into being in 2004 and serves as a structure for centralizing information, studies and analyses on terrorism and for developing counter-terrorism strategies. This event coincided with the 2nd High Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa at which occasion a Declaration was adopted[5] to confirm the importance of the AU Plan of Action as the most viable and comprehensive strategy for the combating of terrorism in Africa, to urge member states to full comply with its provisions, and to urge (instead of request) the Commission of the African Union to draw up a roadmap with priorities and timeframes for the implementation of the Plan.

5.3. The Protocol to the Convention on Prevention and Combating Terrorism. Further attempts to strengthen the enforcement of counter-terrorism instruments occurred in 2004 when the AU Heads of State and Government adopted during the 3rd Ordinary Session of the AU Assembly the Protocol to the AU Convention on the Prevention and Combating of Terrorism. In so doing the Assembly aimed at addressing one of the major shortcomings in the OAU Convention, namely the absence of enforcement measures. Thus, article 2(1) of the Protocol states that its main purpose is to enhance the effective implementation of the OAU Convention and to address the need for better coordination and harmonization of continental efforts in the prevention and combating of terrorism. The following are amongst the measures states parties undertake to implement: full compliance with the OAU Convention; preventing their territories to be used for terrorist activities;

[1] Art 7(4).
[2] AU Doc Mtg/HLIG/Conv.Terror/Plan(I).
[3] *Ibid* para 16.
[4] *Ibid* para 19.
[5] AU Doc Mtg/HLIG/Conv. Terror/Decl. (II) Rev. 2 (2004).

the freezing of funds and other assets used for terrorist activities; the timely exchange of information on terrorist groups and their activities; preventing terrorist groups from acquiring weapons of mass destruction; the submitting of annual reports to the Peace and Security Council on measures taken to prevent and combat terrorism.[1] The AU Peace and Security Council is the body responsible for the harmonization and coordination of the continental efforts in giving effect to the provisions of the Protocol.[2] Unfortunately, the ratification of the Protocol by African states has been dismal. Only 15 states have thus far ratified it.

Two subsequent developments may be briefly mentioned. The one is the appointment in 2010 of the AU Special Representative for Counter-Terrorism Cooperation[3] who, inter alia, undertakes assignments aimed at mobilizing support for the fight against terrorism and for assessing the situation in various member states. The second is the adoption and endorsement in 2011 of the African Model Law on Counter Terrorism[4] which was developed by the AU Commission to assist AU member states in implementing the provisions contained in the various continental and international anti-terrorism instruments.

However, it is also worth mentioning that the anti-terrorism framework outlined above faces numerous challenges amongst them porous borders and the lack of a political will within the AU to implement its own decisions. For example, rebel groups operating in Mauritania, Mali, Niger and Chad have been linked to possible terrorist infiltration from North Africa.[5] Although border control measures to avoid the free flow of weapons and militants are recognised as integral their implementation is a challenge. The lack of funds to acquire the requisite technology to administer rigorous checks at points of entry remains a major point of weakness.[6] The attacks on villages and towns in neighbouring Cameroon and Niger by Nigeria's Boko Haram is evidence of the risk porous borders pose to fighting terrorism in Africa. In relation to the lack of political will, the AU is notorious for adopting landmark decisions only to half-heartedly attempt implementation.[7] While the adoption of theoretical frameworks is important, these must be implemented fully to send a message that an attack on the values of the community will not be tolerated. Although the organisation lacks resources to prosecute and sustain military missions, taking a firm stand against lawlessness serves an important political function as it presents a springboard upon which decisive action may be undertaken. By coalescing around the AU, international partners lend support as opposed to taking the lead. Because countries such as the US, Britain and France are viewed as outside forces with an ulterior motive against Africa and Islam[8] any initiative perceived to be led by any one of them may actually worsen hostilities.

6. CONCLUSION

This paper has highlighted the causes of terrorism in Africa and outlined the regional response to the scourge. Furthermore, the paper situated state-terrorism within the broader context of terrorism as a strategy intended to instil fear and spread intimidation. While the AU's legal framework is a step in the right direction, the organisation must streamline its efforts and seek to address the root causes of terrorism. Although weak states, poverty and religion may be highlighted as causes of terrorist violence, one can trace their roots to poor governance which is often manifested through corruption, inequality in resource distribution and impunity within security agencies and their proxies. Despite the noble initiative to enhance the capacity of states, the framework faces implementation challenges chief of which is the lack of political will within the AU to respond decisively to acts of terrorism.

[1] Protocol, art 3.

[2] Ibid art 4.

[3] See AU Doc, Assembly/AU/Dec.311 (XV), July 2010.

[4] See AU Doc, Assembly/AU/Dec.369 (XVII).

[5] Obi (n 21 above) 62.

[6] K Sturman "The AU Action Plan on Terrorism: Joining the global war or leading an African battle?" 11(4) *African Security Review* (2002) 105.

[7] M Ewi & K Aning "Assessing the role of the African Union in Combating and Preventing Terrorism in Africa" 15(3) *African Security Review* (2007) 42.

[8] Davis J. "Evaluating Counterterrorism in Africa" in J Davis (ed) *Terrorism in Africa: The Evolving Front on the War on Terror* (2010) 217.

The rationale behind the state-centric approach of the continent's counter-terrorism framework is noble but the success of this system is hampered by the financial constraints of member states who are unable to put in place hi-tech systems in relation to border control, money laundering, and safe and secure communication methods for intelligence gathering and the tracking of terrorists. Initiatives funded by international partners such as the US contribute significantly to the fight against terrorism on the continent but unfortunately, these cannot succeed without the active participation of AU member states.

INTERNATIONAL CRIMINAL COURT IN THE CONTEXT OF INTER/SUPRA/CONTRA-NATIONAL RELATIONS

Alexander Mezyaev[1]

The International Criminal Court (ICC) was created in 1998 in terms of the Rome Statute, with the purpose of prosecuting the most dangerous international crimes, crimes against humanity and war crimes.[2] After more than fifteen years of activity, this Court has not only failed to meet its purpose, but is promoting a totally different agenda. The last scandalous events provoked by the ICC and some "South-African" NGOs in South Africa compels us to analyse what the real agenda of the ICC is and the location of Africa (including Republic of South Africa) therein.

We will face serious problems understanding the real agenda of the ICC if we make this analysis within the existing academic lexicon. For example the very name of ICC as an international court is misleading in understanding its true essence and role. Thus before we start this analysis we need to resolve certain methodological matters and to suggest a more correct definition for the court itself as well for the system that it operates in.

The rise of supra- and extra- national entities

The twenty-first century is far more complex than the nineteenth and even the twentieth centuries. One of the main elements that inform the complexity is the appearance of the new subject of management on the international stage.

Before the end of the 1980s there were two main entities on the international stage – states and international organisations. International organisations in their turn were collective representatives of the will of certain states and groups of states. Even when the international organisation acted in its own name, it represented the collective will of the member-states.

From the 1980s human civilization witnessed the emergence of totally new entities. None of them claim to be new, and they even try to camouflage themselves under old names, but the radically different nature of these entities requires that they be defined differently. For example the creation of the European Union marked a sharp appearance of an institution that may hold a separate (and sometimes totally different) position on the matters of economic or political questions, to member states of the EU. Because of this, the European law (law of EU) is more correctly called not international [regional] law, but supranational law. This term rightly reflects that this law is created not by member states but by a supranational institution (like European Commission or European Court of Justice).

At the same time there is at least one other entity or actor of world politics that does not fit into either the *inter*national nor *supra*national levels. These two last levels are both concerned with the "nation", though showing its different positions towards it. This other level of world politics has no functional connection with nations (states) and thus may be called "extra-national". In fact it is better to use a term "global". This term reflects the essence of this level very well, showing the global character of the subject and its agenda. The actors at global level do not represent the interests of any state

[1] ***Alexander Mezyaev*** – Head of the Department of International Law, University of Management TISBI, Russia. Editor-in-Chief of *Kazan Journal of International Law and International Relations*.

[2] Article 1 of the ICC Statute says that the Court is «a permanent institution and shall have the power established to exercise its jurisdiction over persons for the most serious crimes of international concern"

or its population as a whole, but have their own interests. Moreover these interests may contradict the interests of particular states and their populations.

Challenging the conceptualisation of the ICC

The beginning of the 1990s was characterised by the formal institutionalisation of global power. The analysis of the establishment of these institutions, which have at least two main powers, is informed by an analysis of the activities of the ICC and other international courts and tribunals.

We start this analysis from the group of facts that may be called "strange facts". What makes them strange is that such stories are not expected from an institution of the highest integrity and highest quality, which the ICC is claimed to be and is indeed widely regarded as. Nevertheless these stories are indeed from the ICC practice.

1. At the very first trial of the ICC (Lubanga trial, DRC situation), the very first witness confessed right in the courtroom that he gave false evidence and that he was taught to do so by the prosecution. The court did nothing to investigate the case.

2. In the trial of Mr. G. Katanga (DRC situation) the prosecution did not prove any of the counts that were brought against the accused. Instead of acquitting the accused, the court changed the count itself and found Mr. Katanga guilty on these – the court's imposed counts.

3. The President of Cote-d'Ivoire Mr. Laurent Gbagbo was imprisoned by the ICC for more than four years without trial. He spent almost two and a half years in prison even without confirmation of charges. In any local legal system no person could be detained without confirmed charges. After the first hearings for confirmation of charges the majority of judges agreed that there was no case. But instead of dismissing the case, the judges decided to give the prosecution "more time to collect more evidence". After the second attempt, another judges finally confirmed the charges, but the decision to prosecute was adopted by the majority two to one. The dissenting judge still claimed that there was no case. When the defence tried to appeal this decision at the Appeals chamber, the same judges prevented the defence from doing that.

4. In the case against the President of Kenya Mr. Uhuru Kenyatta and others (Kenya situation), the prosecution withdrew the case against Mr. Kenyatta and his co-accused after the charges were confirmed by the court. The problem with this situation is that the prosecution confessed that there were no witnesses in the case. The disturbing question is how did the judges confirm the charges when there were no witnesses?

5. In the case against Muammar Gaddafi (situation in Libya) after the assassination of the accused, the court simply "terminated the proceedings". We have seen a lot of so-called contempt cases when certain individuals were put on trial because of the interruption of the integrity of the proceedings, for example, the cases of bribing witnesses, or refusal to give evidence, etc. But what could make more damage to the integrity of the proceedings than the assassination of the accused? But, notwithstanding the fact that the killing was filmed and criminals may be well identified, no investigation or contempt cases were initiated.

6. During the trial in the case of the former Vice-President of the Democratic Republic of the Congo, Mr. Jean-Pierre Bemba (DRC situation) his entire defence team (with one exception of one non-African member) was violently arrested.

When facing any "strange" fact, we are in reality confronted with the methodological question of whether it is a bad fact or a bad concept. Why should the "bad" facts enumerated above draw our attention at conceptual level? It should draw our attention because these facts cannot be explained by mistakes and negligence. They also cannot be explained if we consider the ICC as an international institution of the highest degree of legal standards and integrity. This means that these facts cannot be explained in the established conceptualisation of the ICC as an international court and as a guardian of law and justice. And thus we have to revisit this official concept.

These bad facts are not an exception, they are the rule. Moreover we have the same bad facts not only in ICC practice, but also at the conceptual level of ICC as an institution. Here are some sharp examples.

According to common sense, judges of an international court must be the best judges that the world ever produced. Unfortunately, common sense is not the best way of understanding the

modern world, because according to article 36 (b) of the ICC Statute, the candidate for election to the Court shall have established only the competence in criminal law and procedure, and the necessary relevant[1] experience. This sounds reasonable though not strict enough. For example to be a judge of the International Court of Justice, the candidate has to possess high moral character, and be jurisconsults of recognised competence in international law. As we see, in the ICC, the high morality is not a necessary and recognised competency that can substitute established competence in relevant areas of international law. The bad fact about ICC judges is that many of them do not have any judge or even court experience in their legal careers.

A second, and even more disturbing bad fact, is that there are some judges in the ICC who do not have legal education, at all. This sounds really unbelievable, but could easily be verified from the official CVs of the judges. Some of the examples are Judge H. Kaul (Germany) and Judge K. Ozaki (Japan)[2].

There is another special aspect of this problem that we are not going to analyse in detail but just mention. This is a problem of states that voted for candidates who do not possess legal education and the attitudes of candidates for the position of ICC judges. Some of them wish to be ICC judges for dubious reasons: "I wish to be elected a Judge of the ICC as I am convinced that I can make a valuable contribution to the development of international criminal law and justice."[3] There is a problem in such an attitude, the ICC Statute requires that the judge applies law, not develop it. But this mind revelation from some judges shows that the "developing" (read: changing) of international law is a real agenda of ICC.

There are cases where almost all human rights of the accused are violated in the ICC. For example, some of the accused are almost completely denied the right to public hearings. This right is assured in all universal and regional human rights treaties. For example, article 14 of the Covenant on Civil and Political Rights (adopted by the United Nations on 19 December 1966), states that in the determination of any criminal charge, everyone shall be entitled to a fair and public hearing by a court of law. But in the case of Jean-Pierre Bemba, 30 of the 40 witnesses were so-called secret witnesses, meaning that their identities were hidden from the defence until it was impossible to collect any information about such witnesses. This is an intentional policy of the ICC, denying the accused to exercise the right to prepare for any meaningful defence.

During a public hearing in the ICC, Judge Cot said to the accused M. Chui: "Accused, the fact that we acquit you does not mean that you are innocent". This is a totally new concept of the rights of the accused. According to the International Covenant on Civil and Political Rights, everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. According the ICC, even when acquitted you are not regarded as innocent.

The human rights issue is one of the most serious issues in ICC practices. Violations of the human rights of the accused is one of the matters that help one understand the reality of the ICC. The ICC cases do not hold water. They are all based on political considerations and thus cannot be proved with the use of law. The only way to "prove" such cases is to deny the accused and defence any rights.

How could we explain all these bad facts? Let us start from the official concepts. The official aim of the International Criminal Court is enshrined in article 1 of the Rome Statute. It says that the ICC is established "to exercise jurisdiction over persons for the most serious crimes of international concern". Thus the prosecution of the most serious international crimes is proclaimed as the main aim. But the practice of the ICC shows that this aim is not achieved.

The situation in Cote-d'Ivoire was brought to the ICC in 2003, but the Court did nothing until 2011. The ICC acted only eight years later, not in the context of the case that was brought to it in 2003, but in the context of a new situation, the forcible removal of President L. Gbagbo. And in this

[1] As article 36 says, "relevant experience" means whether as judge, prosecutor, advocate or *in other similar capacity* (!), in criminal proceedings.

[2] One correction – that could be verified not that easily. The official website of the ICC uses the misleading way of reflecting the education of judges, for example covering the lack of legal education of some judges under the waterfall of words about their experience.

[3] From the response of Geoffrey Andrew Henderson to the Coalition for the International Criminal Court' Questionnaire. In 2013 G.A. Henderson was elected as ICC judge.

context the ICC acted really quickly and issued an order of arrest against Gbagbo within several weeks.

The situation in Libya was brought to the ICC by the UN Security Council when NATO forces were preparing to invade the country. That time Libyan citizens had the highest social guarantees. Now Libya is totally destroyed, its statehood is under serious doubt and more than four years after the coup, thousands of refugees are still leaving the country. The ICC issued no indictments for those who ruined the state. It issued the indictments against those who built that state.

The situation in the Central African Republic (CAR) was brought to the ICC in 2005, but the only case within this situation is a case against former Vice-President of the Democratic Republic of the Congo Jean-Pierre Bemba. Why was Congolese J.P.Bemba indicted by the ICC? He was indicted because he sent his troops to support the then legitimate CAR President A.F. Patasse, in response to his official request to help him to suppress the armed rebellion. Now the legitimate CAR President is overthrown, the country is ruined and the ICC produced no indictments against those who did that.

In the Ugandan situation, the ICC did nothing except publish vague orders of arrest for three persons. ICC investigations in Mali and Nigeria do not stop the suffering of people from al-Qaeda's or Boko Haram's terror. The ICC openly sided itself with these organisations, warning Malian and Nigerian leaders that they may finish in The Hague if not assured of the defence of human rights of these terrorists while fighting with them.

So where has the ICC brought peace? Where has it brought justice? International crimes are committed in front of the ICC but it has very little or no interest in them. At the same time the ICC is actively involved in certain conflicts and it would be difficult not to notice that in many cases this is connected with one side of the conflict.

The true purpose of the ICC

The official conceptualisation of the ICC as a guardian of international law and justice is simply not proved in practice. But what is the real ICC agenda? The real intention behind the creation of an international criminal justice is to create the system of institutions of global power that had at least two main authorities: the authority to remove the Heads of States, and the authority to transform the international rules.

This idea is best implemented by international courts: the removal of Heads of States needs to be sanctified in the name of international law, thus the norms of international law need to be changed. The new system of international justice was assigned with these tasks.

The first international criminal tribunal as part of the global power institution was the International Tribunal for the Former Yugoslavia (ICTY) in 1993 and International Tribunal for Rwanda (ICTR) in 1994. These tribunals successfully probated the idea of removal of heads of states (President of Yugoslavia Slobodan Milosevic, Prime Minister of Rwanda Jean Kambanda and others). At the same time these tribunals started to change international law: some international treaties started to be "corrected", some disregarded and some norms were created by the very tribunals. After a successful probation, the international criminal tribunals were mushroomed in mass: Special Court for Sierra Leone, Special Tribunal for Lebanon, Special courts for Cambodia, Timor-Leste, Kosovo. The creation of the ICC must be understood in the context of that intent and the realisation of the system of international criminal justice.

Removal of Heads of States. To implement the idea of removal of heads of states it was important to personalise the Heads of States as private persons. This task was very well done with the use of mass media. One example was the insertion of the name "Saddam" instead of Hussein or President Hussein etc. This cliché still works. Let us remember how we called the case against President of Sudan in South Africa in June 2015? Mass media imposed on us the title "al-Bashir case" and all society, including lawyers happily accepted it. But the wrong name, which was intentionally imposed on us, changed the essence of the case: it was brought down from a case about sovereignty of Sudan to a personal case against an individual.

This trick of personalisation of the heads of states was implemented via international criminal justice, because criminal justice has personal jurisdiction. All these courts and tribunals were directed

at one operative aim, the indictment and removal of the heads of states. ICTY removed and indicted president of Yugoslavia Slobodan Milosevic and former president Milan Milutinovic. It also indicted four more heads of states (though unrecognised) – Radovan Karadzic and Biljana Plavsic (presidents of Republic Srpska), Milan Martic and Milan Babic (presidents of the Republic of Serbian Kraina). In addition, they indicted and removed all political and military administration of Yugoslavia and then Serbia. Special Court for Sierra Leone removed President of Liberia Charles Taylor. Tribunal for Rwanda indicted former Prime Minister of Rwanda Jean Kambanda. Finally ICC indicted president of Cote-d'Ivoire, Libyan leader Muammar Gaddafi, Kenyan president Uhuru Kenyatta, president of Sudan Omar al-Bashir. The ICC Prosecutor made it clear that the highest officials of Mali, Nigeria and Burundi may be the next one to be indicted and removed as power leaders. This policy of unnamed suspects is another way of controlling the leaders of some states.

Moreover, international criminal tribunals, including ICC and ICTY were used as direct weapons of international crimes. Three sharpest examples of that:

1. The situation in Libya was brought to the ICC by the UN Security Council in February 2011, and processed too fast to have conducted any meaningful investigation. During some weeks, the ICC prosecutor prepared an order of arrest against the Libyan Head of State M. Gaddafi. This order of arrest was issued during the aggression of NATO against Libya. Thus the ICC acted as a legal instrument of war. (It is worth-mentioning that one of the judges in the case against M. Gaddafi was an Italian citizen and Italy was one of the states, taking part in NATO aggression against Libya. Thus the ICC is violating the elementary principles of independence of the judiciary).

2. In April 2014 the ICC received the acceptance of its jurisdiction of the ICC from the Ukraine. The defect of this decision is that the request was sent by an improper subject. People who claimed to be "the government of Ukraine" had no legal justification for that claim. Notwithstanding, the ICC agreed with that acceptance. It is difficult to understand how an international court could work with a government that assumed power illegally through a bloody coup. The main task of the ICC is to check the legality of the subject appearing before it. To understand why this agreement constitutes the taking part in a crime, we have to look at the details of the acceptance of jurisdiction. The illegal government of Ukraine accepted the jurisdiction only for the purpose of prosecuting the members of the overthrown government! Accepting such a cut jurisdiction from an illegal junta, the ICC appeared as a weapon of the *coup d'etat* committed in Ukraine.

3. In 1999 during the aggression of NATO states against Yugoslavia International Tribunal for the Former Yugoslavia issued an order of arrest against the President of the country. Notwithstanding the fact that there was no investigation, the ICTY prosecutor issued an indictment against Mr. Milosevic. Thus, the ICTY was a direct weapon of the war.

The violation of existing rules of international law. ICC practice shows that some of its cases are based on grave violations of fundamental principles of modern international law, namely the principle of equality of states, the principle of consent of states and the voluntary nature of international law. In this regard special attention should be drawn to the situations in Libya and Sudan (and subsequently – to all Sudanese and Libyan cases). The analysis shows that these situations were brought ("referred") to the ICC with great violation of international law. The graveness of these violations and its obvious nature allows us to conclude that it was made in order to destroy the very base of the modern international law.

The situation in Sudan was referred by the UN Security Council to ICC in March 2005 and the situation in Libya in February 2011. The problem with these referrals is that they were not taken in accordance with international law. The main question that arises in this regard is on what legal basis did the Security Council act?

In its Resolution 1593 (2005) the Security Council was hesitant to name any exact article of any exact legal document that informed its decision. It only said that it was "acting under Chapter VII of the UN Charter". Reference to a "chapter" is quite disturbing from a legal point of view, because it shows that the Security Council indeed could not name any exact law it may rely on in taking its decision. Legal decisions must be based on specific articles and even clauses of articles of a treaty, not

on whole chapters. The vague reference to the chapter as a whole is itself clear proof of the absence of any legal basis for this decision.

It is interesting to note that the ICC Pre-Trial Chamber attempted to atone this legal impotence of the Security Council and claimed that the Security Council acted pursuant to Article 13b of the Rome Statute. This attempt brought even worse legal consequences than the Security Council's impotence, because the powers of the Security Council are regulated by the United Nations Charter, not by any other treaty. The Security Council simply could not act according to the ICC Statute. The attempt to claim that it based its powers that are supposedly prescribed in another treaty and not UN Charter is scandalous and illegal.

The Security Council does not have the right to use powers which it does not enjoy according to the UN Charter, moreover with respect to a State which is not a party to the Rome Statute! The UN Security Council was established by the UN Charter and must act on that basis. The UN Charter does not give the Security Council the right to refer situations to the ICC. This is the only possible conclusion if we take into consideration the principles of international law.

Such a power is too serious to be considered as "implied" and to not be included in the Charter as the legal basis for the Security Council's actions. Thus, in the absence of any amendments to the UN Charter itself, the Security Council does not have the right to refer situations in States. This is especially so in relation to the States which are not parties to the Rome Statute. Members of the United Nations have given their consent only to those powers of the UN Security Council which are enunciated in the UN Charter, not to powers expressed in other treaties. The UN Charter is one international treaty and the ICC Rome Statute is completely another treaty. They have different obligations and different state-parties.

There are many other legal defects in these "referral" cases. For example, paragraph 1 of UNSC Resolution 1593 (2005) says that it is referring the situation in Darfur "since 1 July 2002" to the ICC Prosecutor. But the very resolution was adopted on 31 March 2005! On what legal basis does the Security Council claim the right to apply criminal law with retroactive effect? Where is it stated that the Security Council has such a power? It is totally contrary to common principles of law!

Let us imagine that after the Security Council referral of Sudan the country would sign and ratify the ICC Statute. What would be the legal effect of article 11 of the ICC Statute which regulates the temporal jurisdiction of the ICC? The paragraph 1 of this article states that, "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute." Paragraph 2 of the same article says, "If a State becomes a party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3." And what about Article 24 which specifies that "no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute."?

Obviously the decision of the UN Security Council is discriminatory against Sudanese citizens indicted by the ICC because different rules apply to them than to citizens of states which have signed the ICC statute. Many international human rights treaties specifically prohibit discrimination in criminal proceedings. If we accept that it is possible to initiate proceedings against a State which is not a party to the ICC (whether through the UN Security Council or by any other means) then we must accept the legality of discrimination. But it is absurd to say that an international treaty may legalise such discrimination. It is difficult to believe that states decided to discriminate between accused persons from a state party and accused persons from a non-state party, for such discrimination would be contrary to the most basic human rights. If a thesis leads to an absurd conclusion, then the thesis should be abandoned. Thus is must be concluded that without the amendment of the UN Charter, any referral to the ICC of a situation in a non-signatory state is not possible.

There are many other legal problems with these "referral" Security Council resolutions. For example, what is the legal value of a decision forcing a state to be obliged by a treaty of which the Security Council members are not even signatories themselves? In March 2005, only 9 of the 15 member states of the Security Council (and 3 of the 5 among permanent members) were state-parties to the ICC Statute. What is the legality of a decision taken by states which are not parties to a treaty to force another state to be a party to it, or to be bound by obligations under it? In fact, even if all

the members of the Security Council had been state parties to the Rome Statute then this would not have changed the illegality of their decision. This is absolutely illegal, because it violates the very foundations of the international legal order.

The activity of the ICTY clearly shows that when it was necessary to convict a person for political reasons – it deviates from existing international law and create its own law. One such example is the case of former President of Yugoslavia Slobodan Milosevic. In order to convict President Milosevic by any means, ICTY inserted into the practice the concept of the so-called "joint criminal enterprise" (JCE). The third category of this JCE allows the court to convict anybody, including the persons who not only have not taken part in the crimes, but even have not known about the commitment of these crimes!

International Criminal Tribunal for Rwanda violated the Convention on the prevention of the genocide that prescribed the necessity to establish the specific intent, and decided that there is no need to establish the specific intent and there could be a possibility to convict a person for genocide if intent was not established. This tribunal also "corrected" the genocide Convention, added to it some new features with the sole purpose to convict the accused of this tribunal. The same "correction" of existing international law was made by other international tribunals, like Special Tribunal for Lebanon or Special Court for Sierra Leone. Thus we could detect another common direction of the activity of the international tribunals – the destruction of the already existing international law on the one side and the creation of new international law on another side. Needless to stress that international courts do not have a power neither to destroy existing law, nor to create new law. It could only apply law as it already exists! As we see it is not the case with ICC and other international courts.

Another example is the practice of "proofing" cases with the use of plea bargaining. Officially it looks like the accused pleaded guilty and gave a testimony about his crimes. The reality of these guilty pleadings is very different. First of all the accused is not giving his own testimony but is obliged to sign a text of "facts" prepared by the prosecution. The accused receives assurances that sentencing will not be harsh. The accused is then obliged to give testimony against his co-accused. Thus the plea bargaining procedure is not aimed at establishing the truth, but the conviction of a certain accused with the use of the testimony of another accused that was forced to plead guilty. The practice of several international criminal tribunals (especially ICTY and ICTR) shows that plea bargaining is used with pressure. The whole practice of ICTR was based on a false plea bargaining with the Rwandan Prime Minister Jean Kambanda. The whole Srebrenica case in ICTY was based on plea bargaining with D. Erdemovic and M. Nikolic. In this context the ICC's indictment against Simon Gbagbo (wife of President Laurent Gbagbo) is a clear attempt to resolve the case of President Gbagbo without trial.

Another serious derogation of international law is a derogation of human rights law by the international tribunals. For example the accused of international criminal tribunals are denied the right to choose its counsel. This denial has a very "good" explanation. Only the "approved" (by ICC and other courts) counsel may defend these accused, thus guaranteeing that the counsel will not go too far in establishing the truth. The only case when the ICC accused was able to get the defence counsel by his own choice was Jean-Pierre Bemba (Central African situation). That was secured by the ability of Bemba to finance his counsel himself (which is a unique case in the whole history of the international criminal justice). But in November 2013 the whole defence team of Bemba was arrested and put on trial. Officially the reason for this arrest was the attempt of defence to prepare a false witness. At the same time the sudden arrest of the defence counsels of Bemba was conducted just some hours before the defence was about to present evidence of how the ICC prosecution bribes witnesses.

The bribing of witnesses and presenting of false witnesses is not an extraordinary situation in international criminal justice. Moreover, it is not even an exception. False witnesses are a rule at this system. In the Vojislav Seselj trial at ICTY more than 20 witnesses gave sworn testimonies that they were threaten by the prosecution to give false evidence against the accused. The Court took no action against the prosecution. Moreover the accused was prevented from presenting his Defence Case – the unique case in whole history of international criminal justice. In the S. Milosevic trial, one prosecution witness confessed that he was pressed (and even tortured) to give a false testimony against President Milosevic. The court did not take any action including the investigation of the claim.

The synthesis of ICC activity with activity of other bodies in the system of international criminal justice is also important because of the following: – there are the same staff working in these institutions (running from one court to another and sometimes work in different courts at the same time!); – there are the same judges in these courts (running from one court to another and sometimes work in different courts at the same time!); – the courts use their practice as a law; thus the ICC is citing the decision of ICTY as a proof of its own legality.

Al-Bashir case and South Africa

In June 2015 the ICC tried to force the South African government to arrest Sudanese President Omar al-Bashir who attended the African Union meeting in Johannesburg. South Africa's North Gauteng High Court issued the decision obliging the South African government to arrest President al-Bashir, which was not implemented. Unfortunately the discussion on this matter was limited by the very narrow approach that was taken by the North Gauteng High Court, but only to some extent, because nothing prevented the court from considering other relevant issues. First of all the questions of why the elementary matter of jurisdiction was not resolved must be raised. Another question arises when we are facing very strange position of the court that the obligation to cooperate necessarily mean the obligation to arrest, moreover to do this automatically. It is not our aim to analyse the arguments of the North Gauteng High Court. What we would like to highlight nevertheless are those circumstances that escaped any attention of mass media and even judicial institutions on the global level – i.e. the behaviour of ICC.

First of all, it is important to notice the artificial exclusion by the ICC of the majority of judges from the adoption of the decision to force South Africa to arrest President al-Bashir. The decision (that is called "ICC decision") was adopted by a single judge. But the "al-Bashir case" is assigned not to a single judge but to a full chamber constituted by three ICC judges. Why did the other two judges not take part in its adoption? The formal answer to that question is that the decision was taken urgently. But this answer does not hold water, because the urgency of the decision was clearly made up by the intentionally late application by prosecution.

Information about Sudan President's visit to South Africa was available to the ICC months in advance but the ICC prosecution decided to apply for a request to arrest just some hours before this visit? The reason is obvious – to make-up the "urgency" and thus the exclusion of two judges (i.e. majority!) from the decision-making process. The other question arises with the attempt of the ICC (in reality – of one judge from ICC) to force South Africa to arrest the head of state who was enjoying immunity according to international law. Such an attempt was not legally supported. Any reference to article 27 of ICC Statute is not convincing. This article says that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". This article gave some commentators the wrong impression to claim that nowadays heads of states do not have immunity anymore.

In fact the careful reading of this article shows that it is only directed to the ICC Prosecutor and other ICC officials, and not to states. The article relates only to the relations between accused and the Court. As concerns states, the immunities of heads of states and governments are regulated by norms of customary international law and treaties. These treaties clearly obliged the states to assure the immunities of the highest state officials. The so-called "al-Bashir" case is not about Omar al-Bashir in his personal capacity, it is about the President of Sudan, i.e. state sovereignty. The attempt by the ICC to force South Africa to arrest al-Bashir was a case against South Africa, forcing the state to a position where it would destroy the very base of current international law – state sovereignty and equality.

The crystal clearance of this situation raises the legitimate question of why the ICC engaged in that provocation against South Africa. Now, knowing the consequences (North Gauteng High Court decision, it is supposed non-respect by South African government, the impeachment move against South African President etc.) we may suggest that all this was made with the sole purpose for destabilisation of the internal situation in the Republic of South Africa.

Conclusion

The current system of international criminal justice was created by the global power with aims that are too far from the officially proclaimed goals. The real agenda of International Criminal Court is sanctification of the crimes committed by the global power and the creation of new international rules. To be more correct, the creation of global rules, because there are no ways for nations to be subjects of these rules. In the plan of global power, nations must only be objects of these rules.

For the moment there are two separate systems of international law. The first one is the current international law that may relatively be called progressive international law. It is the result of the developments of international system from 1945. The regime of this law is characterised by the aim (common interest for all members of the international community) and way of creation (made by all equal members of international community). The other system is regressive international law that was created mainly through international courts and tribunals. The regime of this law is characterised by the same features but in negative terms: it is created by only certain "chosen states" and in their interest.

Step by step this second system of regressive international law is becoming bigger and stronger. The modern world is more complex than in 1945. To understand the modern world we need at least proper definitions that correctly reflect the essence of objects and phenomena. In our opinion we have difficulties in understanding the true picture of the modern world *inter alia* because of the incorrect definitions and even lack thereof. It is interesting to note that the very lack of definitions sometimes acts as a base for non-existence of certain entities or phenomena in our minds. One of the sharpest example in this regard – is the word "international". We refer to international treaties, organisations, operations, politics… Sometimes the use of this word is an obvious abuse, like in an expression "international judge". The idea of a judge acting as a representative of an international community is clear, but does it have anything to do with reality? The judges elected by other states but nominated by the state of their citizenship. In some cases the election process is a pure hypocrisy, when there is no competition between candidates and their number is the same (or nearly the same) as the number of places. In this situation we are facing not "international" institutions, but rather group of foreign representatives.

While we have some treaties and organisations (like United Nations) that could more or less be called truly as "international", we still have institutions that clearly may be not called by that definition. These institutions are International Monetary Fund, World Bank, NATO, European Union and International Criminal Court. We have to notice the attempt made by some researchers to correct the situation and to introduce the new definition that better reflects the situation, namely introduction of the word "supranational". This attempt is indeed very useful in defining the true character of the entities like European Union institutions, but it is not enough. The international institutions were created to represent the interests of the community of all states and for achieving the common values and goals. Supranational institutions constitute a new phenomenon where the interest of such institutions may not necessarily coincide with the interests of member states. In such institutions the states sometimes are not the decision-makers.

Nowadays the dichotomy "national-international" does not properly reflect the real situation. Even the introduction of the "supranational" or even "transnational" level does not change things. National, supranational and international are all "nation"-centric phenomena. But institutions like ICC are contra-"nation" phenomenon. This level of politics reflects the interest of a subject not connected with any state or group of states, though based in certain states. The interests of these entities do not coincide with interests of states or of the international community as a whole, moreover, sometimes they may be even be contradictory. The strength of the entity is several times bigger than the power of most of the states. And as a *de facto* matter we are witnesses of the existence of certain institutions that assume the new level of politics. We suggest that this level may be called as "contra-national", stressing its *centrifugal* character, where the *centre* – is a nation.

Thus, we argue that the ICC is an institution at the *contra-national* level of politics. Its real aims and policy may only be understood in this context. The ICC was established with the main purposes to create a universal judicial institution for controlling the highest level of national and international level of politics. The main way for such a control is the power to remove the disobedient

heads of states and the destruction of the existing national and international law and creating new (regressive/repressive) international law. To be more correct – contra-national law. Stopping this process of destroying the international system and the grabbing of power by contra-national entities is an essential task of the United Nations.

AFRICA IN THE SHADOW OF TOMORROW

Aslan Abashidze,[1]
Alexandra Koneva,[2]
Alexander Solntsev[3]

In 2015 the period for achieving the Millennium Development Goals (MDGs), stated in the United Nations Millennium Declaration in 2000, has expired. According to a number of figures, some of these goals were achieved.

Extreme poverty rate, as compared to the situation in 1990, fell by one half – to 700 million people. Access to improved drinking water sources became a reality for 2.3 billion people. Between 2000 and 2010 approximately 3.3 million deaths from malaria and tuberculosis were prevented and 22 million people were saved from tuberculosis. Since 1995, access to the antiretroviral therapy (ART) for people living with HIV helped to save 6.6 million lives. The gender parity index in terms of primary education, as well as access to the maternal and child healthcare improved[4].

In accordance with one of the eight MDGs – «global partnership for development» – many African countries got greater access to the international markets, technology and medicine. Some of them got rid of unsustainable debt burdens.

In September 2015 the international community adopted a new agenda for sustainable development for the period of 2016-2030 – "Transforming our world: the 2030 Agenda for Sustainable Development,"[5] which sets out 17 Sustainable Development Goals (SDGs), followed by 169 targets, reaffirms commitment to the global partnership for development, and defines the basic principles of accountability for the implementation of the identified goals.

In the agenda the UN Member States set up the targets to "facilitate sustainable and resilient infrastructure development in developing countries through enhanced financial, technological and technical support to African countries" (target 9a of the SDGs); "encourage official development assistance and financial flows, including foreign direct investment, to States where the need is greatest, in particular least developed countries, African countries" (target 10b of the SDGs), etc.

The agenda also emphasizes the importance of continuing efforts by the United Nations in order to assist in the implementation of the African Union Agenda 2063[6] and the New Partnership for Africa's Development Programme[7].

Moreover, a comprehensive analysis of the documents, adopted at the international summits in the past 15 years, at the international conferences on various issues (climate change[8], financing for

[1] ***Aslan Abashidze*** – Doctor of juridical sciences, professor, Head of the department of international law, Peoples' Friendship University of Russia, Vice-Chairman of the UN Committee on Economic, Social and Cultural Rights, abashidze.rudn@gmail.com

[2] ***Alexandera Koneva*** – Candidate of juridical sciences, assistant of the Department of International Law, People's Friendship University, aleksandra.koneva@gmail.com

[3] ***Alexander Solntsev*** – Candidate of juridical sciences, associate professor of the department of international law, Peoples' Friendship University of Russia, a.solntsew@gmail.com

[4] See: MDGs. Report. 2015. UN, New-York, 2015. URL: http://www.un.org/ru/millenniumgoals/pdf/english2015.pdf (last visited on 21 December 2015).

[5] The UN General Assembly Resolution 70/1 of 25 September 2015 "Transforming our world: the 2030 Agenda for Sustainable Development".

[6] The Agenda is a 50-year transforming programme for development. «Agenda 2063». URL: agenda2063.au.int.

[7] UN Doc. A/57/304, Annex.

[8] Paris Agreement, 12 December 2015 // UN Doc. FCCC/CP/2015/L.9/Rev.1.

development[1], etc.), by the UN main and functional bodies (especially in the field of human rights), by the UN specialized agencies and other international organizations reveals that in the decisions, made at these forums, Africa is often referred to as a confirmation of the existing problems in order to define the extent of the new threats and challenges. The consequence of this approach, in particular, is the fact, that the existing international programmes, strategies and action plans, as well as the research conducted by academics, including international lawyers, focus on problems, faced by the African states (poverty, hunger, epidemics, problems related to the internal armed conflicts, refugees and internally displaced persons, environmental degradation, etc.) at the expense of deep and comprehensive analysis of the main causes of the origin, continued existence and even strengthening of these problems.

The analysis of currently existing international programmes, strategies and action plans, which provide support from the international community to the African countries, confirms that they are, indeed, drawn up at a high professional level, both in form and content. However, a comprehensive study of the documents in terms of their actual implementation reveals various imperfections of substantial nature. Among the major disadvantages the unequal position of the African states with regard to the countries, considered by these international documents as donors, should be mentioned. The conservation of this situation does not allow to get out of the so-called "vicious circle", which contributes to the retention of the African states in the "eternal" dependence on the system.

The consequence of such a dependent situation is the fact that the progress rates towards the achievement of the MDGs remain different, both when comparing different countries and in individual countries. In addition to the abovementioned, the majority of the African countries continue to fail to achieve the goals. Those African States with an armed conflict on their territory face the greatest difficulties in achieving any of these goals. In this context, the land-locked African countries should also be mentioned. The problem is that many of these States turned out to be unable to achieve the MDGs by 2015[2].

The reality is that in general, economically and financially developed countries failed to keep their promises to provide official development assistance. On the one hand, between 2000-2014 the official net development assistance, provided by the member-countries of the Development Assistance Committee (DAC) of the Organization for Economic Cooperation and Development (OECD), increased by 66 percent. On the other hand, after reaching in 2013 the absolute maximum, in 2014 the official total net development assistance, provided by the DAC members, amounted to 135.2 billion US dollars, that is, it decreased in real terms. As the administrator of the UN Development Programme (UNDP) Helen Clark has correctly recalled, the industrialized countries pledged to increase the amount of the official development assistance to 0.7% of the gross national income (GNI) by 2013-2015. However, not all the States managed to cope with that target, and as a result, the official development assistance is now only 0.29% of the collective GNI of the industrialized nations. In 2014 only five countries – Denmark, Luxembourg, Norway, the UK and Sweden turned out to be able to reach the official development assistance of 0.7% of GNI. "If all the industrialized countries had fulfilled their obligations, the amount of the official development assistance in 2014 would have amounted to 326 billion US dollars, not 135,2 billion," – said Helen Clark.[3]

The MDG Gap Task Force Report states that today there is a significant digital division in the world between the industrialized and developing countries. In 2015, the Internet was used only by 20% of the African countries[4].

It should be emphasized once again that this situation is accompanied by inadequate assimilation of the underlying causes of the origin, continued existence and strengthening of the problems at which the international efforts are aimed. The positions of the African States on key aspects of the activities of the international community are distorted and ignored.

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[1] Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), adopted by the General Assembly on 27 July 2015 // UN Doc. A/RES/69/313, Annex.

[2] See: Outcome document of the special event to follow up efforts made towards achieving the Millennium Development Goals. 1 October 2013 // UN Doc. A/68/L.4.

[3] UN News Centre. URL: http://www.un.org/russian/news/story.asp?newsID=24478#.Vf7NixG8PGc.

[4] URL: http://www.un.org/ru/millenniumgoals/summary2015.pdf.

For example, the international community, on the one hand, seeks to establish new requirements for the reduction of the greenhouse gas emissions[1], but on the other hand, it is well aware of the fact that the overwhelming majority of the African countries is against it. The main argument of the African States is that for them an important task is, first of all, to achieve high economic growth rates, though these States realize that economic development can not be achieved in unfavorable environmental conditions. Unfortunately, under the existing system the African States have to follow the course for the economic development.

"I'm extremely disappointed – summarized his attitude towards the negotiations on climate change in Paris in December 2015 the representative of Bolivia *Juan Hoffayster*. – We asked the developed countries about the financing and received a response that there wouldn't be any[2]." The same was stated by the representatives of South Africa, who threatened that if the money was not provided, the final agreement would probably not take place. The dissatisfaction of the world's periphery is shared by the UN officials, who make it clear that the superpowers mislead the public opinion: for example, the United States agree to reduce the greenhouse gas emissions by 26%, though they prefer to start not today but once the environment is polluted by the American manufacturers as never before. While the superpowers argue, which contribution each of them should make to the fight against global warming, the poor countries continue to ask for money. The African States, whose total proportion in the world emission is 4%, hope that the Western countries will compensate for the shortfalls in their "quota." According to the agreement reached back in 2009, the developed economies pledged to provide 100 billion US Dollars per year to the developing countries for the environmental projects starting from 2020.

It is to be recalled that the decisions, taken at the annual climate conference, do not refer to the specific geographic regions. At the same time the only significant exception to this rule is the mentioning of Africa. This continent is defined as "the region, mostly affected by the combined impact of the climate change and poverty," which implied the need to address the targeted assistance to the region in order to support the policy of the African States regarding climate.

The modern system of the international financial and economic relations is construed in such a way that against the background of a low-grade strengthening of financial and technical assistance, there is, however, a favorable picture, showing that the African States get greater access to the international markets, technology and medicine. But in fact, the African countries can not get free access to the international market under conditions when they are not able to increase the production and enter this market, dominated by the monopoly of the developed countries.

Consequently, the African States are in a vicious circle of problems, the underlying causes of which are not identified and addressed. Experts are convinced and the situation in Africa itself confirms that the world needs a new financial and economic system on a global scale.

Apparently, the international community turns a blind eye to the obligations that it has undertaken in the framework of the currently existing international economic order. Economically developed states (mainly the Western States) are reluctant to take into account such acts as the Charter of Economic Rights and Duties of States of 1974[3], which enshrines that economic as well as political and other relations among States shall be governed, *inter alia*, by a number of principles including "mutual and equitable benefit;" "promotion of international social justice;" "international co-operation for development." In accordance with art. 15 of the Charter "all States have the duty to promote the achievement of general and complete disarmament under effective international control and to utilize the resources released by effective disarmament measures for the economic and social development of countries, allocating a substantial portion of such resources as additional means for the development needs of developing countries."

Another document deserving attention is the Declaration on the Establishment of a New International Economic Order of 1974[4]: "international co-operation for development is the shared goal and common duty of all countries. Thus the political, economic and social well-being of present and future generations depends more than ever on co-operation between all the members of the international community on the basis of sovereign equality and the removal of the disequilibrium

[1] Paris Agreement, 12 December 2015 // UN Doc. FCCC/CP/2015/L.9/Rev.1.

[2] URL: http://expert.ru/2015/12/6/bednyie-ne-mogut/.

[3] Adopted by the UN General Assembly Resolution 3281 (XXIX) of 12 December 1974

[4] Adopted by the UN General Assembly Resolution 3201 (S-VI) of 1 May 1974.

that exists between them". The new international economic order should be founded on full respect for the following principles: "The broadest co-operation of all the States members of the international community, based on equity, whereby the prevailing disparities in the world may be banished and prosperity secured for all; The right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result; Full permanent sovereignty of every State over its natural resources and all economic activities. The right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation arid depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples; Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries; Preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible; Giving to the developing countries access to the achievements of modern science and technology, and promoting the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies; The need for developing countries to concentrate all their resources for the cause of development."

In this regard, the considerations mentioned above are quite clearly reflected in the Foreign Policy Concept of the Russian Federation[1], which, inter alia, provides for the "development of a broad and non-discriminatory international cooperation" as one of the objects of the main foreign policy efforts of the Russian Federation. The Concept states, that "the economic interdependence of States is one of the key factors in maintaining international stability" (para. 10). Russia intends to "actively promote just and democratic global trade and economic and monetary and financial architecture." Russia will expand the "diverse cooperation with the African States on a bilateral and multilateral basis with a focus on the improvement of political dialogue and the promotion of mutually beneficial trade and economic cooperation, and promote the settlement and prevention of regional conflicts and crisis situations in Africa. The development of partnership relations with the African Union and sub-regional organizations constitutes an important part of the line."

At the present stage within the framework of the global efforts on the implementation of the documents, adopted at the international summits on various issues, including the SDGs, it is important to pay more attention to the control mechanisms over the achievement of the goals. In this respect, a significant contribution can be made by carrying out the relevant review at the level of the African interregional, regional and sub-regional organizations, which will provide diversified, reliable and proven means of measuring progress in achieving a variety of goals, including the SDGs. Such reviews will identify regional trends, causes of problems, common features; facilitate the exchange of best practices, lessons learned and elaboration of solutions and measures for mutual support at the global level, taking into account the specific regional and sub-regional needs of the African continent.

At the same time the existence of various international bodies and organizations at the universal (UN), interregional (OIC and LAS), regional (AU and NEPAD) and sub-regional levels (SADC, ECOWAS, UEMOA, EAC) complicates the creation of an effective pan-African system of economic development. In this regard, there is a need for strengthening the process of coordination among them in order to avoid fragmentation and duplication of their functions, as well as for the coherent sustainable development in Africa. Consequently, it is necessary to take the following steps: to develop and sign relevant agreements between the regional and sub-regional entities, to establish working groups on coordination in order to identify the most problematic areas and determine the forms of cooperation, to develop a "roadmap" for the further cooperation among universal, interregional, regional and sub-regional mechanisms in the sphere of the development in Africa.

This approach involves raising an international dialogue on the revision of the relations, established within the existing international economic order, controlled by the international financial institutions, in order to enable African countries to enter the global market equally with the developed donor States, and to use their potential for the development of the national economies to the fullest extent and effectively in order to improve the welfare of the peoples of Africa.

[1] Approved by President of the Russian Federation V. Putin. on 12 February 2013.

THE ROLES OF THE UN AND THE AU IN THE OPERATIONALISATION OF R2P IN AFRICA: TOWARDS LEGAL AND INSTITUTIONAL COMPLEMENTARITY

John-Mark IYI[1]

Introduction

Africa is once again at the cross-roads despite material and human resources committed to peace and security on the continent by stakeholders. For a moment, it seems the continent is on the verge of relapsing into the characteristic armed conflicts of the 1990s. From Somalia to Sudan, the Democratic Republic of the Congo (DRC), Libya, Egypt, Central African Republic (CAR), Cote d'Ivoire, Mali, and Nigeria, in a continent of 54 countries, the list seems endless. This, notwithstanding that the African Union's (AU) central objective is the maintenance of peace and security as a necessary precondition for improving the wellbeing of African peoples, and achieving meaningful social and economic development.[2] Thus, the Constitutive Act of the AU, unlike its predecessor –the Organisation of African Unity (OAU) has developed what, in theory, appears to be a comprehensive and elaborate peace and security normative, legal and institutional framework for the continent in order to achieve this objective.[3]

At the same time, efforts had been redoubled at the global level to develop new and creative ways of addressing the challenge of maintaining peace and security in the new millennium through the development of new norms and institutions and the strengthening of existing ones. At the normative level, this drive was heralded by the concept of the responsibility to protect (R2P) which seeks to re-characterise the idea of sovereignty as responsibility and shift the debate away from the traditional and controversial doctrine of humanitarian intervention to the obligation of states to protect people facing mass atrocities.[4] The R2P principle, which was endorsed by the international community at the 2005 World Summit, shares some similarities with certain core principles in the African Union Peace and Security Architecture (APSA) in that both place emphasis on the centrality of early warning and conflict prevention to any system of effective conflict prevention, management and resolution. More importantly, article 4(h) of the AU Constitutive Act sets the trigger crimes for intervention as genocide, war crimes and crime against humanity. The responsibility to protect also sets the same normative standards (including ethnic cleansing) in establishing the crimes that could trigger military intervention as a last resort to protect populations. Although article 4(h) or the AU Constitutive Act does not provide that the use of force would be a last resort, it can be safely concluded that this would be the approach in terms of the broader normative framework of the APSA.

Conceptually, R2P is intended to become the new normative framework for engaging states on the prevention of mass atrocities by the international community acting through the instrumentality of the United Nations as endorsed in paragraph 138 and 139 of the 2005 World Summit Outcome Document.[5] This undertaking has received broad acceptance and its major thrust is hinged on the primary responsibility to prevent genocide, war crimes, crimes against humanity and ethnic cleansing

[1] Post-Doctoral Research Fellow, South African Research Chair in International Law, University of Johannesburg, South Africa. Email: john-marki@uj.ac.za

[2] The AU states that it recognises the 'fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda. See Preamble to the African Union Constitutive Act available at http://www.au.int/en/sites/default/files/ConstituveAct_EN.pdf (Last accessed on March 26 2014).

[3] The African Union Constitutive Act was adopted on 11 July 2000 at Lome, Togo and came into force on 26 May 2003. The African Peace and Security Architecture comprise the African Union Peace and Security Council (PSC), the Continental Early Warning System (CEWS), the African Standby Force (ASF) and the Panel of the Wise. There is also the African Union Peace Fund and the Military Staff Committee. See Louis Matshenyego Fisher Moving *Africa Forward: African Peace and Security Architecture Assessment 2010.*

[4] See *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001) International Development Research Centre: Ottawa.

[5] See United Nations General Assembly, World Summit Outcome Document A/RES/60/1. 24 October 2005. (Hereafter WSOD).

vesting in the territorial state, and a residual collective responsibility of the international community to act through the UN Security Council where the state fails.[1] Through the work of the UN Secretary General, further developments on the R2P concept has sought to emphasis, as did the ICISS in its report, the need for prevention as the best approach to the maintenance of peace and security.[2] Yet, as the rising number of conflicts in Africa shows, when preventive action fails, there will always be need for coercive measures to protect populations facing imminent egregious violations of human rights and this is where the UN and AU frameworks have faced the biggest challenges yet, and the focus of this paper. As a way of setting the context for the analysis that follows, it is pertinent to address certain preliminary issues on the legal character of the principal provisions and principles discussed in this paper—R2P and article 4(h) of the AU Constitutive Act and similar provisions in the constituent documents of other African RECs to which reference would be made in subsequent analysis in this paper.

(a) The Legal Nature of Article 4(h) and R2P.[3]

First, even though article 4(h) preceded the emergence of R2P, there is normative convergence between them in terms of the trigger crimes.[4] However, despite this seeming normative convergence of the AU regional normative framework in article 4(h) and the *global* normative compact of R2P, significant differences and challenges remain and these have impacted the relationship between the AU (including other African RECs) and the UN in the implementation of R2P in Africa.[5] The first point of departure is that whereas article 4(h) is a provision in the treaty of a regional body and therefore has a binding character on members under international law, R2P is essentially a political commitment.[6] The significance of this difference and its implications for what measures could and should be legally taken and by who; becomes apparent once the operationalisation of R2P was authorised in Libya and not in Syria.[7] Secondly, whereas article 4(h) confers a right of intervention in narrow and strict circumstances on a regional organisation, R2P contemplates much broader panoply of human protection options essentially guided by universal principles deriving from human rights and international humanitarian law and so on.[8] Thirdly, article 4(h) is at best a subcategory

[1] WSOD supra, para 139. See United Nations General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary General* A/63/677, 12 January 2009, pp.9ff.

[2] See *Implementing the Responsibility to Protect: Report of the Secretary General* A/63/677, 12 January 2009, para 13 and 14. Where use of force becomes necessary as a last resort, action can only be taken through the UNSC acting in accordance with the relevant provisions of the UN Charter. See paragraph 49-66.

[3] For a detailed analysis of this conceptual distinctions and linkages, see John-Mark Iyi "Judicial Protection of Civilians in Armed Conflicts: The Promise of Article 4(h) and R2P" in Ademola Abass, Dan Kuwali and Frans Viljoen (eds.) "*All Means Necessary": Protecting Civilians and Presenting Atrocities in Africa.* (2015) Pretoria University Law Press. (Forthcoming).

[4] See Chacha Bhoke Murungu 'International Crimes that Trigger Article 4(h) Intervention' in in Dan Kuwali & Frans Viljoen (eds) *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (2014) pp. 166-81. See generally, John-Mark Iyi *the AU-ECOWAS Intervention Treaties under International Law and the Operationalisation of the Responsibility to Protect: Towards a Theory of Regional Responsibility to Protect*. (2015) Springer. (Forthcoming).

[5] These differences have been made more acute by the controversy over the implementation of the UN Security Council-authorised intervention in Libya in 2011. Some continue to challenge R2P as a basis for action by the international community. See the debates at the WSOD and statements by Brazil in terms of its Responsibility While Protecting (RWP) principle. See Maria Luiza Ribeiro Viotti 'Responsibility While Protecting: Elements for the Development and Promotion of a Concept', annexed to the letter dated 9 November 2011, from the Permanent Representative of Brazil to the United Nations to the Secretary-General, A/66/551-S/2011/201, 1 November 2011.

[6] See Carsten Stahn "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm" (2007) 101 *American Journal of International Law* 99-120 (Hereafter Stahn "Responsibility to Protect"); Max W Matthews "Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur" (2008) 31 B.C. International Comparative Law Review 137-152; Cf. Jutta Brunnee & Stephen J Toope "The Responsibility to Protect and the Use of Force: Building Legality" (2009) 2 Global Responsibility to Protect 191-212 at 193 arguing that although the norm is not yet a binging norm, it is on the way to becoming one. For similar views, Alex J. Bellamy & Ruben Reike "The Responsibility to Protect and International Law" (2010) 2 *Global Responsibility to Protect* 267-286. For a fuller treatment of the status of R2P since the events in Libya and Syria, see Spencer Zifcak "The Responsibility to Protect after Libya and Syria" (2012) 13 *Melbourne Journal of International Law* 1-35; Francis Kofi Abiew "Article 4(h) Intervention: Problems and Prospects" in Dan Kuwali & Frans Viljoen (eds.) *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (2014) pp. 108-126 at 112. (Hereafter Abiew 'Problems and Prospects').

[7] See Dan Kuwali "The Responsibility to Protect: Why Libya and not Syria?" *The African Centre for the Constructive Resolution of Disputes* Policy Brief: 016, March 2012.

[8] See Abiew 'Problems and Prospects' supra note 10 at 112.

of R2P because, whereas R2P consists of a preventive, reactive and rebuilding element, article 4(h) was designed and intended to be a reactive legal provision whose invocation is contingent on the existence of specific benchmarks international crimes.[1] To invoke article 4(h), at least one of the three international crimes must exist.[2] In the case of R2P, this need not be so because the responses are calibrated according to the degree of violation. The less egregious the violations, the less intrusive the intervention tool deployed.[3] In terms of the scope of application of article 4(h), it is clear that in terms of article 53 of the UN Charter, the AU would require UN Security Council authorisation for it to be able to invoke R2P as a basis of military intervention in any member state. It is doubtful, whether prior UN Security Council authorisation is a requirement where the AU is relying on article 4(h) of its Constitutive Act as the basis of its military intervention in a conflict in a member state.[4] However, it is an unlikely scenario that either the AU or an African sub-regional organisation like ECOWAS with provision similar to article 4(h) would invoke R2P rather than the intervention provision in its constituent document.[5] One example in which the AU or a regional organisation like ECOWAS might elect to invoke the R2P principle rather than its regional intervention treaty would be cases of non-members like Morocco and Mauritania respectively.

Sadly, despite these existing normative frameworks, in the face of increasing mass atrocities in Africa, and with the exception of the controversial intervention in Libya, the UN has not been able to invoke R2P nor has the AU and African Regional Economic Communities (RECs) and Mechanisms been able to invoke similar normative principles to effectively protect populations and prevent mass atrocities. As outlined above, surely, the normative framework for action exists both at the UN and AU levels. The problem it would seem is lack of political will and conflicting interests in the case of the UN, and lack of actual capacity in the case of the AU and African RECs.[6] Recent and on-going conflicts in Africa and the responses of the UN and the AU raise the question of the relative challenges faced by the UN and the AU whenever question of intervention has to be decided and underscores the need to clarify, forge a better understanding of the normative and institutional competences of the UN and the AU and to seek how they can complement each other in order to achieve the common objective of protection of populations from mass atrocities.

This challenge is not at all new and was underscored by then UN Secretary General, Boutros Boutros-Ghali in his *Agenda for Peace*.[7] The exercise of the veto which often paralyses the UN Security Council means that the UN needs an external agency for the operationalisation of R2P for protection of populations facing mass atrocities. The lack of capacity by the AU means that it needs the resources of better resourced organisations such as the UN in other to implement article 4(h). It is imperative therefore that the UN and AU should device some model for achieving their common objectives. The emphasis so far has been one of improving UN-AU relationship, building cooperation between the UN-AU and improving the UN-AU partnership and so on.[8] The focus has been on institutional cooperation without clarification of existing normative frameworks within these two organisations in the aspect of maintenance of peace and security and protection of populations from mass atrocities. There is a tendency to assume that since both the UN and the AU share certain common objectives (the pursuit of peace and protection of populations from mass atrocities) they necessarily agree on how to achieve these objectives. Not surprisingly therefore, this has sometimes produced mixed results in practice when the UN and the AU have to intervene to resolve a conflict

[1] See Abiew 'Problems and Prospects' supra note 10 at 112.

[2] See Chacha Bhoke Murungu 'International Crimes that Trigger Article 4(h) Intervention' in in Dan Kuwali & Frans Viljoen (eds) *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (2014) pp. 166-81.

[3] See Gareth Evans *The Responsibility to Protect: Ending Mass Atrocities Once and For All* (2008) Brookins Institutions: Washington D.C.

[4] For a more detailed analysis of this point, see John-Mark Iyi, "The AU/ECOWAS Unilateral Humanitarian Legal Regime" (2013) African Journal of International & Comparative Law. (Hereafter, The AU/ECOWAS Unilateral Humanitarian Intervention Legal Regimes").

[5] See Iyi (2013) "The AU/ECOWAS Unilateral Humanitarian Intervention Legal Regimes".

[6] Abiew 'Problems and Prospects' at p112.

[7] See An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping, A/47/277 S-/24111, 17 June 1992.

[8] See S/RES/2033, 12 January 2012. South Africa used its 2012 Presidency of the UN Security Council to call for strengthening UN-AU relationship on conflict prevention and resolution in Africa. See Presidential Statement during South Africa's Presidency of the UN Security Council in 2012.

situation in Africa by the use of force. Attempts to bridge this normative gap quickly turn on what I may describe as the 'normative and institutional cooperation' versus 'normative and institutional complementarity' conundrum. In this paper, I propose that the UN and the AU should develop a legal relationship in the protection of populations from mass atrocities and the maintenance of peace and security in Africa on the basis of a framework of *complementarity* rather than the present framework of *cooperation and partnership*.[1] To do this, it would be imperative to provide normative clarification in respect of certain core principles of maintenance of peace and security and protection of populations from atrocities within the UN and the AU.

This paper is divided into five parts. Part I provides an introductory background and Part II follows with a brief sketch of the criteria for the use of force under R2P vis-à-vis the AU and UN frameworks. This is followed by Part III where I examine the difference in normative approaches of the UN and AU to intervention to protect populations from mass atrocity crimes under their respective constituent documents. This section relies on recent interventions in Libya to highlight the conflicting approaches to the maintenance of international peace and security and the protection of populations from mass atrocities by the UN and the AU. In Part IV, I argue for a paradigm shift from the 'cooperation paradigm' to a 'complementarity paradigm' as a useful way of bridging the gap between in approaches to the protection of populations and maintenance of peace and security by the UN, AU and African RECs in terms of intervention to prevent mass atrocities. Part V concludes the paper. I set out by framing the following questions: what are the requirements for the implementation of the responsibility to react component of R2P? What mechanisms are available under the AU-ECOWAS framework? What mechanisms are currently available under international law UN Charter/R2P? Do the AU and African RECs framework provide sufficient scope and authority for the implementation of use of force for R2P?

Part II

The AU and African RECs and the Criteria for Evaluating the Responsibility to React

For obvious reasons, it the use of force has remained the single most divisive and controversial element in the R2P 'tool box.'[2] As Byers puts it '[p]roponents of the responsibility to protect who focus on military intervention are participating in a terrible charade.'[3] This is because as the ICISS points out in the 2001 report, prevention is the single most important component of R2P and this focus on prevention was subsequently endorsed in the World Summit Outcome Document.[4] However, history teaches us that lofty as the ideal of preventive measures might seem, the use of credible force to prevent or halt mass atrocity crimes may sometimes be necessary and inevitable.[5] This is recognized in all the major documents on R2P even though they approach it differently.[6] We now assess the criteria for the implementation of R2R by military force under the AU framework.

***(i)The Question of Legality of Authority*:** As with the doctrine of humanitarian intervention, an important requirement is the relevant authority to take decision on the use of military force to protect populations in danger. According to the ICISS and the UN High-Level Panel on Threats,

[1] See Review of the Development of the Modalities for Cooperation between the United Nations and Regional Organisations in the Field of Conflict Prevention' UN non-article 6 February 2001.

[2] See generally, Gareth Evans *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* supra.

[3] Michael Byers *War Law: International Law and Armed Conflict* (2005) p. 111.

[4] See Edward C Luck p6 "The United Nations and the Responsibility to Protect" (August 2008) *The Stanley Foundation Policy Analysis Brief* pp. 1-11 at p.6.

[5] Kofi Annan *We the Peoples: The Role of the United Nations in the Twenty-first Century* (2000) 35 para 219; Paul D Williams 'Military responses to mass killings: African Union Mission in Sudan' (2006) 13:2 *International Peacekeeping* 168 at 168.

[6] International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (2001) International Development Research Centre: Ottawa (Hereafter ICISS Report); Kofi Annan 'A More Secure World: Our Share Responsibility, Report of the High Level Panel on Threats, Challenges and Change, U.N. Doc A/59/565 United Nations (2004). (Hereafter *A More Secure World*) available at http://www.un.org/secureworld/report2.pdf (accessed 20 June 2010); 'In Larger Freedom, Towards Development, Security and Human Rights for All, Report of the Secretary General' UN Doc. A/59/2005, 21 March 2005 United Nations (2005) available at http://www.un.org/largerfreedom/contents.htm (accessed 20 June 2010) (Hereafter *In Larger Freedom*); Global Centre for the Responsibility to Protect 'State by State position on the Responsibility to Protect at the 2005 World Summit' Available at: http://www.reponsibilitytoprotect.org/files/Chart_R2P_11August.pdf (accessed 25 June 2010).

Challenges and Change, the UN Security Council is the preferred body to lawfully authorise the use of force.[1] However, in both documents, the drafters also left open the possibility for other bodies to intervene by use of force where the UN Security Council is deadlocked as well as the option of seeking an *ex post facto* authorisation.[2] However, this proposal was rejected in the World Summit Outcome Document and states merely resolved to take 'collective action' through the UN Security Council.[3] The implication is that where the UN Security Council is paralysed, as it currently is in Syria, civilians will continue to be slaughtered and mass atrocities will continue unchallenged. The suggestion that the P5 should pledge to refrain from exercising their veto power where their vital national interest was not at stake was also rejected in the World Summit Outcome Document and we have now seen the implications of this in the Syrian conflict where credible evidence have even shown the use of chemical weapons against civilians but the international community has stood by and watched because the only body that can authorise military intervention since peaceful negotiations have failed—the UN Security Council—remains deadlocked.[4]

Thus, under the UN framework, exclusive authority UN Security Council would lie with the UN Security Council and action can only be taken if authorised by the UN Security Council whatever the scale of atrocities. This is a reflection of the compromises that had to be made in order to achieve the broad consensus and support that made the World Summit Outcome Document possible in 2005 with the result that R2P as conceived by the ICISS and adopted by UN High-Level Panel on Threats and Challenges and Change was normatively weakened and now reminiscence of pre-R2P era.[5] Outside the Security Council, there is as yet no legal framework or authorizing agency to implement R2P when it involves use of force. What this means is that even with R2P, it is more than likely that we might witness a situation where the Security Council is paralyzed by the veto while another Rwanda or Srebrenica unfolds as Syria shows. Interestingly, the AU framework for the prevention of mass atrocities does not have any provision for veto powers and this was arguably intended to avoid the paralysis that sometimes grips the UN Security Council.

***(ii) The Question of When (Just Cause Threshold)*:** Under the World Summit Outcome Document, the four crimes of genocide, war crimes, ethnic cleansing and crimes against humanity are set as the threshold crimes for triggering R2P.[6] Similarly, the UN High-Level Panel requires that there should be a threat or 'harm to State or human security of a kind and sufficiently clear and serious to justify *prima facie* …use of force.'[7] Military intervention is thus justified if it is aimed at averting or halting 'large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.'[8]

When a state is manifestly unwilling or unable to protect its populations from these crimes or where the state is itself the perpetrator R2P is triggered.[9] The ICISS, the WSOD both rule out pro-democratic intervention or intervention to halt human rights violations not constituting actual

[1] See *A More Secure World* supra at para. 272(a).

[2] See "Responsibility to Protect" supra at 106; *A More Secure World* supra at para 272. See also Aidan Hehir *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (2012) New York: Palgrave Macmillan. (Hereafter Heir "The Responsibility to Protect")

[3] WSOD supra para 139. See ICISS Report p.50 at para 6.15 stating that 'Security Council authorization must in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention must formally request such authorization…' 6.28; see WSOD supra at para 139. See also, *In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary General* UN Doc. A/59/2005 21 March 2005, at p. 59 par 7(b). See *A More Secure World* supra, at p. 57 para 203. The Panel recommended at p. 71 par 272 that the efforts of regional organizations should be consistent with UN purposes and be coordinated within the UN System for regional peace operations.

[4] Spencer Zifcak 'The responsibility to protect' in Malcolm Evans (ed) *International Law* (2010) 5044-527 at 516. (Hereafter Zifcak *The responsibility to protect*).

[5] See Aidan Hehir (2012).

[6] ICISS Report at para 4.18, 4.19.

[7] See *A More Secure World* supra, Annexure 1 Recommendation 56(a). See also Gareth Evans *The Responsibility to Protect: Ending Mass Atrocities Once and For All* supra at p. 142.

[8] ICISS Report supra at para 4.18, 4.19.

[9] See ICISS Report supra at para 2.31.

or imminent 'large scale loss of life' or not qualifying as apprehended genocide or ethnic cleansing (including use of rape, terror or forced expulsion).[1] Though the ICISS set a high just cause threshold and recommended that the UN develops a framework for the use of force for R2P, the World Summit Outcome Document unfortunately did not produce one and this will therefore depend on the reform of the UN Security Council. As already elaborated above, article 4(h) of the AU Constitutive Act provides for these crimes without the requirement of 'large scale' loss of life.[2] Apart from not prescribing any objective criteria for evaluating what constitutes 'large scale loss of life' both the ICISS and the the World Summit Outcome Document omitted pro-democratic intervention and systematic racial discrimination as justifications for the use of force under R2P.[3] Seeing that there is a causal connection between these factors and the series of conflicts and mass atrocity crimes on the African Continent, the AU intervention framework prohibits unconstitutional change of government even though it stops short of stating that this could be a ground for military intervention. The intervention frameworks of some African RECs like ECOWAS make unconstitutional change of government a legal ground for military intervention and to this end, appears to be far more progressive than both the AU and the UN systems as a legal basis for operationalising R2P.[4] This sets a lower just cause threshold than do the World Summit Outcome Document or the other documents on R2P.

***(iii) Right Intention*:** The purpose for which military intervention is to be used must clearly be to halt or prevent mass atrocities.[5] Irrespective of what other motives might be involved, the question should be asked 'is the primary purpose of the planned intervention to stop or prevent mass atrocity?'[6] It is recognized that an intervention can hardly be free from other interests but the ICISS concluded that the need to protect should be preeminent.[7] This conclusion is based on the argument that states hardly intervene solely on humanitarian grounds without other national interest being present.[8] At best, it will always involve a variety of motives.[9] The feasible route for legitimacy, it is argued, even in UN Security Council authorised interventions is that the primary motive should be to protect the population.[10] According to the ICISS, the '[o]verthrow of regimes is not, as such, a legitimate objective, although disabling that regime's capacity to harm its own people may be essential to discharging the mandate of protection—and what is necessary to achieve that disabling will vary from case to case.'[11] The support of the target population, regional organization and so on will be relevant in deciding right intention.[12] This raises a number of questions.

***(iv) Last Resort*:** The first response to a grave situation of R2P should be non-coercive. In the World Summit Outcome Document, the international community through the UN Security Council is to 'use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter' to resolve the situation.[13] Non-military strategies should be explored before resorting to use of force as last resort.[14] 'The responsibility to react—with military coercion—

[1] See ICISS Report supra at para 4.20, 4.21.

[2] See Article 4(h) of the AU Constitutive Act (Hereafter AU Act) available at and http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm (accessed 12 August 2012); Article 4(j) of Protocol Relating to the Establishment of the Peace and Security Council of the African Union Available at http://www.au.int/en/sites/defualt/files/Protocol_peace_and_security.pdf (last accessed 12 August 2012); and Article 25 of the Protocol Relating to the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security adopted at Lome Togo December 1999, available at http://www.comm.ecowas.int/sec/index.php?id=ap101299&lang=en (last accessed 20 August 2012)

[3] See Jeremy Levitt 'The responsibility to protect: A beaver without a dam?' (2003-4) 25 *Michigan Journal of International Law* 153 at 166.

[4] See article 25 of the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, supra.

[5] See ICISS Report supra at para 4.33.

[6] See Gareth Evans *The Responsibility to Protect: Ending Mass Atrocities Once and For All* supra at p. 143.

[7] See ICISS Report supra 4.33.

[8] See ICISS Report supra 4.33.

[9] See Mohamed Sahnoun 'Mixed intervention in Somalia and the Great Lakes: Culture, neutrality and the military' in Jonathan Moore (ed) *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (1998) 87-98 at 87.

[10] See ICISS Report supra at para 4.35.

[11] See ICISS Report supra at para 4.33.

[12] See ICISS Report supra para 4.34.

[13] WSOD supra at para 139.

[14] See ICISS Report supra at para 4.37.

can only be justified when the responsibility to prevent has been fully discharged.'[1] However, in view of the time constraints usually characteristic of humanitarian catastrophes, all possible options need not have been tried and it is sufficient if there is reasonable ground for believing that such options would have failed had they been tried.[2] This is another area that is controversial and has been demonstrated in the implementation of resolution 1973 in Libya and the inaction in Syria.[3] In Libya, it was doubtful whether the scale of atrocity or imminent threat of atrocities by the government reached the threshold and whether there was adequate steps were taken to utilize peaceful and non-military options.[4] Without doubt, this is one area where the UN and the AU clashed in the implementation of resolution 1973.

***(v) Proportional Means*:** The intended scale of military operation should be the minimum necessary to accomplish the humanitarian objective of the intervention.[5] 'The means have to be commensurate with the ends, and in line with the magnitude of the original provocation.'[6] The relevant question should be 'is the scale, duration, and intensity of the proposed military action … the minimum necessary to meet the humanitarian objective of the particular case'?[7] This requires that there should be a 'balance of consequences.'[8] The overall impact of the intervention on the socio-economic and political system of the target state should be taken into account and the intervention must comply with the rules of international humanitarian law.[9] Intervention will be unjustified if it comes at an unacceptable cost.[10] This criterion will necessarily require a pragmatic rather than a legal assessment in order to reach a determination. With the benefit of hindsight now, it is debatable whether the overwhelming use of force that resulted in the overthrow of the regime in Libya was proportionate to what was necessary to prevent the government from carrying out its threats.[11]

***(vi) Reasonable Prospects*:** It is important to make a reasonable assessment of the chances of the intervention being able to avert or halt the mass atrocities.[12] The cost of action should be balanced against the consequences of non-intervention.[13] The ICISS acknowledged that there will always be double standards because there is unlikely to be intervention against any major power or permanent 5 members of the UN Security Council whatever the situation but went on to conclude that 'the reality that interventions may not be able to be mounted in every case where there is justification for doing so, is no reason for them not to be mounted in any case.'[14] In some cases, rescuing populations in jeopardy are simply not 'doable' without unimaginable consequences both for the threatened population, the intervener and the region at large because such interventions will likely result in a more destructive and larger conflict. Can this justify the case in the on-going Syrian crisis where the number of deaths is now approaching half a million people?[15] It is argued that an intervention in any of the P-5 is unlikely and here, one thinks of the crisis in Ukraine.[16] The implication of this for the implementation of the responsibility to react element of R2P by the international community is that it not only weakens the normative value of R2P per se, but undermines the legitimacy and credibility of the global governance institutions saddled with the responsibility of operationalizing it.

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[1] See ICISS Report supra at para 4.37.

[2] See ICISS Report supra at para 4.37; See Gareth Evans *The Responsibility to Protect: Ending Mass Atrocities Once and For All* supra at p. 141.

[3] See Michael Walzer, "The Case against our attack on Libya" *The New Republic* (20 March 2011). Available at Available at http://www.trn.com/article/world/85509/the-case-against-our-attack-on-libya. (Last accessed 12 January 2015) Alex de Waal "African Roles in the Libyan Conflict of 2011" (2013) 89(2) *International Affairs* 365-379.

[4] See Alex de Waal "African Roles in the Libyan Conflict of 2011" (2013) 89(2) *International Affairs* 365-379.

[5] See ICISS Report supra at para 4.39.

[6] See ICISS Report supra at para 4.39.

[7] See Gareth Evans *The Responsibility to Protect: Ending Mass Atrocities Once and For All* supra at p. 144.

[8] See Gareth Evans *The Responsibility to Protect: Ending Mass Atrocities Once and For All* supra at p. 145.

[9] ICISS Report supra at para 4.40; Gareth Evans *The Responsibility to Protect: Ending Mass Atrocities Once and For All* supra at p. 144.

[10] See Gareth Evans *The Responsibility to Protect: Ending Mass Atrocities Once and For All* supra at 145.

[11] See Walzer supra, de Waal "African Roles in the Libyan Conflict of 2011".

[12] See ICISS Report supra at para 4.41.

[13] See ICISS Report supra at para 4.41.

[14] See ICISS Report supra at para 4.42.

[15] See Dan Kuwali "The Responsibility to Protect: Why Libya and not Syria?" supra.

[16] See Gareth Evans *The Responsibility to Protect: Ending Mass Atrocities Once and For All* supra at 145-6.

There is no doubt that the question of whether, and when it is lawful to use force to protect a people in danger of mass atrocity crimes from their own government under existing international legal framework remain controversial and the UN is unlikely to be able to utilize R2P for this purpose without a new approach that reorders the roles of regional organisations. The reason for this is not far-fetched and lies the combination of a number of factors arising from the unique position occupied by regional organisations including their proximity to theatre of conflicts. As a commentator puts it: "[r]egional actors and organizations may have a greater appreciation of the history, culture, and other regionally specific factors that are likely to influence the conflict resolution process; possess a greater connection to and knowledge of the primary participants in the conflict; view extra-regional institutions as suspicious and illegitimate; and give greater attention and more urgent consideration to these conflicts than global institutions that have broader agendas, competing priorities, and numerous distractions."[1] It is failure to recognize these realities and tailor approaches accordingly that discredited the intervention in Libya and undermined any effort by the UN Security Council to take decisive action in Syria. Implementing the responsibility to react therefore calls for a new approach. Before proceeding to recommend what this new approach should be, it is pertinent to briefly examine the normative ambiguity between the AU and UN institutional frameworks and comment on how they have impacted the implementation of R2P.

Part III
The Intervention in Libya and the Normative Ambiguity in AU and UN Institutional Frameworks

As originally conceived, the use of enforcement action by the UN was for the prevention of inter-state conflicts and this remained so for the most part of the life of the UN while the Cold War lasted. Massive violation of human rights, however egregious, did not constitute grounds for invoking the Chapter VII powers of the UN Security Council for purposes of military intervention owing to the principle of sovereignty.[2] It was only in the 1990s that the idea that sovereignty is not absolute and certainly not a defence if a state engages in massive violation of the human rights of its own citizens began to emerge.[3] From then on, the UN's doctrinal approach to intervention to prevent mass atrocities began to evolve. This normative shift saw the UN undertaking several missions ranging from the traditional peacekeeping to civilian administration in the mode of Mandated Territories. At the same time, the AU had begun to develop its own peace and security architecture culminating in the establishment of its APSA. As already stated above, overall, the R2P principle marked a watershed in the development of these new normative frameworks. However, the contentious aspect of R2P implementation remains the third pillar –responsibility to react. Exactly what does R2P mean? This lack of normative clarity and how the AU on the one hand, and how principal members of the UN Security Council, (particularly France, the UK and the US: the P3) would interpret it and its implementation played out in the intervention in Libya.

The AU and the P3 clashed over this normative ambiguity in terms of what the AU means when it speaks of the responsibility of a member state to protect its citizens (understood in terms of the AU's legal framework as enumerated in its APSA; and what the P3 means when it speaks of the responsibility of a state to protect its citizens in terms of R2P.[4] As already discussed above, though similar, they are different and this creates a normative ambiguity that has posed a problem to how the African Union and the UN approach the operationalisation of R2P in Africa. These differences were attenuated during the Libyan crisis and partially explain why the AU and UN Security Council appeared to have pursued parallel approaches to resolving the conflict despite the initial African

[1] Michael Barnett 'Partners in peace? The UN, regional organizations, and peace –keeping' (1995) 21(4) Review of International Studies 411 at 432. (Hereafter Barnett *Partners in peace?*)

[2] See Article 2(4) and 2(7) of the UN Charter.

[3] See Jarat Chopra & Thomas G. Weiss "Sovereignty is no Longer Sacrosanct: Codifying Humanitarian Intervention. (1992) 6 *Ethics & International Affairs* 95-117.

[4] See the Statement of President Jacob Zuma of South Africa on the occasion of the UN Security Council Summit Debate, 12 January 2012. Available http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=24395&tid=53564. (Last accessed 25 January 2015).

support for resolution 1973.[1] In Libya, the UN Security Council adopted Resolution 1970 on 26 February 2011 in which the Council called on the Libyan authorities to protect its civilian populations.[2] Then, on 19 March 2011, (a little over three weeks after the adoption of resolution 1970 was adopted), the UN Security Council adopted resolution 1973 recalling the need to take "additional appropriate measures" in terms of paragraph 26 of resolution 1970 in order to ensure access to humanitarian relief; the Security Council therefore imposed "no-fly zone" on Libya and authorised the use of force for the protection of civilian populations and civilian populated areas in Libya.[3] The basis of the UN Security Council authorisation of the use of force in Libya was that there was imminent and credible threat to commit mass atrocities by Gadhafi against his people.[4] The extent to which these threats where exaggerated have remained debatable.[5] It is however significant to note that by 22 March 2011, barely three days after the adoption of resolution 1973, French jets had already started bombing Libya! To the best knowledge of the present writer, to date, this is the fastest use of force in enforcement of a UN Security Council resolution to protect civilians in Africa or anywhere else in the world. This effectively undermined the AU's diplomatic efforts at peaceful resolution of the conflict and it was even suggested that while attempts were being made by the AU for a negotiated settlement, these efforts were being covertly undermined by certain states.[6] President Jacob Zuma of South Africa, who led the AU Committee on the Libyan crisis reportedly told reporters 'I think that the point we have been making is that those who have a lot of capacity, even the capacity to bombard the countries, really undermined the AU's (African Union's) initiatives and effort to deal with the matter in Libya'.[7] As Weiss and Welz put it

[t]he NATO-led coalition effectively snubbed the AU and its diplomatic efforts when it convened a summit on 19 March in Paris, the same day for which the first meeting of the AU ad hoc committee was scheduled. The AU had effectively lost control over negotiations (if it had ever had any) as air strikes began. The AU's committee could not proceed to Libya on 20 March because the coalition, particularly France, would not interrupt air strikes and ensure the committee's security.[8]

Meanwhile, the basis of the AU's assessment and response to the crisis was the AU's Constitutive Act and its APSA being implemented through the Peace and Security Council of the AU. Within this framework, emphasis and preference is for a high threshold and a narrow construction of circumstances that would warrant the invocation of Article 4(h) and military intervention. Consequently, on 10 March 2011, the AU set up an ad hoc Committee the AU High-Level ad hoc Committee on Libya (the Nouakchott Committee) to find solution to the Libyan Crisis.[9] In the opinion of the AU, this offered a 'viable basis for a lasting solution to the crisis in Libya' while recognising the needs of the Libyan people for political reform and democracy.[10] The AU had developed a roadmap to implement negotiated settlement and transition from the Gadhafi era.[11] Some commentators have criticised the

[1] See further, John-Mark Iyi 'Emerging Powers and the Operationalisation of R2P in Africa: The Role of South Africa in the UNSC' (2014) 7 *African Journal of Legal Studies* 149 at 158-9.

[2] See S/RES/1970 (2011) 26 February 2011.

[3] See S/RES/1973 (2011) 17 March 2011, preambles.

[4] See S/RES/1973 (2011) 17 March 2011, para. 6.

[5] See for example Alex J. Bellamy "Libya and the Responsibility to Protect: The Exception and the Norm" (2011) 25 *Ethics & International Affairs* 25:263-269; Alex J. Bellamy & Paul D Williams "The new politics of protection? Cote d'Ivoire, Libya and the Responsibility to Protect (2011) 87 *International Affairs* 825-850, *cf.*

[6] See Alex de Waal "African Roles in the Libyan Conflict of 2011" (2013) 89(2) *International Affairs* 365-379.

[7] South Africa, *War Crimes Court should Probe NATO role in Libya* Decan Herald 25 August 2011 Available at http://wwwdeccanherald.com/content/186211/war-crimes-court-should-probe.htlm Accessed 12/02/2012. The view should however be balanced with the urgent need to protect threatened civilians from mass atrocities.

[8] See Weiss & Welz "The UN and the African Union in Mali and Beyond" supra at p. 895.

[9] See African Union Peace and Security Council Communique, 10 March 2011, PSC/PR/COMM.2(CCLXV). See also African Union Press Release "The African Union Announces the Composition of the Ad Hoc High Level Committee on Libya' (2011) Available at http://www. http://www.au.int/en/sites/default/files/ANN_EN_10_MARCH_2011_PSD_THE_AFRICAN_UNION_ANNOUNCES_COMPOSITION_AD_HOC_HIGH_LEVEL_COMMITTEE_LIBYA.pdf. (Last accessed 15 March 2015).

[10] See African Union Peace and Security Council 268th Meeting, Addis Ababa, 23 March 2011, PSC/PR/BR.1 (CLXVIII).

[11] See African Union Peace and Security Council 268th Meeting, Addis Ababa, 23 March 2014, PSC/PR/BR.1 (CLXVIII). See *The African Union ad hoc High-Level Committee on Libya convenes its second meeting in Addis Ababa* African Union Press Release, Addis Ababa, 25 March 2011.

AU not only failing to act promptly but for its reluctance to invoke article 4 (h) of its Constitutive Act. "The implementation of weak mandates grounded in peaceful negotiations and consensual intervention, may, perhaps, ultimately translate into a framework for the future implementation of R2P in Africa.' If the AU has not invoked article 4(h) ten years after entering into fierce, then it is either the AU believes that there is no clear credible evidence of mass atrocities or the AU believes there are mass atrocities but has decided to exercise its discretion not to intervene".[1] With the benefit of hindsight now and with the deepening crisis in Libya as it descends into further chaos and anarchy; the growing humanitarian and migrant's crisis in the Mediterranean, the proliferation of small arms and light weapons flowing from the Libyan crisis and how this has now exacerbated the destabilization of the States like Mali, Nigeria and so on; it was perhaps better to have erred on the side of caution and therefore even more imperative to re-examine the normative framework of AU and UN relationship and how they can work together more effectively in the future for the benefit of Africa and the credibility of the UN.[2] The UN Security Council recognised the AU High-Level ad hoc Committee on Libya and the AU urged the Committee to work in accordance with UN Security Council Resolution 1973.[3] So, whereas the dominant argument has been that the AU was reluctant to act in Libya because of the influence and funding of Gadhafi for the AU, it is arguable that beyond that, and from a normative point of view, the AU did in fact have a normative basis for pursuing the approach it did within its peace and security architecture. As will be shown below, with such wide normative divergence on what norms should underpin the decision and action to be taken in Libya, it was difficult for the UN and AU to work together for a common purpose once again raising the 'cooperation versus complementarity' debate.

Part IV

From Cooperation and Partnership to Complementarity: Time for a Paradigm Shift?

(a)Operationalizing R2P in Africa: AU, African RECs and the UN Security Council: Partners or Competitors?

Since the Agenda for Peace in 1992, the UN has increasingly recognised the roles of regional organisations in the maintenance of peace and security and has supports and strengthens them because of the obvious advantages they bring to conflict prevention, management and resolution.[4] This was taken further in the World Summit Outcome Document in which commitments were made to support Africa and Africa regional organisations to enhance their capacity development in key areas, the UN began to work with the AU to develop a Ten Year Capacity Building Programme for the latter.[5] The need for capacity enhancement arises from the realization that regional organisations such as the AU and other RECs in Africa are considered to be better informed about the historical background and circumstances of a particular conflict as well as the actors involved.[6] Secondly, as a result of their proximity to the theatre of conflicts in the region, these organisations are major stakeholders and inexorably have to contend with the repercussions of such conflicts such as influx of refugees into member states.[7] In the *Declaration on Enhancing UN-AU Cooperation; Framework for the Ten-Year Capacity Building Programme for the African Union*, the UN and AU, taking cognizant of the challenges faced by Africa, agreed to "work … effectively together to meet the challenges to peace and security in Africa" through cooperation, collaboration and partnership and to enhance the

[1] See Abiew 'Article 4(h) Intervention: Problems and Prospects' supra at p. 118.

[2] It should be admitted that migrants had been crossing the Mediterranean from Libya for several decades but it is also clear that the magnitude of the current crisis has never been seen before.

[3] See S/RES/1973/ 26 March 2011, para 2,

[4] See *An Agenda for Peace* supra where the UN Secretary General called for an increased role for regional organisations in the maintenance of international peace and security in their areas of jurisdictions.

[5] See Cooperation between the United Nations and Regional and other Organisations: Cooperation between the United Nations and the African Union. Letter date 11 December 2006 from the Secretary-General addressed to the President of the General Assembly. A/61/630, 12 December 2006.

[6] See David Carment & Martin Fischer "R2P and the Role of Regional Organisations in Ethnic Conflict Management, Prevention and Resolution: The Unfinished Agenda" (2009) p. p261-290 at 268. (Hereafter Carment & Fischer "R2P and the Role of Regional Organisations").

[7] See Carment & Fischer "R2P and the Role of Regional Organisations" supra at 268.

capacity development of the AU in key areas including peace and security.[1] The Declaration stresses the dynamic nature of the proposed Framework and it was intended to undergo periodic review to take into account new trends and developments in the cooperation and partnership between the two organisations.[2] This cooperation and partnership have been reaffirmed in numerous subsequent UN General Assembly and UN Security Council resolutions.[3] While recognizing the pivotal role of the AU and African RECs, these resolutions have time and again endorsed UN-AU cooperation and partnership within the legal framework of Chapter VIII of the UN Charter and the primacy of the UN Security Council in the maintenance of international peace and Security. Yet, the implementation has been somewhat been a partnership of convenience between the UN and regional actors like the AU and RECs like ECOWAS with the latter asserting themselves more and more both normatively and institutionally. The AU and African RECS, recognise their own resource constraints and would ordinarily prefer UN approval of its peacekeeping or peace enforcement operations while the UN endeavours to retain the legal regulation of the AU particularly in respect of the use of force. However, without a clear delineation of the legal basis of certain emerging practice by the AU and ECOWAS, this has resulted in subtle supremacy struggle and sometimes overt conflictual approaches to conflict resolutions in Africa. This struggle for supremacy played out again in Libya and Mali.[4] But as Weiss and Melz argue, it is important for the two organisations to follow through on the cooperation and partnership programme, but even more so, for them to seek a way of bringing clarity to the legal basis of this cooperation and partnership. Whereas it is clear that Chapter VIII of the UN Charter provides for a subsidiarity relationship between the UN and regional organisations, practice since 1945 and the emergence of regional intervention treaties have now beclouded this legal framework and given rise to controversy about the legality of certain practices by regional organisations such as the AU and ECOWAS.[5]

There is no doubt that Article 53(1) of the UN Charter is clear on the subsidiarity relationship between the UN and regional arrangements like the AU. However, this legal position has now been muddied by recent developments in the practice of these regional organisations.[6] However, whereas the UN and AU agree on the common goals of peace and security neither the UN nor the AU is clear as to whether they are complementary or alternatives in view of the intervention treaties and

[1] See A/61/630, 12 December 2006, para 3, 4, 5, 6, 7.

[2] See A/61/630, 12 December 2006, para 8 and 9.

[3] See Cooperation between the UN and the African Union, A/61/L.70, 17 September 2007; A/66/L.41/Rev.1 Add. 1, 23 July 2012; S/PRST/2013/12, 6 August 2013; Report of the Secretary-General on the Relationship between the United Nations and Regional Organisations, in particular the African Union, in the Maintenance of International Peace and Security, S/2008/186, 7 April 2008; Report of the African Union-United Nations Panel on Modalities for Support to African Union Peacekeeping Operations, A/63/666, 31 December 2008; The Role of Regional and Sub-regional Arrangements in the Implementation of the Responsibility to Protect, Report of the Secretary General, 27 June 2011. The United Nations Security Council's Thematic Debate on "Cooperation between the United Nations and Regional and Sub-regional Organisations in Peace Operations: The AU-UN Partnership and its Evolution" Statement by H.E. Mr Pierre Buyoya, High Representative of the African Union for Mali and the Sahel/Head of the AU Mission for Mali and the Sahel, 16 December 2014.

[4] See for example, Weiss & Welz "The UN and the African Union in Mali and Beyond" supra; de Waal "African Roles in the Libyan Conflict of 2011".

[5] See Suyash Paliwal "The Primacy of Regional Organisations in International Peacekeeping: The African Example" (2010) 51(1) *Virginia Journal of International Law* 185-230; Iyi "The Legal Framework for Sub-regional Humanitarian Intervention in Africa: A Comparative Analysis of ECOWAS and SADC Regimes" (2012) 2(2) 281-303; Erika de Wet "The Evolving Role of ECOWAS and the SADC in Peace Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?" (2014) 27 *Leiden Journal of International Law* 252-369; Erika de Wet "Regional Organisations and Arrangements and their Relationship with the United Nations: The Case of the African Union" in Marc Weller (ed.) (2014) *The Oxford Handbook on the Use of Force in International Law* (2015) Oxford: Oxford University Press.

[6] See Iyi "The Legal Framework for Sub-regional Humanitarian Intervention in Africa: A Comparative Analysis of ECOWAS and SADC Regimes" (2012) 2(2) 281-303; Erika de Wet "The Evolving Role of ECOWAS and the SADC in Peace Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?" (2014) 27 *Leiden Journal of International Law* 252-369; Erika de Wet "Regional Organisations and Arrangements and their Relationship with the United Nations: The Case of the African Union" in Marc Weller (ed.) (2014) *The Oxford Handbook on the Use of Force in International Law* (2015) Oxford: Oxford University Press; Suyash Paliwal "The Primacy of Regional Organisations in International Peacekeeping: The African Example" (2010) 51(1) *Virginia Journal of International Law* 185-230.

practices developed by the AU and other RECs like ECOWAS and SADC.[1] The AU and ECOWAS in particular, seems to be attempting to wrest some authority from the UN Security Council and extricate themselves from what they consider to be Big Power interest-dominated UN system while the UN Security Council at the same time tries to reign in what it considers 'breakaway regionalism or creeping sphere of influence'.[2] This issue has never been fully resolved and re-echoes in all the major official documents on R2P and the attempt to implement R2P in Libya and Mali. According to the ICISS, the UN Security Council only has "primary" but not exclusive responsibility for the maintenance of international peace and security.[3] Article 11 of the UN Charter confers powers for the maintenance of international peace and security on the UN General Assembly (though recommendatory) and by practice, the Assembly had also developed the Uniting for Peace Principle.[4] Article 52(1) of the UN Charter confers powers for maintenance of peace and security on regional organizations as well (though only exercisable by peaceful means before reference is made to the UN Security Council). Many studies, including the major documents on R2P suggest that regional organizations should have authority to intervene where the UN Security Council has failed to halt mass atrocity crimes.[5] In the Ezulwini Consensus, the AU pointed out that

> "[s]ince the General Assembly and the Security Council are far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organizations, in areas of proximity conflicts, are *empowered to take action* in this regard. The African Union agrees with the Panel that the intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted "after the fact" in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations."[6]

What emerges from events in the Middle East especially given the Saudi-led intervention in Yemen is that there would be great merits if regional organisations like the AU and are allowed to become the first line of response to conflict situations even in cases involving the use of force where the UN Security Council has ostensibly failed to act. The consequences of the status has once again proved to be too costly in human lives as we see in Syria while UN Security Council members far removed from the zones of conflicts watch the great human tragedies unfolding before a paralyzed UN Security Council. Leaving out the issue of resource constraints for now, it is obvious that regional organisations seem to offer better prospects for action on R2P in Africa for many reasons. While mutual suspicion has hindered global consensus on R2P, action at the regional level seems promising. It is unlikely that such consensus can be built outside a regional bloc. This should support a paradigm shift towards *complementarity* between the UN and regional organisations like the AU. In this case, it should be limited to regional organisations and not their individual member states. In fact, such regional organisations should prohibit military intervention by individual member states.[7] I am aware of the danger that such complementarity doctrine of intervention to implement R2P could undermine the UN Security Council as the legitimate agency to authorize intervention but it is only by exercising its authority legally and legitimately that the UN Security Council could ultimately avoid this as the Saudi-led intervention in Yemen now illustrates.

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[1] See Michael Barnett 'Partners in peace? The UN, regional organizations, and peace –keeping' (1995) 21(4) *Review of International Studies* 411 at 432.

[2] See Michael Barnett 'Partners in peace? The UN, regional organizations, and peace –keeping' (1995) 21(4) *Review of International Studies* 411 at 432.

[3] ICISS Report supra at 48 para 6.7; see C.F Amerasinghe "The Conundrum of Recourse to Force to Protect Persons" (2006) 3 *International Organisations Law Review* 7-53 at 8.

[4] See ICISS Report op cit note 5 at 48 para 6.7.

[5] See for example The Independent International Commission on Kosovo *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000) 292, Agenda for Peace SC Doc. S/25111 17 June 1992; ICISS Report op cit note 5 at para 6.31.

[6] The Ezulwini Consensus, 'The common African position on the proposed reform of the United Nations', Executive Council, 7th Extraordinary Session, 7-8 March 2005, Addis Ababa, Ethiopia Ext/EX.CL./2(VII) (Hereafter *The Ezulwini Consensus*) 6. Emphasis supplied.

[7] See Articles 4(f) and (g) of the AU Act, Article 4(a) and (d) of the ECOWAS Revised Treaty listing equality and non-aggression respectively as principles of the Organization.

(b)Can the AU and African RECs Provide the Scope and Authority for the Implementation of R2P?

The viability of a proposal of complementarity rather than cooperation and partnership rests largely on a careful assessment of the relative strengths and weaknesses of the UN and the AU. As Gareth Evans points out, there are three major challenges to the operationalization of R2P within the UN framework: conceptual, institutional and political.[1] As a concept, R2P remains amorphous and it is still not a legal principle. For example, even resolution 1973 does not rely on R2P as an independent legal norm for action.[2] Hence, some commentators describe it as a political commitment while others argue it is an emerging legal norm.[3] On this point, one can argue that the AU provides a clear legal basis for action on R2P by virtue of article 4(h) of the AU Constitutive Act. This is in contrast to the UN Charter in which the only legal basis for accommodating use of force on R2P particularly for the protection of civilians would necessarily be under Chapter VII. In many cases this is not free from controversy and political horse-trading within the UN Security Council before effective action could be taken. So on this level, the AU provides a useful framework for action.

Secondly, the capacity to access readily deployable troops vary greatly between the UN and AU. Weiss classifies these different strengths and weaknesses as "different capabilities; risk-averse vs risk-assuming approaches to casualties; diverging geopolitics; and leadership rivalry".[4] The standing army contemplated by the UN collective security system in 1995 has failed to materialise and the UN has always had the challenge of raising troops. Even in the best of times, the UN has never been able to raise the actual number of troops stipulated in the authorising UN Security Council resolution—negatively impacting prompt and effective deployment.[5] Like many of the troops from AU and Africa RECs, many of these troops (with the exception of Western countries) come poorly trained and inadequately equipped. The fact that most of the conflicts in Africa have been and are currently being managed by external actors underscore the acute and extensive lack of capacity in the AU and other African RECs.[6] In particular, despite the ambitious normative legal framework of Article 4(h), the AU risks becoming irrelevant if the present apathy towards invocation of the norm and intervention continues.[7] As a solution, Aidan Hehir has proposed revisiting the UN Standing Army proposed in article 43 of the UN Charter which army would be constituted and deployable not only by the UN Security Council but also by a judicial body.[8] Yet, even the staunchest sceptics would have to admit that the current AU efforts at establishing a standing regional army comprising five brigades for the five sub-regions is the most far-reaching and probably most promising of such efforts since 1945. While conceding the lack of resources that has plagued the standing army of RECs the ECOMOG of ECOWAS, it is can still constitute a viable basis for planning for an effective and readily deployable standing army. This is unlikely to be achieved within the UN system because of the geopolitics of the P5.[9] Taken together with the legal framework of the AU, the willingness to contribute troops—however poorly equipped—is an indication that given the necessary support, the AU, and African RECs can provide the legal and institutional framework for implementing R2P. As

[1] Gareth Evans 'The responsibility to protect: Ending mass atrocity crimes once and for all' Law Week Oration 22 September 2009 Victoria Law Foundation and Melbourne Law School, Available at http://www.lawisanass-wingate.blogspot.com/200911/professor-hon-gareth-evans-qc-ao-htm#!/2009/11/professor-hon-gareth-evans-qc-ao.html (accessed 22 August 2011).

[2] Wouters et al *The Responsibility to protect and regional organizations* op cit at 12.

[3] See Alex J Bellamy 'The responsibility to protect-Five years on' (2010) 24:2 *Ethics & International Affairs* 143 at 158; Teresa Chataway 'Towards normative consensus on responsibility to protect' (2007) 16:1 *Griffith Law Review* 193 at 210. See also, Maria Luiza Ribeiro Viotti *Responsibility While Protecting: Elements for the Development and Promotion of a Concept*', annexed to the letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Secretary-General, A/66/551-S/2011/201, 1 November 2011. (Hereafter Ribeiro Viotti *RWP*). See Iyi, "Emerging Powers and the Operationalisation of R2P" (2014) 7 AJLS 154.

[4] See Weiss & Welz "The UN and the African Union in Mali and Beyond" supra at p. 900.

[5] Weiss & Welz "The UN and the African Union in Mali and Beyond" supra at p. 900

[6] See Carment & Fischer "R2P and the Role of Regional Organisations" supra at 272.

[7] See Carment & Fischer "R2P and the Role of Regional Organisations" supra at 272.

[8] See Hehir "The Responsibility to Protect" supra at pp. 231-250.

[9] See Hehir "The Responsibility to Protect" supra at Chapter 7.

Carment and Fischer rightly put it, "[o]f the regional organisations in the Global South under review …, we propose that the AU offers the most reason to be optimistic."[1]

Article 4(h), (j) of the AU Act, AUPSC Protocol and Article 25 of the ECOWAS Protocol encapsulate the normative essence of R2P as a legal norm and even though they use the phrase 'right to intervene' rather than 'responsibility to protect' there is a convergence.[2] The major difference is the approach to operationalizing the duty to protect which is the fundamental object of R2P and the AU APSA.[3] This is not just a moral duty as currently exist under the UN Charter law, there is now a legal obligation on AU-ECOWAS member states to protect their populations, and a legal right to intervene by AU-ECOWAS where a member state fails or is unwilling to discharge its responsibility to protect. Arguably, this is a more progressive approach and development towards operationalizing the R2R than available under the UN framework. However, the AU continue to lack the operational and institutional capacity to implement these norms in practice and basically relies on funding from external partners such as the EU for its activities.[4] This hinders its operations and implementation of R2P whether at the preventive or intervention levels. But where the state is manifestly failing or is unable to deal with the situation and yet failed to request AU intervention, the AU cannot intervene unilaterally at that stage because the situation does not meet Article 4(h). Considering that the situation does not meet Article 4(h) threshold, but some form of intervention is necessary which cannot be undertaken without the invitation or consent of the target state, the AU will be faced with a dilemma. This is a lacuna which may prove costly in practice.

The second challenge to the operationalization of R2R is institutional. ECOWAS and the AU recognized long ago that a right of intervention is meaningless unless it is accompanied by a corresponding institutional capacity to give effect to the object and purposes for which the right exists. Two of the most important reasons the UN Charter collective security system failed and so cannot be used for the operationalization of R2R in Africa are institutional –the use of the veto and the failure to set up a military command as required by Article 43 of the Charter. It will be difficult for the UN to pursue implementing R2R when it has not remedied these fundamental defects and it is unlikely this will happen soon. On the other hand, ECOWAS has a standby army (ECOMOG) and the AU is currently establishing the African Standby Force (ASF). For all the logistic, financial and operational capacity weaknesses facing these institutions, they still represent the only platform for operationalizing R2R in Africa.[5] The idea is to create an alternative framework outside the UN Charter collective security arrangement for preventing mass atrocities because the UN cannot be relied upon especially in Africa and this is not only in Africa. As Wippman correctly asserts,

> "[r]ecognizing the U.N.'s limitations in this field, various regional organizations have begun to develop their own institutional capacities to engage in humanitarian and other forms of intervention….The AU is seeking to develop its own crisis response capabilities….One of the most interesting developments in this regard is the 1998 ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security."[6]

For example, in Darfur, after the UNSC has prevaricated for several years, AMIS was eventually deployed by the AU in 2004 and even though it continues to face operational challenges it is agreed that

[1] See Carment & Fischer "R2P and the Role of Regional Organisations" supra at pp. 274-5. See Tim Murithy "The Responsibility to Protect as Enshrined in Article 4 of the Constitutive Act of the African Union" (2007) 16(3) *African Security Review*, 14-24.

[2] See Dan Kuwali *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (2010) p. 7; Paul D Williams 'From non-intervention to non-indifference: The origins and development of the African Union's security culture' (2007) 106:423 *African Affairs* 253 at 277.

[3] See Kuwali *The Responsibility to Protect* supra at p. 7. See also Jan Wouters, Philip Vincent & Marie De Mans 'The Responsibility to Protect and Regional Organizations: Where does the EU Stand?' (June 2011) *Leuven Centre for Global Governance Studies Policy Brief No* 18 Available at http://www.ghum.kuleuven.be/be/ggs/publications/policy_briefs/pd18.pdf (Last accessed 2/10/2012) (Hereafter Wouters et al "The Responsibility to Protect and Regional Organizations") at 10.

[4] See Carment & Fischer "R2P and the Role of Regional Organisations" supra at pp. 275-6.

[5] See Jakkie Cilliers 'The African Standby Force and update on progress' (2008) 160 *Institute of Security Studies Paper*; See Article 17 of the ECOWAS Protocol listing ECOMOG as a supporting organ of ECOWS.

[6] David Wippman 'Kosovo and the limits of international law' (2001) 25:1 *Fordham International Law Journal* 127 at 144.

without the presence of AMIS, the situation in Darfur would have been much worse.[1] Furthermore, as an institution, the UNSC has not yet demonstrated that it will not dither in the face of genocide as the P-5 have rejected any restraints on the exercise of the veto as suggested by several studies as a first step to making the Charter collective security system and by extension, the implementation of R2R feasible.[2] On the other hand, unlike the UNSC the AU-ECOWAS do not have room for veto powers and decisions are made by consensus.[3] Therefore, the legal and institutional progress made by the AU-ECOWAS RHMI regimes to protect civilian populations mark them out as the ready framework for taking action on the implementation of R2R in Africa.[4]

A third and overarching point is the problem of will. Operationalization of R2R would require more than having the military hardware or logistic capacity. The political will to deploy troops in faraway lands where there is no strategic or economic interest often prove a difficult decision for Western governments. In states where soldiers returning in body bags can quickly become political issues and questions of democratic accountability especially in election years, the decision to intervene, the best methods for protecting the civilian populations in such interventions become secondary to the safety of soldiers of the intervening states.[5] It is the reason Somalia was abandoned, it is the reason there was no intervention in Rwanda and it is the reason NATO bombed from 30,000 feet in Kosovo (resulting in avoidable civilian casualties) rather than deploying ground troops as the most effective way to protect civilians. Although the AU does not have such rich history of interventions, ECOWAS has demonstrated an unmatched political will to launch interventions whenever and wherever necessary within its sub-region. Therefore, African States have the political will to intervene and operationalize R2R halt mass atrocities on the continent though lacking the resources.[6]

Finally, since regional bodies already have intervention treaties they should co-exist with the UN system and the proposed reform of the UN should accommodate these developments. This is better suited for practical purposes and it is more realistic to achieving both the objectives of the regional bodies and the purposes of the UN. From Liberia to Sierra-Leone, to Cote d'Ivoire and the on-going deployment in Mali, there is an African renaissance in progress seizing the initiative for military intervention when diplomacy and non-coercive measures have failed or proved unlikely to succeed. Therefore, the conceptual and institutional c challenges that beset R2P at the global level have largely been taken care of within the AU-ECOWAS RHMI regime and this should facilitate the operationalization of R2P in Africa.

(c)From 'Cooperation and Partnership' to 'Complementarity'.

The Concise Oxford English Dictionary states that to cooperate means to 'work jointly towards the same end; assist someone or comply with their request'.[7] The same dictionary defines 'complement' as meaning 'to add to in a way that enhances or improves' and 'complementary' as meaning 'combining in such a way as to form a whole or enhances each other.'[8] It then defines 'complementarity' as 'a situation in which two or more different things enhance each other or form a balanced whole'.[9] The idea of 'complementarity' as an approach to distribution of authority gained notoriety in international law through the Rome Statute of the International Criminal Court which provides in both its Preamble, and article 1 that the ICC shall be complementary to national courts.[10] The idea of complementarity and the contours of the principle are outlined in article 17 of the Rome

[1] See Nsongurua J Udombana 'Still playing dice with lives: Darfur and the Security Council Resolution 1706' (2007) 28:1 *Third World Quarterly* 97 at 103 (Hereafter Udombana *Still playing dice with lives*).

[2] See Michael Clough 'Darfur: Whose responsibility to Protect?' *Human Rights Watch* 1 Available at http://www.responsibilitytoprotect.org/files/HRW_Darfur-WhoseResponsibilitytoProtect.pdf

[3] See Article 7(1) of the AU Act; see generally, Nsongurua J Udombana 'The institutional structure of the African Union A Legal Analysis (2002-203) 33 *California Western International Law Journal* 69.

[4] See Wouters et al "The Responsibility to Protect and Regional Organizations" supra at 16.

[5] See John-Mark Iyi, 'The Duty of an Intervention Force to Protect Civilians: A Critical Analysis of NATO's Intervention in Libya' (2012) 2 *Conflict Trends* 41 at 47.

[6] Paul D Williams 'Military responses to mass killings: African Union Mission in Sudan' (2006) 13(2) *International Peacekeeping* 168 at 169.

[7] The Concise Oxford English Dictionary, edited by Judy Pearsall (2002) p. 313.

[8] The Concise Oxford English Dictionary, edited by Judy Pearsall (2002) p. 291, 292.

[9] See Concise Oxford English Dictionary (10th Rev. ed.) (2002) Oxford University Press: Oxford, p.292

[10] See article 1 of the Rome Statue of the ICC.

Statute. In terms of this provision, 'complementarity' as a principle relates to the admissibility of a particular case before the Court rather than the jurisdictional competence of the Court.[1] The principle implies that a state has the primary responsibility to prosecute and punish international crimes. However, where such state is unable or unwilling to do so, the principle of complementarity requires that such state refers the matter to the ICC.[2] Rigorous tests are used by the Court to determine the whether a state is already conducting investigations into the case or whether the case is of serious gravity to warrant the intervention of the ICC.[3] One way of ascertaining whether such state is *unable* as opposed to being *unwilling*, is an assessment of the resources, capacity, and credibility of its domestic judicial process and whether it meets and guarantees minimum international standards of substantive and procedural fair trial.[4] This is important for our analysis because once it is determined that the State is willing but lacks capacity, and then the principle of complementarity requires that the ICC steps in to facilitate. The ICC does not substitute itself. So in effect, the primary actor, both in normative and institutional terms remains the territorial state. There can be 'cooperation' between the ICC and the host state in terms of working together for the common goal of justice. However, in terms of the underlying normative and institutional decisions, the principle of complementarity requires that the ICC defers to the host-state, at least to the extent that it is willing and able to prosecute.[5] One of the rationale for this principle is dictated by conventional wisdom—even if it were willing, it is practically impossible for the ICC to prosecute every compelling case of international crimes and it therefore makes perfect sense to continue to locate primary jurisdiction in the territorial state. The wisdom in this would even be more acute in the context of the UN-AU relationship in the maintenance of international peace and security.

Located within the paradigm of AU-UN relations in the maintenance of peace and security on the continent, the preference has been for cooperation rather than complementarity. The implication is that cooperation allows the normative ambiguity to persist and this affects the practical implementation of peace and security in a conflict context such as Libya. The AU wanted a political settlement, the P3 within the UN wanted Gadhafi out. Within the cooperation paradigm, the UN felt, under the Charter, Chapter VII and VIII, it could only cooperate with the AU. However, as the host continent, the AU maintained that it should be in the driving seat to be complemented by the UN and I argue that this approach was only compatible with a complementarity paradigm. This would have seen the AU remain in the driving seat of resolution 1973 both in terms of the applicable normative framework and the institutional mechanism for its implementation. To be sure, regional organisations did play a pivotal role in the intervention in Libya, but that role highlighted one of the weaknesses of a complementarity principle—membership of multiple regional organisations—which made forum-shopping possible and the AU was effectively sidelined for the more intervention-friendly Gulf Cooperation Council and Arab League. Nonetheless, under a complementarity paradigm, what we would have seen in Libya would have been normatively, least persuasion from the UN Security Council for the AU to invoke article 4(h); and institutionally collective regional decision by the AU acting through its Peace and Security Council with the African Standby Force as the instrumentality for its enforcement. This proposition seems fat-fetched at the moment, it is nevertheless plausible that such scenarios might yet develop in the future where the AU-UN relationship is based on the principle of complementarity rather than cooperation and partnership.

Conclusion

In this contribution, I have focused on the frosty relationship between the United Nations (especially the UN Security Council) and the African Union in respect of human security whether under the rubric of protection of civilians or through the implementation of the responsibility to

[1] See Markus Benzing (2003) 7 Max Planck United Nations Yearbook 591-632 at 594. See William A Schabas An Introduction to the International Criminal Court (3rd ed.) 2007, pp174-186, Cambridge: Cambridge University Press. (An Introduction to the International Criminal Court)

[2] See Schabas "An Introduction to the International Criminal Court" supra at p. 179.

[3] Schabas "An Introduction to the International Criminal Court" supra at p. 179.

[4] See Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst *An Introduction to International Criminal Law and Procedure* (2008) Cambridge: Cambridge University Press, pp. 405-421. (Hereafter Cryer et al. "An Introduction to International Criminal Law and Procedure").

[5] See Cryer et al. "An Introduction to International Criminal Law and Procedure" supra at 412-13.

protect. The roles of the two organisations in the maintenance of international peace and security in Africa have evolved since the end of the Cold War but so has legal uncertainty as a result of important developments both at the regional and global level. The legal architecture of the UN Charter of 1945 has been playing catch-up with the consequence that friction often characterize the "cooperation-partnership" relationship between the AU and the UN. Recent cases of intervention in Africa such as Libya has underscored this reality and the need for a reappraisal. I have therefore called for a shift away from "cooperation-partnership" paradigm towards "complementarity paradigm" based on the ICC Rome Statute model. This should take place at the normative and institutional levels drawing on the normative and institutional frameworks already developed by the AU for the protection of mass atrocities on the continent. What is needed for this architecture to be effectively implemented is complementary efforts from the UN and this can be achieved on the basis of a complementarity paradigm rather than the current cooperation-partnership paradigm that exacerbates friction and turf protection struggles in UN-AU relationship.

REGIME COLLISIONS: FRAGMENTATION ACROSS INTERNATIONAL LAW DISCIPLINES

Musa Njabulo Shongwe[1]

1. Introduction

This paper analyses the problem of fragmentation[2] as it occurs across international law regimes. Inter-regime conflicts are the consequence of normative incompatibilities.[3] Such conflicts present some of the most pressing problems of modern international law.[4] The development of international law has been accompanied by "the rise of specialized rule-systems that have no clear relationship to each other"[5], are not subject to coordination or review, and are not based on any hierarchical relations. It comes as no surprise therefore that with the complexity and diversification of international law, there are areas of overlap. Contemporary international law is characterized by what is described as an "intense process of normative cross-fertilization, motivated by the prestige of some sources, and the necessity to find solutions for similar problems".[6] In their conclusions to the study of fragmentation, the International Law Commission (ILC) acknowledged tensions that may exist between international law regimes, recommending that "increasing attention will have to be given to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions".[7] It is in that context that this paper analyses how norms of different regimes interact and relate to each other, and the problems associated with those relations.

[1] Dr. ***Musa Njabulo Shongwe*** – Post-Doctoral Research Fellow at the South African Research Chair in International Law, University of Johannesburg. Email: musanjabuloshongwe@yahoo.com

[2] Fragmentation can be defined as the interaction between conflicting rules and institutional practices that culminate in the erosion of general international law. See Singh S "The Potential of International Law: Fragmentation and Ethics" Vol. 24 Leiden Journal of International Law (2011) 23 at 24-25. Other scholars define fragmentation as the fracture of the international legal order caused by the emergence of specialized functional regimes of international law. See Koskenniemmi M "The Fate of Public International Law: Between Technique and Politics" Vol. 1(4) Modern Law Review (2007) 70; and Simma B "The Universality of International Law from the Perspective of a Practitioner" Vol. 20 EJIL (2009) 265 at 270.

[3] The term "regime" in this study is adapted from contemporary definitions developed in international relations scholarship. See for example Young M A *Regime Interaction in International Law: Facing Fragmentation* (2012) 113 – 114. The term "regime" has come to include rule systems which have institutions as well: See Ratner S "Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law" Vol. 102 *AJIL* (2008) 475 at 485.

[4] Michaels R and Pauwelyn J "Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of Public International Law" *Duke Journal of Comparative and International La*w (2012) 367.

[5] The International Law Commission, Report of the Study Group of the International Law Commission on Fragmentation of International Law "Difficulties Arising from the Diversification and Expansion of International Law" U.N. Doc. A/CN.4/L.682 (2006) 245 par. 483 (hereafter "ILC Report").

[6] Varella M D "Central Aspects of the Debate on the Complexity of International Law" Vol. 27 *Emory International Law Review* (2013) 5.

[7] ILC Report (n 4 above) at par 493.

The general problem dealt with is that specialized regimes occasionally come into conflict over what international law means or requires. Examples of conflict are divergence on the meaning of particular treaty norms, the relationship between treaties, and the authority or jurisdiction of interpretation. Conflicts lead to increasingly divergent court decisions on international law obligations.[1] Conflicts occur whenever "self-contained regimes"[2] collide with other regimes. A self-contained regime consists of rules laid down in an international agreement or group of agreements regulating a specific subject matter[3] such as trade law, environmental law, law of the sea etc. Some regimes often claim exceptionalism or primacy over other rules of international law. This may be because they have set up their own institutions to regulate and ensure observance of the rules of the regimes, and courts to administer their own remedies for breach of the rules.[4] Additionally, the norms upon which such regimes are established are often interpreted in light of the object and purpose of that particular regime, resulting in an "autonomous interpretation"[5] of the treaties. In view of these problems, this paper analyses the kinds of interaction between selected regimes that cause and contribute to the fragmentation of international law. The inquiry focuses on the relationships and interactions between human rights law international humanitarian law, environmental and climate change law, as well as international trade law.[6] Lastly, the paper illustrates the effects of regime collisions in international dispute settlement through case law examples.

2. Human rights law's imperialism over other areas of international law

International human rights law has extended its reach to many fields of international law, including armed conflict, environmental law and international trade. Fragmentation is therefore inherent within the human rights context because the protection of human rights is now a legitimate topic of inquiry in multiple *fora.*[7] Optimistic scholars view the reach of human rights law into other areas as a necessary "humanization"[8] of international law. They argue that "human rights law provides a set of unifying rules and principles that can stitch together a fragmenting international legal system".[9] Regardless of those necessities, it may be argued that human rights law's imperial ambitions can constitute a threat to the coherence of international law. My postulation is based on the fact that those areas to which human rights law has expanded are already governed by long-standing legal regimes which may have already developed their own frameworks for balancing various rights and responsibilities.[10] International law does not provide sufficient choice of law mechanisms for addressing conflicts or ensuring harmony across regimes. This pessimistic view of human rights imperialism is supported by Geoffrey Corn, who holds the opinion that human rights law is seen as an unnecessary and unwelcome intruder in other international law regimes, as it sows confusion into established law, hence stimulating even greater fragmentation of the legal order.[11] This is the

[1] Cohen H G "Finding International Law II: Our Fragmenting Legal Community" *Journal of International Law and Politics* (2012) 1051.

[2] See Simma B and Puldowski D "Of Planets and the Universe: Self-Contained Regimes in International Law" Vol. 17 (3) *European Journal of International Law* (2006) 483-529.

[3] Kuijper R J "Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO" *International Centre for Trade and Sustainable Development (ICTSD) Issue Paper No. 10* (2010) at 8 par 3.2.2.

[4] Kuijper R J "Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO" *International Centre for Trade and Sustainable Development (ICTSD) Issue Paper No. 10* (2010) at 8 par 3.2.2.

[5] Autonomous interpretation means an interpretation driven by the needs of the organization which may not follow the normal rules of interpretation of international law. This was observed earlier by Jenks W "The Conflict of Law-Making Treaties" Vol. 30 *British Yearbook of International Law* (1953) 401-453.

[6] The analysis is limited to these subjects for reasons of maintaining relevance to the subject matter. The compared regimes act as examples, from which general conclusions can be drawn with relative caution.

[7] Boon K E "The Law of Responsibility: A Response to Fragmentation?" Vol. 25 *Global Business and Development Law Journal* (2012) 397.

[8] Teitel R and Howse R "Cross-Judging: Tribunalization in a Fragmented but Inter-Connected Global Order" Vol. 41 *NYU Journal of International Law and Politics* (2009) 959 at 964.

[9] Ibid at 965.

[10] Corn G S "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict" Vol. 1 *Journal of International Humanitarian Legal Studies* (2010) 52 at 53.

[11] Ibid at 54.

premise on the basis of which the paper analyses problems of fragmentation arising from conflicts of norms between human rights and other norms of international law. The linkages which are constantly established between human rights and other substantive areas imply that tribunals in different branches of international judicial architecture may be faced with human rights claims,[1] and those tribunals can possibly render conflicting decisions or even exclude the applicable law simply because those courts are not human rights courts, and have different and specific mandates to fulfil. The following section will show that conflicts between human rights and international humanitarian law reflect that the problem of fragmentation runs much deeper, and in fact presents more serious challenges for international law than is normally assumed.[2]

2.1 International human rights law and international humanitarian law

Human rights and international humanitarian law (IHL) have different sources and rules. However, they are both premised on the respect for human dignity; hence they can be viewed as separate parts of a single order committed to respect for human rights in armed conflict.[3] While IHL applies only to armed conflicts as stipulated in common Article 2 of the four Geneva Conventions,[4] human rights law continues to apply in both peace and war.[5] This was stated by the ICJ in its advisory opinion on the *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory.*[6] In this case, the construction of the Wall was defended by the claim that Palestinian territory was under belligerent occupation.[7] The ICJ in that context observed that the Wall led to the destruction or requisition of properties in violation of Articles 46 and 52 of the 1907 Hague Regulations, and Article 53 of the Fourth Geneva Convention. Specifically, the Court stated that these destructions were not justified by military necessity.[8] Instead, the wall and its associated regime violated civil and political rights because it deprived a significant number of Palestinians of their freedom to choose the place of their residence, thus impeding the freedom of movement under Article 12(1) ICCPR.[9] It also impeded the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living under the ICESCR. The same reasoning was upheld in *DRC v. Uganda*.[10]

The purpose of this part of the analysis is to find out how IHL and human rights law provisions interact in such circumstances where both regimes are applicable. This part explores how the featuring of human rights in humanitarian law can raise problems, especially in areas where these two regimes have conflicting philosophies. In this context IHL is the *lex specialis*, that is, the body of law of presumptive and principal application.[11] There are of course numerous instances where IHL sets out the position required under human rights law and *vice versa*.[12] But when assessing the interaction between international human rights law and IHL applicable to armed conflicts, the relevant concern or question is whether the protection provided to individuals under IHL is lower than that under human

[1] Alvarez J E and Leebron D W "Linkages" 96 *American Journal of International Law* (2002) 5.

[2] Grant C H "From Fragmentation to Constitutionalization" Vol. 24 Pacific McGeorge Global Business & Development Law Journal (2011) 382.

[3] Dugard J *International Law: A South African Perspective* (2011) 532.

[4] Convention [No I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 12 August 1949 (entered into force 21 October 1950) 75 *UNTS* 31; Convention [No II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 12 August 1949 (entered into force 21 October 1950) 75 *UNTS* 85; Convention [No III] relative to the Treatment of Prisoners of War 12 August 1949 (entered into force 21 October 1950) 75 *UNTS* 135; and Convention [No IV] relative to the Protection of Civilian Persons in Time of War 12 August 1949 (entered into force 21 October 1950) 75 *UNTS* 287.

[5] Orakhelashvili A "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?" Vol. 19 (1) *EJIL* (2008) 162.

[6] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004 General List No. 131 (2004) ICJ Reports 136 at 178 par 106.

[7] Ibid at par 89.

[8] Ibid at par 132 – 135.

[9] Ibid at par 134.

[10] *Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda* Judgment of 19 December 2005 General List No. 116 (2005) ICJ Reports at par 216.

[11] See Bethlehem D "The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict" Vol. 2(2) *Cambridge Journal of International and Comparative Law* (2013) 188.

[12] Orakhelashvili (n 22 above) at 162.

rights law. In the survey of literature on this topic, it appears that scholars view human rights law as having different roles within IHL: human rights law may inform the interpretation of a substantive IHL obligation by supplementing or completing it for purposes of appropriate contemporary application; it may prevail over an inconsistent IHL provision; it may fill in the gaps in circumstances in which there is no relevant IHL provision; or it may augment the relevant and applicable IHL obligation by way of a human rights' procedural and accountability mechanism.[1]

The problems between IHL and human rights law begin when states view IHL as being exceptional to international human rights law, by virtue of IHL being the *lex specialis* in armed conflict cases. The significance of this problem transpired after the United States' declaration of a "war on terror" following the terrorist attacks of 11 September 2001 on New York and Washington DC.[2] President Bush's administration launched a military campaign against Afghanistan and detained suspected terrorists without trial in Guantanamo Bay. The US justified its legal position by arguing that this was an international "war on terror" and therefore claimed that the detainees were justifiably denied protection under the IHL.[3] The U.S. claimed to be acting under IHL provisions which confer upon a party to such a conflict the prerogative to detain enemy combatants without any judicial decision. The U.S. denied the detainees any human rights protection arguing that their detention was governed neither by the rules applying to combatants nor by those applicable to civilians.[4] The detainees were classified as "combatants" and were not considered to benefit from international human rights law.[5] This means that the US government improperly interpreted its legal obligations under the Geneva Conventions. Even though the Obama Administration has abandoned the terms "war on terror" and "unlawful combatants", it continues to hold that an armed conflict exists, and the laws of war apply, between the US and Al Qaeda.[6] It also considers that supporters of those enemies may be attacked and detained under the laws of war, just as enemy combatants could under the laws of international armed conflicts.[7] In this matter, it is clear that the United States not only excluded human rights law, but restrictively interpreted IHL for its own benefit. The Third Geneva Convention which aims at protecting detainees, requires that where there is doubt whether persons who committed a belligerent act are combatants; they must be treated as "Prisoners of War" until such time as their status has been determined by a competent tribunal.[8] Regardless of this provision, the U.S. argued that the detainees were not considered as Prisoners of War because they had not effectively distinguished themselves from the civilian population and had not conducted their operations in accordance with the laws and customs of war.[9]

International human rights law is by definition made for asymmetric relations, that is, the relation between the state and the individual,[10] and to protect the individual against the state and other individuals. It can be observed therefore that the *lex specialis* principle, as it applies under the human rights and IHL relationship, presents problems because it brings forth the difficult question of how far international human rights law can, or should, intervene in armed conflict. From the U.S. example above, it can be gathered that the manner of application of the *lex specialis* excludes or curtails the protection required by international human rights law.

[1] See Bethlehem (n 28 above) at 188; and Sassòli M "The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts" in Ben-Naftali O (ed) *International Humanitarian Law and International Human Rights Law* (2011) 73.

[2] See the U.S. "*National Strategy for Combating Terrorism"* (September 2006) Available at http://www.globalsecurity.org/security/library/policy/national/nsct_sep2006.htm (visited 20 August 2015).

[3] Schlesinger R "Final Report of the Independent Panel to Review DoD Detention Operations*"* (2004) Appendix "C" at par 2(d) available at: http://www.defenselink.mil./news/Aug2004/d20040824fi nalreport.pdf (visited 20 August 2015).

[4] This meant that the detainees were not given the "Prisoners of War" status enshrined in the Geneva Convention III, or the "Civilian" status under Geneva Convention IV.

[5] Response of US to request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba, 11 April 2002, Inter-American Commission on Human Rights Vol. 41 ILM (2002) 1015.

[6] Glazier D "Playing by the Rules: Combating Al Queda within the Law of War" Vol. 51:957 *William and Mary Law Review* (2009) 957 at 961; and D' Cunha S "Not so Extraordinary Circumstances: The Marginalization of International Law in American Counter-Terrorism Policy" *The Modern American* (2013) 40-53.

[7] Glazier *Ibid* at 961.

[8] Article 5(2) of *Geneva Convention III.*

[9] Schlesinger (n 30 above) at 53.

[10] Sassòli (n 30 above) at 73.

Since international law does not provide sufficient and clear choice-of-law rules to mediate conflicts between human rights law and IHL, it is suggested that IHL should have a broader concept or principle of proportionality.[1] According to this principle, states must observe "general principles relating to the protection of the civilian population which apply irrespective of whether the conflict is an international or an internal one".[2] For example, in human rights law the right to life is a *jus cogens* norm that is considered as non-derogable even in public emergencies such as a violent riot or insurgency. The right to life does not prohibit all use of lethal force by states, but rather, it imposes a requirement of justification, specifically: states may not use lethal force unless they can show that this extraordinary measure is "absolutely necessary" to protect life or legal order.[3] This requirement for the use of lethal force places human rights law in conflict with IHL: IHL requires only that civilian casualties not be "excessive in relation to the concrete and direct military advantage anticipated".[4] Human rights law therefore imposes a significantly more protective standard than IHL for determining whether a state's use of force is adequately proportional.[5]

IHL can also affect international human rights law in more negative ways. There are some IHL provisions which cut across ICCPR principles in a manner that raises questions about the scope of application of the latter. An example is Article 76 of the Third Geneva Convention, which *inter alia* permits the censoring of correspondence addressed to prisoners of war. This is an issue that also engages the application of Article 17 (interference with privacy) and Article 19 (freedom of expression) of the ICCPR. This raises questions about the possibility of reasonable application of the ICCPR provision in such circumstances. Article 25 of the ICCPR provides for the right to take part in the conduct of public affairs and to participate in periodic elections. It is difficult to establish how this provision is possibly amenable to IHL norms and applicable in armed conflict, other than in circumstances in which the territory in question is under a military occupation authority, i.e. where the law of belligerent occupation applies. But even this is likely to be controversial. It can be argued on the basis of this view that Article 25 of the ICCPR is not amenable to reasonable application in circumstances of armed conflict. Not all human rights provisions are amenable to reasonable application in situations of armed conflict. To borrow the words of Daniel Bethlehem, "the closer one gets to the battlefield the less amenable to reasonable application are most human rights provisions".[6]

While in practice, circumstances where IHL and human rights law provisions will be materially divergent are likely to be limited, it remains important that where there are such material divergences, international law develops "an appropriate methodology of hierarchy, reconciliation and interpretation".[7] The aspect of hierarchical superiority of human rights is further discussed below.

The examples above show some of the problematic areas in the interaction between the two regimes. It seems that the two regimes are developing in a way of fragmenting the legal standards that seek to protect the individual. It is suggested that where IHL is applicable as the *lex specialis*, it must be applied in a manner that complements, not restricts, the enjoyment of rights or the level of protection under human rights law. The proportionality principle will thus play an effective role in ensuring that states may only infringe human rights (such as the right to life in armed conflict) if they first take appropriate precaution to avoid or minimize casualties.[8]

3. How WTO Law relates to other rules of international law

The WTO system is a comprehensive and specific legal order. This is true because the WTO system has two essential attributes: a body of valid legal rules that govern a community, as well as

[1] See Criddle E J "Proportionality in Counter-insurgency: A Relational Theory" 87 *Norte Dame Law Review* (2012) 1073 at 1078.

[2] Ibid at 1080.

[3] Criddle E J "Proportionality in Counter-insurgency: Reconciling Human Rights and Humanitarian Law" in Banks W (ed.,) *Counter-Insurgency Law: New Directions in Asymmetric Warfare* (2013) 3-4.

[4] Article 51 (5) (b) of the Additional Protocol I to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 *UNTS* 3.

[5] Criddle (n 40 above) at 1082.

[6] Bethlehem (n 28 above) at 191.

[7] Ibid at 192.

[8] Criddle (n 42 above) at 4.

enforcement mechanisms.[1] But the fact that it is complete and specific does not mean that it is insular or isolated: there is a presumption of validity of WTO rules in international law, in terms of which the rules of its treaties must be read in harmony with the principles of general international law.[2] The WTO system is thus still a part of general international law, and interacts with other international law regimes. The analysis that follows shows how the attribute of self-containment brings forth some normative and procedural conflicts.

3.1 Trade and the Environment

In the last two decades there has emerged an overall environmental awareness within the international community. Consequent to this development, environmental issues have become subject to new regulations at both the domestic and the international level. The relationship or interaction between the international trade regime and environmental law is based on the inclusion of trade affecting measures in Multilateral Environmental Agreements (MEAs).[3] There are typical legal issues that may arise between WTO law and MEAs, giving rise to conflicts. Members of the WTO who are also parties to a specific MEA can experience a clash in regard to their rights and obligations under both treaties. For example, a MEA that authorizes the imposition of import restrictions, or measures to that effect, can be challenged before the WTO dispute settlement system as conflicting with the MFN-principle in article I of the GATT. It can be challenged on the basis that it does not fulfil the requirements for equal treatment of like products between the WTO members. Moreover, the principle of national treatment in article III of the GATT could be infringed where import restrictions in MEAs restrict the use of certain substances in products: those could be challenged as violations of the national treatment principle due to their distinction of like products.[4]

Conflicts between WTO law and laws binding WTO members under other environmental protection treaties are always possible.[5] The main reason is that environmental protection treaties have legal implications for the conduct of international trade. Some treaties place restrictions on certain forms of trade that are harmful to the environment.[6] There are therefore cases where a state may find itself in a conflict position: where the performance of its obligations under a free trade agreement may constitute a breach of its environmental protection obligations. The most prominent example of conflict between international trade law and environmental law is the application of the precautionary principle[7] and GATT 1994 principles. Both of the basic principles of the UNCLOS and the GATT 1994 are in direct conflict with each other: underlying the core objectives of UNCLOS are the principles of ecological sustainable development and the precautionary principle; underlying the trade liberalization objectives of the GATT 1994 are the "most favoured nation" and "national treatment" principles. These principles exist concurrently. Therefore, their parallel application can

[1] Jean Salmon defines a legal order as "a body of rules of law constituting a system and governing a particular society or grouping". We can therefore see that there exists, within the international legal order, a specific WTO legal order: See http://www.wto.org/english/news_e/sppl_e/sppl26_e.htm (visited 23 January 2015).

[2] Lamy P "The Place of the WTO and its Law in the International Legal Order" Vol. 17 *EJIL* (2006) 969 at 972.

[3] The environment may be affected by international trade in different ways: firstly, there are substances that are very dangerous for the environment (such as hazardous wastes, chemicals, or pesticides), and international trade of these kinds of products must be strictly regulated. Secondly, the environment can also be damaged if international trade of specific natural resources (such as particular animal species, biodiversity elements) is not regulated. In order to protect the environment, several MEAs provide for Trade-Related Environmental Measures. These are measures that can ban, limit or regulate international trade. These measures may be incompatible with WTO rules and, therefore, lead to a conflict of norms and of jurisdictions.

[4] See Caldwell J "Multilateral Environmental Agreements and the GATT/WTO Regime" in Schalatek L (ed) *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship* (2001) 39-56.

[5] See generally Pauwelyn J *Conflicts of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003) 5.

[6] For example, the Basel Convention for the control of Transboundary Movements of Hazardous Wastes 1989 prohibits the export of hazardous waste. See Dugard (n 20 above) at 407.

[7] See United Nations Declaration on Environment and Development (13 June 1992) 31*ILM* 874. ("The Rio Declaration") principle 15, which provides that: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

cause substantive fragmentation as the precautionary approach can be interpreted as infringing the intended rights under the "most favoured nation" and "national treatment" principles.[1]

There are a number of provisions in different MEAs which challenge the international trade law regime. However, there are mainly three such MEAs on which legal commentary has focused: The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Convention on International Trade in Endangered Species in Wild Fauna and Flora (CITES), and the 1985 Vienna Convention for the Protection of the Ozone Layer together with the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer. These environmental conventions contain specific trade measures that address environmental harm by regulating the transboundary movement of certain environmentally harmful products.[2] Environmentalists argue that these trade measures are an important instrument of policy for MEAs because they are used to regulate trade in environmentally harmful products, and to create a regulatory framework to manage and minimize environmental risk.[3] In an attempt to regulate or avoid such conflicts, states have included in the WTO Agreement provisions that make environmental considerations possible. These are contained under the "general exceptions"[4] in article XX of the GATT (and Article XIV of the GATS),[5] specifically Article XX (b) and (g).[6] In general, Article XX allows for the protection of some important non-economic societal values including the environment. However, the relevant provisions (Article XX(b) and (g) make an exception for trade measures "necessary to protect human, animal or plant life or health" and "relating to the conservation of exhaustible natural resources", respectively. Additionally, the WTO reaffirmed its commitment to the objective of sustainable development, which was already recognized in the Preamble to the Marrakesh Agreement, through the Doha Declaration in 2001.[7]

States party to MEAs may impose measures in the form of sanctions to non-compliant members pursuant to the non-compliance mechanisms under MEAs. For example, under the Montreal Protocol, a Meeting of the Parties can adopt measures which include the suspension of trading rights in respect of the delinquent member.[8] This constitutes an imposition of trade restrictions, and appears to be in conflict with the WTO rules on market access. This kind of conflict is illustrated by the *US Tuna Ban Case*.[9] In this case, the United States had passed legislation prohibiting the import of tuna products from countries which used purse-seine nets for catching tuna.[10] The US was against the use of purse-seine nets, because fishermen cast their nets around dolphins which normally swim above schools of tuna, and the nets did not allow dolphins to escape unharmed. Mexico challenged the ban before the WTO dispute settlement panel. The GATT Panels rejected the argument of the United States that the import bans were justified under article XX (b) of the GATT as measures necessary to protect animal life. The panel stated that "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own".[11]

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[1] Salama R "Fragmentation of International Law: Procedural Issues Arising in Law of the Sea Disputes" Vol. 19 *MLAANZ Journal* (2005) 46.

[2] Marceau G "Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties" Vol. 35(6) *Journal of World Trade* (2001) 1095.

[3] Ibid.

[4] The general exceptions of article XX of the GATT allows members to take non-economic values and interests, that compete or conflict with free trade, into account. Through this possibility WTO members could be allowed to deviate from basic rules and disciplines of the WTO regarded that certain conditions are met. See Van den Bossche P *The Law and Policy of the World Trade Organization* (2005) 43.

[5] Article XIV of the GATS contains terms similar to Article XX of the GATT.

[6] According to article XX "the commitments entered into by the Contracting Parties were not meant to prevent them from adopting measures "(b) … necessary to protect human, animal or plant life or health" and "(g) … relating to the conservation of exhaustible natural resources", for example endangered species of animals or plants.

[7] See the WTO Doha Ministerial Declaration at paragraph 6 which states: "… that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive".

[8] Report of MOP-4, Decision IV-5, Annex V.

[9] Panel Report – *US Restrictions of Tuna*DS21/R – 39S/155(1991) "the U.S. Tuna-Ban case".

[10] The US Marine Mammal Protection Act of 1972.

[11] *U.S. Tuna-Ban case* (n 63 above) at par 6.2.

The WTO Appellate Body also faced a similar issue and handed down a similar decision in the *Shrimp Turtle Case.*[1] In this case the United States government imposed a prohibition on the import of shrimp harvested using methods that involved high rates of mortality for species of sea turtle protected by CITES.[2] This was in conformity with the US Endangered Species Act of 1973. This measure was challenged by India, Malaysia, Pakistan and Thailand on the basis that it was inconsistent with articles I, XI and XIII of the GATT and not justified as a permissible measure to protect animal life under article XX. The WTO Panel found that the import ban was inconsistent with WTO rules and that article XX did not apply.[3] On appeal, the Appellate Body also upheld the panel decision. The Appellate Body, however, gave a different rationale for its conclusion by developing a more flexible interpretation of the article XX environmental exemptions, and having regard to developments in international environmental law. The Appellate Body applied a two-tier test for determining whether the US trade measures were justified under article XX. Firstly, the Appellate Body asked whether the measure was compatible with article XX (g) by relating to the conservation of exhaustible natural resources. If compatible, the second stage involved determining whether the measure met the requirements of the chapeau of article XX that is, not being applied in a manner that would constitute unjustifiable discrimination or a disguised restriction on international trade.[4] In applying the test, the Appellate Body referred to international environmental law to determine whether sea turtles could be considered "exhaustible natural resources" within the meaning of article XX (g) of the GATT.[5] The Appellate Body held that sea turtles were indeed "exhaustible natural resources", just as much as any non-living resource.[6]

The Appellate Body then turned to consider whether the import ban was consistent with the requirements of the chapeau to article XX. On this point the Appellate Body found against the United States, concluding that the measure was a means of arbitrary or unjustifiable discrimination within the meaning of the chapeau.[7] The Appellate Body held that the US ban on the import of shrimp harvested without turtle-excluder devices (which protected sea turtles during shrimp harvesting) violates WTO rules. These decisions have been heavily criticized by environmentalists.[8] They attracted strong criticism mainly on the grounds that they privileged trade considerations over legitimate efforts to achieve the protection of marine wildlife.[9] On a positive note, it can be argued that the Appellate Body's positive action of considering international environmental agreements in applying Article XX of the GATT 1994 was the best procedure to circumvent fragmentation in this case. Rather than the usual conflict avoidance technique, the approach adopted by the Appellate Body here directly addressed the substantive conflict between international trade law and international environmental law. The legal issues arising from the trade and environment debate reveal the difficult relationship between two legitimate interests of the international community. Those interests are: the liberalization

[1] WTO Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1999).

[2] Convention on International Trade in Endangered Species of Wild Fauna and Flora, (3 March 1973) 993 *UNTS* 243 (CITES).

[3] The discussion of the panel report is contained in Hardcastle R "Environmental Trade Measures under Siege: The WTO US Shrimp Case" Vol. 3 *Asia Pacific Journal of Environmental Law* (1998) 157.

[4] *Shrimp-Turtle I* Appellate Body Report WTO Doc WT/DS58/AB/R (1998) 118 – 119.

[5] The Appellate Body reached its conclusion by reference to the concept of sustainable development which is in the first recital of the Preamble to the WTO Agreement. The Appellate Body also considered interpretation of the term "natural resources" as referred to in the United Nations Convention on the Law of the Sea (UNCLOS), the United Nations Framework Convention on Climate Change (9 May 1992) 1771 *UNTS* 165; Convention on Biological Diversity (5 June 1992) 170 *UNTS* 143, "Agenda 21" Adopted by the United Nations Conference on Environment and Development, 14 June 1992; and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, (3 March 1973) 993 *UNTS* 243; and the Convention on the Conservation of Migratory Species of Wild Animals (23 June 1979) 19 *ILM* 15 (1980) "the Bonn Convention". The Appellate Body also referred to the fact that as all sea turtles were listed as endangered under CITES, they must therefore be considered "exhaustible" under article XX (g) of the GATT. See *Shrimp-Turtle I Appellate Body Report* (n 69 above) at par 130-132.

[6] *Shrimp-Turtle (Ibid*) at par 134.

[7] Ibid at par 187.

[8] See for example Tladi D "Can the Wolf Protect the Lamb? Free Trade Regimes as Instruments towards Sustainable Development" Vol. 27 *SAYIL* (2002) 149.

[9] See Stephens T "Multiple International Courts and The Fragmentation of International Law" 25 *Australian Yearbook of International Law* (2006) 256, citing Esty D C *Greening the GATT: Trade, Environment and the Future* (1994) 114-30.

of international trade and the international protection of the environment**.** So, the main goal of the WTO, to liberalize world trade,[1] is now set against the urgent need of protecting the environment. This has brought about tensions between trade and environmental policies, making a harmonization of norms under both regimes imperative. The difficulty in reconciling the claims of free trade and environmental protection is also exacerbated by the fact that international trade law is a powerful system with its own distinct set of norms, a specialized dispute resolution system with exclusive jurisdiction over the interpretation and application of those norms, and an internal institutional structure capable of enforcing those norms. Because of these factors some authors have gone so far as to claim that this system conducts itself as self-contained.[2] International environmental law on the other hand is a vulnerable regime. It is mostly vulnerable to external influence by international trade law and WTO jurisprudence in particular. It is my view that there is an institutional frailty within the international environmental law regime which has negative implications for international environmental law. When compared to other subsystems of international law, international environmental law has emerged quite late. International environmental law was only considered as a distinct discipline from the late 1960s, and with the adoption of the Stockholm Declaration of 1972.[3] As it currently stands, international environmental law has no court of its own to interpret, apply and enforce norms of international environmental law. We can only resort to competing expressions of basic norms, since no one international environmental law organization has the requisite capacity or recognition to be able to give an authoritative interpretation of its norms. This leaves environmental norms vulnerable to analyses and interpretations from outside of the field of international environmental law. International environmental law is short of a unified and effective institutional structure.[4] Bodanksy notes that the "continuing centrality of state consent" in international environmental law is likely to limit future possibilities of achieving a system of greater international governance.[5] Consequent to the institutional deficiencies stated above, there has been a proliferation in the number of organizations with environmental protection programmes.[6] The United Nations itself has over a dozen such bodies and specialized agencies.[7] Because of the large number of specialized bodies producing multilateral environmental agreements or other international environmental law documents, the body of norms which constitutes international environmental law is now highly fragmented.[8] Thomas Cottier and Manfred Elsig argue that the cross-cutting nature of international environmental law explains why this regime is inherently fragmented and why it has not so far been placed under the roof and umbrella of a single international organization.[9]

In connection to the trade-environment debate, it can be concluded that the absence of well-coordinated and authoritative international environmental institutions has meant that the WTO Dispute Settlement Body is the forum of choice for trade-environment disputes.[10] In seeking to address this "impasse" the dispute settlement bodies of trade regimes have exhibited a strong bias towards trade liberalization at

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[1] Preamble to the Marrakesh Agreement Establishing the WTO.

[2] See Kuyper P J "The Law of GATT as a Special Field of International Law" Vol. 25 *NYBkIL* (1994) 227 at 257.

[3] *Declaration of the United Nations Conference on the Human Environment* (16 June 1972) 11 *ILM* 1416 (1972) "Stockholm Declaration." See Bodanksy et al "Mapping the Field" in Bodanksy, Brunnée and Hey (eds) *The Oxford Handbook of International Environmental Law* (2007) 3.

[4] French H "Reshaping Global Governance" in Starke L (ed.,) *State of the World 2000: A World-watch Institute Report on Progress toward a Sustainable Society* (2002) 176.

[5] Bodansky D "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" Vol. 93 (3) *American Journal of International Law* (1999) 596 at 624.

[6] UN OHCHR "Human Rights and the Environment: Rio+20 Joint Report" (19 June 2012) 32 available at: http://www.unep.org/environmentalgovernance/Portals/8/JointReportOHCHRandUNEPonHumanRightsandtheEnvironment.pdf (visited 2 September 2015).

[7] The Centre for International Environmental Law "Background on the Johannesburg Summit 2002 Call to Action − The Need for New International Environmental Governance" (21 February 2002) available at: http://www.ciel.org/Tae/Johannesburg_Call_Back1.html (visited 2 September 2015).

[8] Sands P *Principles of International Environmental Law* (2003) 124.

[9] Cottier T and Elsig M "Can the Trade Regime Offer Lessons for Reforming the Architecture of the Environmental Regime?" preliminary draft (June 2011) 14 available at: http://www.environmentalgovernance.org/wp-content/uploads/2011/06/9b.-CottierElsig_A-DiscussionNote_June2011.pdf (visited 20 August 2015).

[10] Cinnamon C "The Kyoto Protocol and the World Trade Organization: Reconciling Tensions between Free Trade and Environmental Objectives" Vol. 17 *Colorado Journal of International Environmental Law & Policy* (2006) 45–88.

the expense of sound environmental management.[1] From the above discussions it clearly appears that there is a need for harmonization of the competing interests of international trade and environmental protection. The international community must find a way to balance environmental and trade interests, as the WTO may not always be the most appropriate organ to cope with complicated environmental issues.

3.2. International trade law and the climate change regime

World trade law has been chosen for its suitability as an example of how regimes with very different objectives and principles can give rise to substantial tensions. International trade is one of the pillars of the global economic system. The conduct of international trade affects climate change in the sense that the economic activities necessary for trade lead to increased greenhouse gas emissions.[2] At the same time, the adoption of measures to reduce greenhouse gas emissions can adversely affect trade competitiveness, hence reducing the willingness of countries to participate in such measures.[3] It is thus inevitable that overlaps between the climate change regime and the multilateral trading system may occur.

The climate change regime and the international trade regime are *prima facie* mutually supportive. On the one hand, the preamble to the WTO Agreement clearly states that the goal of the organization is "to raise standards of living … while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment".[4] The UNFCCC and the Kyoto Protocol, on the other hand, reaffirm their commitment to "minimize adverse effects on international trade" in the pursuit of their objectives.[5] International environmental law shares many principles and instruments with the climate change regime, and given the commonalities, one would anticipate little conflict between them. However, the language of these provisions does not take away the conflicts inherent between these two regimes. Note that in this analysis it is possible to adopt Kelsen's simplistic or narrow definition of conflict: the incompatibility of two legal norms.[6] The general or broader definition is also applicable, according to which a conflict arises when two or more norms containing obligations, prohibitions or permissions cannot simultaneously be complied with without necessarily violating one another.[7] The question to answer therefore is where do conflicts appear between the climate change and trade regimes? Firstly, these regimes experience some interaction in relation to the measures envisaged under the UNFCCC and the Kyoto Protocol to mitigate climate change. These measures go to the very heart of contemporary trade activity[8] by, for example, targeting industrial processes that are based on fossil fuel combustion, energy intensive production practices, global deforestation, transport and travel modalities. The states or parties included in Annex B of the Kyoto Protocol have committed themselves to quantified emissions reduction targets; hence they had to adopt national policies and measures that limit their anthropogenic emissions green-house gases in order to mitigate climate change by the year 2012. For this reason, the climate change regime features a number of trade-related environmental measures. Climate change policies have the potential to distort free trade by introducing potentially discriminatory measures into the trade system. Free-trade distortion can occur when:

[1] Dunoff J L "Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes" Vol. 15 *Michigan Journal of International Law* (1994) 1043.

[2] Leal-Arcas R "Unilateral Trade-Related Climate Change Measures" Vol. 13(6*) Journal of World Investment and Trade* (2012) 2 – 3.

[3] Charnovitz S "Trade and Climate: Potential Conflicts and Synergies" In Diringer E (ed.,) *Beyond Kyoto: Advancing the International Effort Against Climate Change* (2003) 141.

[4] Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1867 *UNTS* 154.

[5] UNFCCC Article 3; Kyoto Protocol Article 2.3.

[6] Kelsen H *General Theory of Norms* (1991) 123.

[7] Voigt C "Conflicts and Convergence in Climate Change and Trade Law: The Role of the Principle of Sustainable Development" Unpublished (2004) 3 available at http://www.esil-sedi.eu/sites/default/files/Voigt_0.PDF (visited 24 August 2015).

[8] Ibid.

(a) Climate change policies endow national companies with comparative advantages such as subsidies, border tax exemptions and adjustments for carbon taxes.[1] These are prohibited under the Agreement on Subsidies and Countervailing Measures (SCM)[2];

(b) Climate change policies require an application of technical regulations on production and processing methods, such as greenhouse gas emissions during the production processes; energy efficiency, eco-labelling, and carbon and energy intensity). The imposition of such technical regulations potentially conflicts with the WTO Agreement on Technical Barriers to Trade, in the sense that treating imported goods and services less favourably than national ones, violates the national treatment rule in Article III of the GATT; and

(c) When goods or services from specific "climate-change-policy compliant" countries are given favourable treatment, especially those that have commitments under the Kyoto Protocol, it potentially violates the MFN rule under Article I of the GATT, and Article II of the GATS.

Policies to mitigate climate change have an impact on relative costs and returns among economic activities of different countries.[3] The size of these cost effects depends on a range of factors, including the relative level of mitigation efforts among countries, the degree of uniformity of different jurisdictions in the approach to combating climate change. The only way to ameliorate the situation would be with an internationally uniform climate mitigation policy such as a uniform carbon tax or a unified carbon price based on auctioned emission permits.[4]

4. The multiplicity of international courts and fragmentation

The international legal system possesses few mechanisms for maintaining inter-regime judicial consistency. There is no strict doctrine of precedent, or a hierarchy among jurisdictions.[5] Uncertainty therefore surrounds the efficacy of the existing techniques of promoting coherence such as the rule expressed in article 31(3)(c) of the Vienna Convention on the Law of Treaties that treaties should be interpreted having regard, among other things, to "any relevant rules of international law applicable in the relations between the parties".[6] In practice, judicial decisions have assumed great practical importance in processes of normative development.[7] This is true especially in the case of general environmental principles such as the obligation upon states not knowingly to allow damage to be caused to the territory of other states.[8] Therefore, when jurisdictional conflicts arise, the certainty that must be achieved by international relations can be disrupted.[9] Conflicts may arise concerning the jurisdictional competence of different dispute-settling mechanisms, as well as concerning the applicable law. Where more than one international court or tribunal is seized of the same dispute, even though presented with the same material facts, conflicting decisions can result, causing fragmentation of international law.[10] Overlap and conflict of jurisdiction are defined as a situation where the same dispute or related aspects of the same dispute can be taken to two distinct institutions or two different adjudicating bodies.[11] This at times leads to difficulties relating to "forum shopping", where parties

[1] Fischer C and Fox A K "Comparing Policies to Combat Emissions Leakage: Border Carbon Adjustments versus Rebates" Vol. 64 (2) *Journal of Environmental Economics and Management* (2012) 199 – 216.

[2] Agreement on Subsidies and Countervailing Measures (15 April 1994) Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization 1869 *UNTS* 14.

[3] Boute A "Combating Climate Change through Investment Arbitration*"* Vol. 35 *Fordham International Law Journal* (2012) 614 at 622.

[4] Zedillo E *Global Warming: Looking Beyond Kyoto* (2008) 115 – 145.

[5] Article 59 of the *Statute of the International Court of Justice* which provides that "the decision of the Court has no binding force except as between parties and in respect of that particular case."

[6] United Nations *Vienna Convention on the Law of Treaties* (23 May 1969) Vol. 1155 *UNTS* 331.

[7] Rosenne S *The Perplexities of Modern International Law* (2004) 43.

[8] See the *Trail Smelter Case (Canada v United States)* [1938] and [1941] 3 *RIAA* 1911.

[9] Marceau G and González-Calatayud A "The Relationship between the Dispute Settlement Mechanisms of MEAs and those of the WTO" in Schalatek L *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship* (2001) 71.

[10] Brown C Review of "Manual on International Courts and Tribunals" *Melbourne Journal of International Law* (2002) 453.

[11] Marceau G Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties" Vol. 35(6) *Journal of World Trade* (2001) 1081 at 1084.

will have the choice between two adjudicating bodies or two different jurisdictions.[1] The availability of multiple forums is not an ideal feature of international law in the sense that a single dispute may be examined by two different tribunals that may reach different or even opposite conclusions. This issue is also most significant in the comparison of international trade law with other regimes. This is because of the nature of the WTO dispute settlement mechanism: the WTO system is powerful, automatic and claims to be exclusive of any other forum in relation to allegations of violations of trade-related matters. The WTO generally "attracts" jurisdiction[2] whenever a trade element is involved. The problem that parties to a dispute can bring that dispute before two or more judicial bodies *under two different regimes* is illustrated in the *Swordfish* Case.[3] This case concerned the closing of the ports of Chile for ships flying the flag of member states of the EU, impeding EU vessels to import their catches into Chile.[4] The case was brought before a WTO panel and before the ITLOS in 2000. Both the WTO DSB and ITLOS had compulsory jurisdiction to hear the dispute. Jurisdiction of the WTO was established through procedure: on 6 November 2000, the EU requested the establishment of a panel to hear the dispute,[5] after failed consultations.[6] The compulsory jurisdiction of the ITLOS was established under UNCLOS Article 282.[7] Before the WTO DSB, the EU argued that this measure violated the provisions of the Convention on the Law of the Sea concerning fishing on the high seas,[8] as well as articles V and XI of the GATT 1994.[9] Chile defended its national legislation under the GATT 1994 "general exceptions" in Articles XX (b) and XX (g).[10] Before the ITLOS, Chile argued that the EU failed to manage its fishing vessels and co-operate in the conservation of swordfish stocks. Chile argued that, under Articles 64 and Articles 116-119 of UNCLOS, the EU had an obligation to ensure conservation of swordfish stocks in the high seas adjacent to Chile's exclusive economic zone and to act in a manner other than cooperatively was challenging Chile's sovereign duty and right as a coastal state to prescribe and implement conservation measures. Before either forum could make a ruling on the matter, the parties withdrew and came to a provisional arrangement.[11] It is therefore not necessary to engage the details or merits of this case since an amicable settlement was reached.

Nevertheless, what is gathered from this dispute is that the issue of concurrent jurisdiction between the WTO dispute settlement system and the ITLOS required an analysis of the extent to which both tribunals would inter-relate, given that both had legitimately established jurisdiction. The

[1] Marceau and González (n 101 above) at 72.

[2] Marceau G (above) at 1109.

[3] Case concerning the conservation and sustainable exploitation of Swordfish stocks in the South-eastern Pacific Ocean (Chile/ European Community) "The Swordfish Case" Case no.7 Order 2000/3, par. 3(a)-(d) available at: http://www.itlos.org/start2_en.html (1 August 2015).

[4] Chilean Fisheries Law was passed through Decree 598 (1991). Article 165 thereof states that vessels are prevented from trans-shipping or landing catch in Chilean ports that does not comply with Chilean regulations. Therefore Spanish vessels have been denied access to Chilean ports since the enactment of the decree.

[5] On 21 November 2000, the EU submitted a request to establish a panel, and the panel was subsequently established: See WT/DS 193/2, "*Chile – Measures Affecting the Transit and Importation of Swordfish*," Request for the Establishment of a Panel by the European Communities.

[6] On 19 April 2000, the EU had requested formal consultations at the WTO, which took place on 14 June 2000 and did not progress.

[7] The United Nations Convention on the Law of the Sea, 1982 article 282 provides that: "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree".

[8] UNCLOS Articles 87, 89 and 116 and the freedom of transit provisions under GATT Articles V and XI.

[9] WTO *General Agreement on Tariffs and Trade* (GATT 1994).

[10] These provisions state that:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: …(b) necessary to protect human, animal or plant life or health; … (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"

[11] The parties ceased proceedings in both forums in January 2001 before either ITLOS or the WTO DSB could comment on the relationship of the two courts and how the issue of multiple jurisdiction would be resolved. See Brown (n 102 above) at 453.

fact that this case was brought before both forums, at almost the same time, also demonstrates the problem of forum shopping which contributes to fragmentation of international law.[1] This case shows that the claims brought before both tribunals concerned different aspects of the matter of which both tribunals had legitimate jurisdiction over: the ITLOS was competent to decide on law of the sea matters (which in this case concerned the freedom of fishing on the high seas), while the Panel was competent to decide on trade-related issues (freedom of transit). This example illustrates the fact that even though international judicial bodies are created within particular treaty frameworks and competent to apply the law as specified in that treaty, they do often have to consider "external" law for deciding a case[2], that is, they would have to apply a set of rules governing another judicial body. The parties' claims before each judicial body differed in nature. It is therefore conceivable that ITLOS and the WTO DSB would have reached different results given the different purposes and ideals of the UNCLOS and GATT 1994. It is now foreseeable that states generally can have obligations under various treaties, which are not necessarily compatible. This kind of problem can also occur in human rights cases which imply questions of humanitarian law, or in cases concerning environmental law implying questions of the law of the sea, or in cases of trade law implying questions of human rights, the environment, law of the sea, etc.[3]

Another example is taken from the *Southern Bluefin Tuna Dispute*.[4] In this dispute, the International Tribunal for the Law of the Sea (ITLOS) and a subsequent Arbitral Tribunal established under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS)[5] reached entirely opposite conclusions. While in the provisional measures phase, ITLOS considered that jurisdiction on a *prima facie* basis could be established, the Arbitral Tribunal constituted to determine the merits of the dispute held that its jurisdiction was clearly excluded through the combined operation of UNCLOS and the Convention for the Conservation of Southern Bluefin Tuna.[6] Analysts have described this as a glaring instance of fragmentation.[7]

5. Conclusion

The paper has demonstrated how normative incompatibilities and conflicts of state obligations are the main causes of fragmentation. A wide range of interactions exist between international law regimes, which can potentially be beneficial or detrimental to the international legal system. It has been shown for example how the application of IHL as *lex specialis* in armed-conflict cases can bar or restrict the protection of persons as required by international human rights law. The relation of IHL with ICCPR rights in armed conflicts also illustrated the issue of incompatibility of norms. In the examination of international trade law, it was established that the attributes of self-containment of the trade regime are the very elements that bring about its clash with other international law regimes. It was demonstrated for example that environmental protection treaties have legal implications for the conduct of free trade by placing restrictions on certain forms of trade that are harmful to the environment. The basic principles of MFN and National Treatment under the WTO system are not amenable to, and are in direct conflict with, the requirements of the important environmental protection treaties. The above factors encapsulate the normative aspects of fragmentation between the trade and environment regimes. This paper has gone further to discover that the institutional frailty within the international environmental law regime renders it susceptible to fragmentation. In light of these challenges, there is clearly a need for reconciling free international trade with environmental

[1] Especially that the parties were able to resort to different international law regimes to support their respective claims, and thereby characterize the dispute differently. This highlights the tension between international trade law and international environmental law.

[2] Oellers-Frahm K "Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions" Vol. 2 *Max Planck UNYB* (2001) 67 at 87.

[3] Ibid at 87.

[4] *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)* [1999] 38 *ILM* 1624 (Order); *Southern Bluefin Tuna Award ILM* 1359 (2000) Award.

[5] United Nations Convention on the Law of the Sea (10 December 1982) 1833 *UNTS* 397.

[6] Convention for the Conservation of Southern Bluefin Tuna (10 May 1993) 1819 *UNTS* 359.

[7] See Romano C "The *Southern Bluefin Tuna* Dispute: Hints of a World to Come, Like it or Not" Vol. 32 *Ocean Development and International Law* (2001) 313; and Salama R "Fragmentation of International Law: Procedural Issues Arising in Law of the Sea Disputes" Vol. 19 *MLAANZ Journal* (2005) 24 at 32-41.

protection. The climate change regime is marked by a complex and unstructured rule-system. International policy efforts to address the causes, impacts, and to develop solutions to climate change come from and affect a wide spectrum of specialized international regimes, resulting in inevitable legal overlaps.[1] A positivist view suggests that fragmentation should be regarded as a "strength rather than a weakness of environmental co-operation".[2] Indeed, regulation from multiple fronts can facilitate the fight against environmental degradation. However, the coherence of regulation will remain threatened by the multiplicity of institutional arrangements and the overlapping of regimes. Fragmentation is thus the hallmark of the international environmental law regime: it is both the key to its success and the pathway to its unravelling.[3] When dealing with regime collisions, it is important to maintain the objective strengthening the overall coherence of international cooperation, by exploiting the synergies between different agreements, and minimizing potential or actual conflicts.[4]

COMPLETION MANDATE OR DISSOLUTION OF INTERNATIONAL COURTS AND TRIBUNALS BY MEMBER STATES: THE SADC TRIBUNAL DEMISES AND THE ICC UNDER THREATS

Jean-Jacques Kandala Lupwana[5]

1.1. Background to the Southern African Development Community (SADC)

The Southern African Development Community (SADC) was born out of the Southern African Development Co-ordination Conference (SADCC) in 1992.[6] At the time of the formation, its member states understood that they will not achieve economic freedom in an isolation manner, therefore the need for a supranational or regional economic institution. As a result, SADC mission is to "Promote sustainable and equitable economic growth and socio-economic development through efficient productive systems, deeper cooperation and integration, good governance, and durable peace and security, so that the region emerges as a competitive and effective player in international relations and the world economy".[7] To this end, the community works in close collaboration with its organs, including the Secretariat, the Summit of Head of States, the Council of Ministers, Senior Legal Official and the Tribunal.

As it is, the SADC Tribunal is the judicial branch of the Southern African Development Community (SADC). As a judicial institution, the SADC tribunal was established under article 16 of the Southern African Development Community treaty.[8] The legality on the establishment of the SADC tribunal has since raised concerns. One of the most controversial issue is the coming into effect of the protocol of the SADC tribunal. The debate arises, particularly, because, unlike initially provided for in the SADC treaty that agreement on the amendment would requires ratification, member states agreement amending the SADC treaty in 2001 were adopted. In the context of such a great consensus, it was determined that the Protocol of the SADC Tribunal came into effect through

[1] H Van Asselt, F Sindico, and M A Mehling 'Global Climate Change and the Fragmentation of International Law' *Law and Policy* (2008) 424.

[2] Oberthür S and Gehring T "Reforming International Environmental Governance: An Institutionalist Critique of the Proposal for a World Environment Organisation" Vol. 4(4) *International Environmental Agreements: Politics, Law and Economics* (2004) 369.

[3] Cinnamon 'Good Climate Governance: Only a Fragmented System of International Law Away?'*Law and Policy* (2008) 451.

[4] Van Asselt H 'Dealing with the Fragmentation of Global Climate Change: Legal and Political Approaches in Interplay Management' *Global Governance Working Paper No 30* (2007) 2 available at www.glogov.org. (Visited 2 August 2015).

[5] ***Kandala Lupwana,*** South African Research Chair in International Law, Faculty of Law, University of Johannesburg

[6] The Southern African Development Co-ordination Conference (SADCC) was inspired by Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe, which became the Southern African Development Community (SADC) in 1992.

[7] The SADC Mission

[8] Article 16 of the SADC Treaty

its incorporation into the SADC Treaty in 2001.[1] Indisputably, the SADC tribunal was legally constituted and welcoming by member states through the adoption of the agreement amending the SADC treaty. Nevertheless, despite some burning issues, which are also discussed in this research, the SADC tribunal was given such a great consideration and expectation.

1.2. Great Commitment of SADC member states. With great expectation member's states welcomed the SADC tribunal and made several commitments. One of which is the willingness to be bound by the SADC tribunal's decisions.[2] As a result, the decisions of the SADC tribunal are binding upon member states and all institutions of the community. To give effects to their commitments, member states were required to ensure that the tribunal decisions or judgments are enforced in accordance to domestic procedures governing the execution of national court judgments.[3] A clear picture of this commitment shows that the decisions of an international tribunal, that's the SADC tribunal, have the same legal status as national courts' decisions. A promising narrative here is that the national judges or institutions applying the decisions from the SADC tribunal are exempted from used national requirements on the acceptance or compliance with foreign judgements.[4]

1.3. Burning issues in the SADC Tribunal Protocol.

1.3.1. Individual access to the Tribunal. The SADC tribunal protocol provides for the right of individual or natural person to bring cases before it. However, such right of access has been subjected to many limitations. The initial article 15 provides for individual access under three conditions. Firstly, access is allowed under condition that the person should have an interest of a legal nature. Secondly, legal person shall bring an action against a member state unless he / she have exhausted all available domestic remedies. Thirdly, unless he/ she is unable to proceed under domestic jurisdiction.

These limitations raise several legal questions. One is to which extent a person may be unable to proceed under national domestic systems. The second is the question of what is an interest of a legal nature. In an attempt to assess these issues, it may be contended that a person may be able to proceed under national jurisdiction but then have a judgment full of irregularities, which would deny him/her the right to seek remedy before the regional tribunal. Such irregularities may include the lack of a fair trial, lack of jurisdiction or incompetence, and unlawful constitution of a tribunal. Issues such as unwillingness or inability to enforce a court decision as a mean to provide redress to the victims may also constitute a barrier to a person to proceed to the SADC tribunal.

Much may also be argued around the requirement of an interest of a legal nature. Assuming that a legal action before a national court has been admissible, can the same action lack an interest of a legal nature when the case is brought before the SADC tribunal? Based on the general legal principle "there is no action without an interest", it is very challenging to rule on the lack of an interest of a legal nature when a case, which was already dealt with before a national court, be declared inadmissible before the SADC tribunal.

As it appears, the right of individual to access in the SADC tribunal is very contentious. Combined with the challenges related to individual right to access, are procedural challenges to exercise such right. However, it is important in this context to refer to the recommendations made by regional civil societies.[5] The significance of these recommendations lay on the individual complaint procedures. It was suggested that "the individual complaint procedure should be simplified to increase access to justice by SADC citizens and residents. This is at least to allow interested parties to file complaints and other documents electronically and make use of new technology…".

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[1] The Protocol of the SADC treaty came into effective on 14th August 2001, and was subsequently amended on 3rd October 2002, 17th August 2007 and 17th August 2008 , and recently in August 2012 agreements amending the treaty were adopted, instead of being ratifying as provided for in the Article treaty. Council of Ministers of Justice/ Attorneys – General The tribunal was therefore established under

[2] Article 47 (ex-article 24) of the SADC Treaty as amended in June, 2012.

[3] Article 52 (ex-article 32) of the SADC Treaty.

[4] Some countries, including the Democratic Republic of Congo view a foreign judgement whether as a matter of law or facts. As a result, the application and procedure for compliance differ significantly.

[5] Workshop on the SADC Tribunal Review Process, 2010, Johannesburg, South Africa by the SADC Lawyers' Association (SADC-LA), International Commission of Jurists (ICJ), and the Southern African Litigation Center (SALC).

Nonetheless, the right of a natural person to access an international or regional tribunal is not an innovation by the SADC tribunal. International, regional and sub-regional economic communities such as the Caribbean Court of Justice (CCJ), the ECOWAS court of Justice, COMESA court of Justice (COCJ), East African Court of Justice (EACJ) also provide for individual petitions.[1] The ECOWAS court, especially has the most comprehensive and open access provisions. Article 10(a, c) of the protocol recognizes access to individual and other corporate bodies right to file a complaint before the court.

The right of individual access to an international tribunal is also a fundamental human rights recognized in both domestic and international instruments. International and regional tribunal with human rights jurisdiction provide for individual access. For instance, the European human rights system, also known as the oldest system,[2] consider individual access to justice as an important right. This right includes the right to an effective remedy and the right to a fair trial.[3] Thus, apart from states, [4] the European Commission and other European Union institutions, and private individual have direct access to court.[5]

The Inter-American system is not silent in this regards. Article 44 and 45 provide for individual petition and inter-states complain respectively. The individual procedure complain is direct or automatic while the inter – states complain require an explicit declaration from the states recognizing the competence of the commission to receive and examine communication in which a state party alleges that another states party has violated the convention.[6]

The African Human rights system, which is also known as the youngest system of the two previous mechanisms for human rights protection, also provide for individual right to access the African Court for Human and People Rights.[7] Article 5(3) of the African Charter on Human and Peoples' Rights allows individual access. However, it restricts individual petition only against states that have made a special declaration accepting the competence of the court. As to now, only five countries, including Burkina Faso, Mali, Ghana, Tanzania and Malawi have made such special declaration.[8]

The mapping of the right to access an international courts reflects that almost all international judicial systems are accessible by individuals and entities other than states. Specially, international or regional courts, which have human rights jurisdiction, have broadened access provisions as to allow non-states entities, including individuals to file complaints before the court. The right of access to a tribunal should not for any reason be confused with the jurisdiction of the tribunal. The right to access to a court encloses the right to have standing before a court, which allow a tribunal to have jurisdiction on the matter brought before it. In a more explicit way, the difference between the right to access and the court jurisdiction is well demonstrated in the practice of the International Criminal Court (ICC), which allow states to bring or refer cases before it but does not have jurisdiction over states. Likewise, it allows individual to refer cases, even it is subjected to some restrictions, but have jurisdiction over them.

Another significant issues in the SADC tribunal, is the fact that it provides for national courts referral,[9] and the right to stand before the tribunal is also open to states parties as well as to other SADC institutions such as the secretariat, the summit and the Council.[10] As a result, the SADC tribunal has jurisdiction over inter – states disputes, disputes between states and natural persons , disputes between states and the community as well as between the community and its staffs.

1.3.2. Human rights jurisdiction. Another contentious and burning issues in the SADC tribunal protocol is the court human rights jurisdiction. The observance of human rights, democracy and the

[1] See article 10(d) and 30 respectively the ECOWAS and EACJ.
[2] The dated from 1950, this was recognized in 1964 in the case between Costa v Enel Case6/ 64.
[3] See Article 45 of Charter of Fundamental Rights of the European Union.
[4] See Article 33 and 34 of the EUCHR
[5] See Articles 263, 265, 268, 272 of European Court of Justice.
[6] See the American Convention on Human Right/ACHR adopted in 1959, amended in 1971 and 1978.
[7] The African Court on Human and Peoples 'Rights was created in 1998, enter into force in 2004.
[8] Article 34 (6) of ACHPR for individual petition
[9] article 16
[10] See article 16, 17 & 20 of the SADC Tribunal Protocol.

rule of law principles are the most prominent principles in the SADC community.[1] Their enunciation in the SADC treaty has induced many to believe, in the absence of a specific provision, that the SADC tribunal have a human rights jurisdiction. However, the tribunal jurisdiction may be traced in article 36, formally article 14 which states as follow: "The Tribunal shall have jurisdiction over any matter, which relates to:

a) The interpretation and application of the treaty;

b) The interpretation, application or validity of the protocol, all subsidiary instruments adopted within the framework of the community, and acts of the institutions of the community intended to have legal effects;

c) All matters specifically provided for in any other agreements that member states may conclude among themselves or within the community and which confer jurisdiction on the tribunal

A narrative analysis of this provision therefore provide for the court right to entertain on any matters, including human rights matters.

From the aforementioned facts, one may be persuaded that these burning issues in the SADC protocol are perhaps the basic cause of the SADC tribunal dismissal or dissolution. While it may be contended, in the following lines the research provides an assessment of some outsourcing facts which have several implications with the decision for the dismissal of the tribunal. However, prior to that, it is noteworthy to elude illusions on the unconstitutionality of the constitution of the SADC Tribunal treaty required ratification. After established that the legally of the constitution of the SADC tribunal, it is important to assess how and why the tribunal was dismissed.

2.1. The Constitution of the SADC Tribunal. The year 2001 represents a very important year in the history of the SADC tribunal.[2] The relevance of which is related to the legal question on the legality and legitimacy of the SADC tribunal. As previously discussed, the main legal question was whether the protocol of the tribunal, which was incorporated into the SADC treaty called for ratification or adoption, since the agreement amending the treaty was adopted.[3] The SADC Council of Ministers of Justice/ Attorneys-General was entrusted with the duty to determine the effectiveness of both the SADC tribunal protocol and the agreement amending the SADC Treaty since the Protocol of the Tribunal was incorporated into the SADC Treaty and only the agreement amending the SADC treaty was adopted and not the protocol of tribunal. After their meetings, the Council stressed that the tribunal was legally constituted and that its protocol took effect through its incorporation into the SADC Treaty by the adoption of the agreement amending the treaty in 2001. As a result, neither the Protocol of the Tribunal nor the agreement amending the SADC treaty required ratification. After established that the legally of the constitution of the SADC tribunal, it is important to assess how and why the tribunal was dismissed.

2.2. Dismissal of the SADC tribunal. Upon its creation, the SADC tribunal gave promises to be a regional platform for the settlement of disputes between natural or legal persons and member states arising from any agreement concluded by member states. In carrying out its duty, as assigned by member states, the tribunal was confronted with several challenges. One of the most pertinent is the lack of implementation or compliance with the court decisions by member states.[4] The unwillingness to comply with the tribunal judgements had dire consequences for the rule of law and the protection of human rights in the Southern African Region.

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[1] See article of SADC Protocol.

[2] The protocol of the SADC tribunal was adopted on the 7th August 2000 became effective on 14th August 2001, and was subsequently amended on 3rd October 2002, 17th August 2007 and 17th August 2008.

[3] Southern African Development Community/ SADC "Draft Agreement amending the Protocol of the SADC Tribunal" 10 May 2012.

[4] Article 52 (ex-article 32) 1. "Member States and institutions of the Community shall take for forthwith all measures necessary to ensure execution of the decisions of the tribunal."

2. A decision of the tribunal shall be binding upon the parties to dispute in respect of that particular case and enforceable within member states in which enforcement is sought in accordance with domestic procedure governing the execution of judgments.

Especially, the judgement in the case of Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe handed down in November 2008 by the SADC tribunal raised a great deal of concerns.[1] As provided for under paragraph 4 of article 52 (Ex-article 32), the tribunal shall establish the existence of such failure and report the matter and its findings to the Summit to take appropriate actions. Accordingly, Zimbabwe refusal to comply with the judgement was referred to the Summit of Head of States,[2] as the supreme organs to take appropriate actions.

Surprisingly, in January and February 2010, the tribunal was squashed with the decisions of the SADC Council of Ministers and of the Summit not to renew the contracts of some officials of the SADC secretariat.[3] The situation, which was then referred to the tribunal[4] was found unlawful since it violated the rules of natural justice, including the right to be heard. The decision not to renew the contract of those officials also violated procedural rules of the SADC secretariat on the renewal of contracts. This is because those officials were not given the opportunity to make representations before an independent and impartial body before the taking of such decision by their superiors. Consequently, the decision violates the rule against bias, that no one shall be a judge in his own cause. This was obvious in the case of Ms. Kethusegile-Juru, where the tribunal found that, despite various evidences on record, the former Secretary General of the SADC Parliamentary Forum acted as both party and judge.[5]

Despite these decisions, in July 2010, the tribunal renewed its request for appropriate actions against Zimbabwe in the light of existence of further acts of non-compliance with the decision of the tribunal. Unfortunately, on the recommendation of the Council of Ministers, the Summit decided to defer action against Zimbabwe and to order the review of the role, responsibilities and terms of reference of the Tribunal by an independent consultant.[6] In addition, the Summit re-affirmed it decision to not re-appoint regular and non-regular members of the tribunal but allowed them to stay in office until the completion of the review. Furthermore the Summit reiterated its decision to order the Tribunal not to receive any new cases or hearing of any cases until the SADC Protocol on the Tribunal has been reviewed and approved.[7]

A narrative analysis of the decision of the Council and the Summit of the SADC, which include the non – appointment of members of the tribunal whose term of office was to expired in 2010 and the non-replacement of those whose term was to expired on October 2011, clearly revealed the Summit decision to dissolve the SADC Tribunal by expressly barred it from hearing any new or pending cases. Even though, such a decision was meant to establish a new tribunal with a different jurisdiction and a new membership after the amendment by the Ministers of Justice/ Attorneys General of the relevant SADC legal instruments, including the SADC Treaty and Protocol, the true and reality are that member states have dissolved the SADC tribunal with dire consequence for the SADC citizen.

Whether the SADC tribunal was suspended or dissolved, the fact of the matter remains that the decision of the Summit and the Council is illegal and ultra vires. Apparently, the Summit has no power under the SADC Protocol and Treaty to hamper the jurisdiction of the SADC Tribunal, not least because the Summit itself is subjected to the Tribunal Jurisdiction. Nevertheless, the Summit have the power to amend the SADC Treaty and Protocol but not to restrict the jurisdiction of the tribunal.

The decision of the Summit is also illegal because it sought to dissolve the Tribunal and paralyzed it from carrying out its core activities, including the hearing of new or pending cases. The provision of article 8 (4) of the SADC Protocol provides that: "Notwithstanding the expiration of his/ her term of office, a Member shall continue to hear and complete those cases partly heard by him or her". Therefore the restriction violate the fundamental principles and right of access to justice. In addition, the decision to dismiss the SADC tribunal is in contravention of article 4(c) and 6(1)

[1] The Southern African Development Community/ SADC Tribunal 02/ 2007

[2] See William Campbell and Other v Republic of Zimbabwe (SADC-T 03/2009).

[3] SADC Secretariat "Extraordinary Summit Heads of State and Government of the Southern Africa Development" Windhoek Republic of Namibia 20 May 2011.

[4] Kanyama v SADC Secretariat (SADC-T) 05/2009 and Mondlane v SADC Secretariat (SADC-T 07/2009).

[5] Bookie Monica Kethusegile-Juru and the Southern African Development Community Parliamentary Forum (SADC-T 02/2009).

[6] See Summit decision 20 of August 2010 in Windhoek, Namibia.

[7] SADC Secretariat (above) at 2.

of the SADC Treaty, especially it violates human rights, democracy and the rule of law principles. By taking such decision, the Summit has also jeopardised the sustenance of the objectives and the implementation of the principles of the SADC Treaty.

As previously discussed, the SADC tribunal was legally constituted and its decisions are binding upon all member states. Thus, even the concerns raised on the scope of its jurisdiction and the law to be applied was only an astute to kill it off. Because, instead of taking appropriate actions against Zimbabwe for non-compliance with the judgement of tribunal, the Summit ruled against the tribunal and its officials. The question here is how to explain the coincidence between the judgment of the tribunal and the summit decision to review the tribunal instruments. Can one believe that such a decision was taken because member states plan to create a new tribunal with a new jurisdiction or just because of concerns raised on the jurisdiction of the tribunal?

Legal questions, as discussed above, appear to be not the real problem for the dissolution of the SADC tribunal. However, and perhaps the true is that those legal concerns, especially those related to the jurisdiction of the tribunal in matters between persons and member states have persuaded member states to support the decision dissolving the tribunal. For instance, Zimbabwe and Botswana had the most contestably views on the issue of jurisdiction of the SADC tribunal arguing that the tribunal should be confined to giving preliminary rulings on matters brought before it by national courts of member state. Since the tribunal jurisdiction with regards to individual petitions was already questioned by Zimbabwe and other countries, one may establish a link between such concern and Zimbabwe's refusal to comply with the tribunal judgment. In order words, Zimbabwe's contestation in allowing the SADC tribunal to entertain individual petition with member states was later justify by its refusal to comply with the judgment of the tribunal on this regard.

However, what is of great concerns here is the question on how Zimbabwe attitude, which may be inferred to a "reservation" have induced other SADC member states to dissolve the tribunal and to what extent such attitude may influence AU member states parties to withdraw from the ICC.

2.3. African Union Member State parties to the International Criminal Court threatening for withdrawal. Although the concern between the ICC and the AU is expressed in many way, to date the 2010 decision of the AU Assembly that African states will not cooperate with the ICC in the arrest of Bashir is the most controversial. The AU decision not to cooperate with the ICC stems from the UNSC refusal to defer proceedings in Darfur for the period of one year as provided for under article 16 of the Rome Statute. Subsequently, in 2011 the AU made a similar request in respect for a deferral of ICC's investigation into the 2008 post-electoral violence in Kenya. Ultimately, Africa concerns with the ICC peaked in respect of the court's decision to seek an arrest warrant for President Al-Bashir of Sudan.

However, when analyzing the AU decision, the question is whether this decision was intended to be binding to AU member states or was just optional. Under international law, the legal force of a decision, though there are political motivation, lies in the law-marking body, which in the case at issue , is the AU Constitutive Act which influenced the process of taking such decision. Obviously, there is no express provision in the AU Constitutive Act conferring binding power to the AU Assembly decisions. Article 23 of the Constitutive Act of the AU only sets out the consequences for failing to abide by the AU decisions.

However, when looking at some practices within the AU institutions, including the AU Commission who regards the decision of AU organs as binding, one may contend that the decision taking by the Assembly was binding upon member states. The AU Commission statement in response to the ICC pre-trial decision on Kenya refusal to cooperate with the ICC for the arrest and surrender of Al-Bashir, is more explicit. The AU Commission "expresses its deep regret that both the statement and decisions grossly ignore and make reference whatsoever to the obligations of the two countries to the Africa Union arising from Art23 (2)…. Which oblige all AU member to comply with the decisions and policies ….the decision adopted by the AU policy organs are binding on chad and Kenya and it will be wrong to coerce them to violate or disregard their obligations."

In addition, the AU Constitutive Act has been given consideration mandate by member states. Therefore, it may be argued that under the doctrine of implied powers, the AU decisions are binding on member states. In essence the doctrine implies that an organization is deemed to have those

powers that are necessary for achieving its purposes even in the absence of words in the text. From the aforementioned, it may be inferred that the decision not to cooperate clearly make a prima facie and was binding upon AU member states parties to the ICC. The AU commitment to bind its member states parties to the ICC not to cooperate with ICC for arrest of Al-Bashir, was also obvious in light of the 2010 AU decision. Especially, in paragraph 5 the AU reiterates its decision that member states shall not cooperate with the ICC in the arrest and surrender of Bashir. Having made it clear in the above paragraph, the AU decision not to cooperate with the ICC was not exhortatory but intended to be binding.

Equally important and perhaps one of the most significant question is whether the ICC decision to arrest and surrender Al-Bashir was binding upon AU member states. The significance of this question lays on the fact that it shall induce our conclusion on the correlation between the attitude of the SADC member states in dismissing the SADC tribunal and the AU member states to withdraw from the ICC after their refusal to comply with the court decision. Unlike, the AU decision which called for a deep assessment to determine it binding character, generally the ICC decisions are binding upon member states by virtue of the ratification of the Rome Statute. Especially, article 86 compel member states to cooperate fully with the ICC decision. With regard to the arrest and surrender of a suspect of international crimes, article 89 oblige states party to bring before the ICC any persons. In particular, article 59 (1) lays an obligation on a custodial States.

As it appears, both the AU decision not to cooperate with the ICC and the ICC decision to arrest and surrender Al-Bashir were binding upon AU member states parties to the ICC. Thus, AU member states were in a conflict between two binding obligations. Ultimately, a situation where a states find itself in competing obligations, require such a state, in the context of the ICC, to consul immediately with the court. Article 97 of the Rome Statute states as follow: "Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia,

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State".

A parallel narrative of this provision lays an obligation upon a state, in case of competing obligations to consult with the Court immediately. Failure to do so constitute a violation of the obligation to act in good faith as required under the same article. Unlike the ICC strategy to deal with competing obligations, the AU decision of 2010 provides a balancing paragraph, which is very destructive of other binding decisions. It requires member states to "balance, where appropriate, their obligations to the AU with their obligations to the ICC".

Resolving norms clashes is also very controversial in international law. Milanovic notes: "Crucially, international law lacks the key method for resolving genuine norm conflict that is used in domestic law: a centralized system with a developed hierarchy, and that a hierarchy based on the source of norms. Thus, in domestic systems constitutional norms will prevail over statutory one, while legislations will ordinarily prevail over executive orders and decrees. Not so in international law, where all sources of law are considered equal."[1]

Obviously, international law lacks a hierarchy of norms. However, the only exception to the rule of norm hierarchy is perhaps from the rule of Jus Cogens norms as provided under article 103 of the UN Charter. It provides that: "In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". In terms of article 103, the obligations arising from the UN charter are peremptory and shall prevail over any other international law, including bilateral and multilateral treaties.

Subsequently, article 53 of the Vienna Convention on the law of treaties provides that: "…A treaty is void if….it conflicts with a peremptory norm of general international law". It defines peremptory norms as those "accepted and recognized as a whole as a norm from which no derogation

[1] Milanovic M "Norm Conflict in International Law: Whither Human Rights? *20 JCIL* (2009) at 53.

is permitted and which can be modified only by a subsequent norm of general international law having the same character". However, despite the existence of a hierarchy rule in international law, only conflict between norms falling within the context of article 103 of the UN Charter, those that have the Jus Cogens character and other general international law can be resolved by the hierarchy rule. Nonetheless, it is not the focus of this study to analyse approaches dealing with competing obligations, rather to determine the legal status of both the AU and the ICC decisions and their implications on the future of international tribunals and courts.

In retrospect, it was determined that the AU and the ICC decisions not to cooperate with the ICC and to arrest Al-Bashir respectively, were binding upon AU states parties to the ICC.

Non-compliance with court decisions as a way to dismiss or dissolve international tribunals. Since it may be contented, there is a move that states parties to international treaty relating to international tribunals or courts, have been reluctant to cooperate or comply with the decisions of these institutions, which they are the makers. As a result, legally binding decisions from those international tribunals are being overthrew by political decisions. Such attitude has been prevailing within Africa, where member states are acting ultra-vires and illegally towards the decisions of international tribunal. In the Southern African Development Community/ SADC, some member states attitude not to comply with the decisions of the tribunal has resulted in the dismissal or closure of the SADC tribunal.

This is despite the fact that states may be legally bound whether by virtue of ratification or through membership, their attitude have changed towards international tribunals, for which they are the architects. States actions has been found ultra vires and illegally towards legal decisions from international tribunals and courts. This was obvious in the case of SADC member states to dismiss the SADC tribunal. Today, AU member states parties to the ICC have refused to comply with their binding obligations and threat to withdraw from the ICC. A review of states attitude, as provided under this analysis may be conclusive to determine that non-compliance with the ICC decisions by AU member states may be the basis motive for their withdrawal thereby dissolving the ICC like SADC member states did with the SADC tribunal.

3. Conclusion. Despite several legal arguments put forwards in the context of the AU member states refusal to comply with the ICC decision, which are not discussed in the context of this research, it is however determined herein that there is a shift in states attitude towards legally binding decisions from international tribunal for which they are the makers. African states non-compliance with the ICC decision constitute a treat for their withdrawal or perhaps an attempt to dismiss the ICC. However, whenever it may happen, it appears like the role of retribution of criminal law which subsequently calls for the establishment of criminal tribunals[1] or the prosecution of perpetrators at the International Criminal Court (ICC)[2] does little to appease victims of mass atrocities. The growing distrust of the ICC by some African states has therefore dampened the excitement that greeted the establishment of the court. Initially, the ICC was welcomed as an opportunity to punish offenders and also act as a deterrent to future acts. But that optimism has been watered down by perceptions that the court is pursuing an anti-African agenda.[3] It is upon this observation that this study argues that the AU decision not to comply with Al-Bashir arrest and surrender is merely a shadow of the SADC member states attitude, which resulted in the decision of dismissing the SADC tribunal. Thus, whatsoever reasons position or decision that the UNSC or the Assembly General may take against AU member states parties to the Rome Statute, the dire of the matter is that the decision not to comply with the ICC has dampened African states commitment and excitement thereby killing off the ICC.

[1] See Waldof,L. "like Jews waiting for Jesus: Posthumous justice in Post-Genocide Rwanda" in R Shaw & Waldof L.(Eds) *Localising Transitional Justice: intentions and priorities After Mass Violence* (2010) Stanford University Press.

[2] The ICC was created through the Rome Statute of the ICC. UN Doc. A/CONF.183/9;37 I*LM* 1002 (1998):2187 UNTS 90 (1998).

[3] See for example Odero S. "Politics of International Criminal Justice:The ICC's Arrest Warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Theory" in Murungu C & Biegon J (eds). *Prosecuting International Crimes in Africa* (2011) 146 at 148-156

INTERNATIONAL RELATIONS: VIEW FROM SOUTH AFRICA and RUSSIA

THE AFRICAN PEER REVIEW MECHANISM

Chris Landsberg[1]

In 2003 African initiatives to establish a new continental regime based on the pillars of peace and security, governance and stability, development, and co-operation were in full swing. A group of African leaders, including Thabo Mbeki, Olusegun Obasanjo, Joachim Chissano, Meles Zenawi, John Kufuor, Abdelaziz Bouteflika, Abdoulaye Wade, Benjamin Mkapa, Pedro Peres and others were in the forefront of efforts to craft this new continental order. Afro-governance strategies were key for these leaders. It should be remembered during the Cold War decades of proxy wars and east-West tensions, "democratic governance" and "good governance" were not high on the agendas of the superpowers. Indeed, Africa had an ambivalent relationship with democratic governance for more than 50 years.

The decade before the end of the Cold War saw Africans finding themselves in the grip of Structural Adjustment Programmes (SAPS) and tied aid, induced by the Washington Consensus, followed by World Bank induced notions of "good governance" in the 1990s, which had as its aim the "hollowing out of the state" and making the world safe for capitalist development. African leaders mentioned above, and at other institutions like the Africa Group at the United Nations, the United Nations Economic Commission for Africa (UNECA), Regional Economic Communities (RECs), and of course the Organisation of African Unity (OAU) realised the need to take ownership and craft their own agendas, lest such agendas and projects be imposed on them. It was imperative for them to promote their own versions of "good governance". As these leaders developed a new continental architecture, spearheaded by the successor to the OAU, the African Union (AU), they realised the importance of developing "a common governance ethos within the AU". They set out to define their own Agenda, which came to be known as the "African Agenda". Former Mozambican president, and key member of the new African coalition, Joaquim Chissano reminds us that:

"The African continent and many developing countries have for the past two decades been involved in the democratisation process, as democracy is gradually being accepted as the political ideology that can better inform internal and external socio-political and economic relations as a vector for state development".[2]

What is key about Chissano's point is that Africans took responsibility for governance promotion, and did not need encouragement and prodding from outsiders; they realised what their obligations were.

Enter the APRM. In response to the post-Cold War realities and heightened Western triumphalism, and determined to reclaim their agency and voice in world Affairs, African leaders were instrumental in setting up an African Peer Review Mechanism (APRM) to promote democratic conduct in Africa.[3] Thabo Mbeki's colleagues singled him out for his *primus inter pares* and innovative role he played

[1] Professor ***Chris Landsberg*** – Director of South African Research Chair in African Diplomacy and Foreign Policy, University of Johannesburg.

[2] Joaquim Alberto Chissano, "A Review of democracy and development in Africa", African Journal of Governance and Development, Vol. 1, No. 1, November 2011, p. 88.

[3] NEPAD Secretariat, "NEPAD at Work", Summary of NEPAD Action Plans, Midrand, July 2002.

in the setting up, not just of the APRM, but the broader continental regime. In 2008, for example, the APRM Panel of Eminent Persons commended "President Thabo Mbeki for his commitment to NEPAD and the APRM processes at both national and continental levels", and recognized his "tireless commitment to promoting peace and security on the continent and the key role played by South Africa in hosting the NEPAD and APRM Secretariat".[1]

The APRM is a unique governance promotion tool which seeks to coax leaders in the direction of good and democratic governance through mutual learning, dialogue and negotiations. The establishment in 2003 of the APRM was an example of a new leadership dynamism on the continent. With the establishment of this instrument, Africans sought in part to rid themselves from the yokes of colonial rule and white minority domination. South Africa and some of its African partners assumed key roles in negotiating and promoting a new political normative framework for the continent that included a governance and democratization regime. The promotion of "good governance" in a non-confrontational fashion, or in a quiet diplomatic manner, occupied a central position in the emerging African Agenda. Africa wished to engage the industrialised and other powers on the basis not of neo-colonialism or neo-patrimonialism but genuine partnership based on the principles of mutual accountability and mutual responsibility.

Under the ethos of their African Agenda strategies, the "new" Africans promoted a policy which was based on the view that "there is need to develop a common governance ethos within the AU, which would create a conducive environment for the AU Government, when the latter is established". African Agenda policies promoted adherence to democratic benchmarks and governance indicators set up by Africans and for Africans in order to benefit from the renewed focus on African ownership. It had for example been instrumental in setting up the APRM to promote democratic conduct in Africa.[2] Given its commitment to democratisation as part of its Africa policy strategies, South Africa and its NEPAD allies introduced the APRM. The APRM is an instrument to which African member states sign up voluntarily and commit to comply with the principles, priorities and objectives of the AU Constitutive Act and other decisions of the AU and NEPAD. It is a mechanism for mutual learning and socialisation. It promotes democracy and good governance as "hot political issues", and the APRM openly encourages adherence to these. South Africa is firm in the view that the APRM should make a link between governance, democracy, peace and security and development. For Tshwane-Pretoria, African member states should comply with the APRM's provisions, and all African states should ideally sign up to the APRM.

The APRM became Africa's most innovative governance promotion tool, and it was based in South Africa, and the Republic invested more financial resources in it than any other African state; with the APRM Africa was "showcasing the continent's innovative thinking in governance".[3] The goal of the APRM was "reflective of the deepening democratic ethos and political pluralism" and was seen to be "accentuating the benefits of political and economic reforms".[4] The APRM is a "commonly-agreed-to instrument for self-monitoring" and had as its "epicentre the dissemination of best practices and the rectification of underlying deficiencies in governance and socio-economic development processes among AU member states".[5] The APRM also set out to inculcate democratic governance in Africa by "encouraging and building responsible leadership through a self-assessment process, constructive peer dialogue and the sharing of information and common experience in order to reinforce successful and exemplary practices among African states".[6] Countries are encouraged to undertake "self-assessments" as the APRM promotes a "holistic approach to development"[7] that emphasises the following:

• poverty eradication;

[1] Quoted in Chris Landsberg, "Thabo Mbeki's legacy of Transformational Diplomacy", in Daryl Glaser (ed.), *Mbeki and After: Reflections on the Legacy of Thabo Mbeki*, Wits University Press, 2010, p. 222.

[2] The New Partnership for Africa's Development (NEPAD), NEPAD workshop on Indicators, Benchmarks and Processes for the African Peer Review Mechanism (APRM), Cape Town, 7-8 October 2002.

[3] NEPAD, NEPAD Governance Programme: Concept Note, op. cit., p. 16.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid.

• gender balance;
• decentralisation;
• the capacity of countries to participate in the APRM;
• access to and dissemination of information;
• anti-corruption measures;
• broad-based participation; and
• sustainability in financial, social and environmental issues.

Good and democratic governance would thus not be promoted through diktats and gunboat diplomacy and the threatening of punitive measures. Just like South Africa's own negotiated settlement came about through dialogue and negotiations, so the postapartheid leaders chose to promote democratic leadership and governance through negotiations, dialogue and constructive peer pressure. Accession to the APRM entailed submitting to periodic peer reviews, and to facilitating such peer reviews in partnership with civil society, as well as committing to and implementing a National Programme of Action (NPOA) arising from peer reviews. Very importantly, there needs to be a commitment to operationalising the agreed upon parameters for good governance, such as: Democracy and Political Governance; Economic Governance and Management; and Socio-economic Development.

Challenging times for the APRM. While the decade 1998-2008 was important for African agency and leadership, there is a problem currently of many African leaders not taking their responsibilities seriously by appropriating continental institutions and mechanisms. The APRM, together with NEPAD, are two such programmes that have been allowed to drift and wither at the seams. It is key that African leaders reclaim these African initiatives and re-appropriate them. There is a sense in which the continent has become more fragmented, and ownership of continental initiatives has weakened. Indeed, there has been a sense of a leadership "retreat" by many. One of Apart from leadership challenges, we have also witnessed the APRM and other institutions being fraught with many financial, capacity, procedural, operational and political challenges. Here should be added the fact that the APRM as a project and a process is beset with many organisational, technical, leadership and political problems. Indeed, the APRM could be said to be in real jeopardy. The APRM Panel is not fully constituted, thereby leaving a real organisational and political void. The status and stature of the Secretariat has diminished in recent years, and the Midrand office is understaffed, with many of the programmatic and political staff having left in recent years. One of the negative consequences is that there has been no real continuity in the first six years. Within the Secretariat is a real leadership vacuum, but this goes far beyond that. A leadership vacuum also plays itself out continentally, as the AU has not assumed ownership of the APRM, as it did in the case of NEPAD and other continental initiatives. For as long as there is uncertainty about the future and status of NEPAD, the APRM's own future is likely to be in doubt.

One of the challenges that needs to be overcome is the love-hate relationship between governments and civil society organisations (CSOs) in Africa. While governments believe they are the legitimate holders of power, and should determine the APRM agenda, CSOs have been viewing themselves as 'gatekeepers' and 'guardians' of the APRM. This stand-off and stalemate has triggered some kind of oppositionalism in African politics.

It will be remiss not to say something about the international donor community, and the role it has played to date in both the evolution of and challenges faced by the APRM. At the time of its establishment, there was a widespread perception among NGOs and CSOs that the APRM was there to placate donors and international financial institutions (IFIs) like the World Bank, the International Monetary Fund (IMF) and other Western bodies. Here we should start by reminding ourselves that donors helped to fuel this perception. Instead of regarding the APRM as an important opportunity, and giving it the benefit of the doubt, many donors chose to do the opposite by treating the mechanism as a conditionality tool. Notwithstanding that Zimbabwe has never been a signatory to the APRM, the bulk of donors chose, of course, to subvert the body to Zimbabwean politics, putting pressure on African states to use this governance instrument to whip Mugabe into line, and even threatened to withhold funding, in spite of the commitments they had made. When African states reminded donors that Zimbabwe was not even a member of the APRM, donors would merely insist that they should act against the recalcitrant Mugabe anyway.

Many African states treated the APRM as a beauty parade, there to impress donors and foreign partners to dispense with largesse. Donors in turn have tried to use the APRM as a stick to pressurise recalcitrant leaders into compliance. Donor countries have also lost interest in the APRM, NEPAD and broader AU initiatives, thereby posing a threat to the much vaunted partnership between Africa and the outside world.

Conclusion. As for all the doubters, there is no refuting the fact that the APRM, adopted in 2003, represents a unique and most imaginative African governance promotion tool, and no other continent has something akin to it. Not only did a number of African leaders organise themselves in the form of coalitions and concerts; they also forged close strategic partnerships among one another so that they, and not outsiders, would take the lead in crafting the African Union (AU), and become the chief architects of a new continental developmental and governance paradigm. Instead of willy-nilly adopting external initiatives, these states set out to promote "a holistic approach to development", as they remained committed to "African solutions to African problems". These leaders were not going to stand idly by as others impose agendas on them; they were determined to craft their own renewal agendas and programmes.

Keen to reduce western encroachment and imposition, they wanted to take ownership of, and responsibility for their future, and reduce foreign diktats. While the APRM had much in common with other initiatives, the African ownership idea, crafted and appropriated for Africa was vital. Instead of borrowing from wholesale external initiatives, the APRM would be applied in ways that responded to African particularities and realities, and took on board African dynamics and sensitivities.

Finally, it is important to end on a cautionary note here. In spite of the continent's serious efforts in the post-Cold War period to put in place the measures that would see the continent moving towards and consolidating an African society of states, there exists in Africa a very serious policy-to-implementation crisis – a gap between stated policy and commitments on the one hand, and the operationalization of values and instruments on the other. The implementation of policy ideas and initiatives, turning policy into tangible outcomes, should henceforth enjoy priority.

AFRICAN STATES' FOREIGN POLICIES IN THE 21ST CENTURY: NEW OPPORTUNITIES AND CHALLENGES

Evgenyi Korendyasov[1]

In two last decades the foreign policy concepts of African states have undergone significant and large-scale changes. The essence of these changes is in the increasing independence of African foreign policies and in the growing role of the African continent as a dynamic actor in global politics and economy.

Today African states have more opportunities than ever before to determine their own future, to build the architecture of inter-continental and external relations independently. The driving force of the current changes generated by the energy of global transformations, by the acceleration of the economic development and modernization processes on the continent, by the shill of the main axis of the global economic development to the East, and 4iIso by the emerging challenges and threats of globalization. These same changes contributed to the collapse of the bipolar model of international relations, to the extinction of rigid confrontation between the opposing groups, to I lie fall of the Soviet Union, and the end of the Cold War. The system of international relations, which formed in the second half of the 20th century, has come into sharp collision with the new realities.

The search for the new world order adequate for the new challenges and threats the humankind faces has taken a stormy, often conflicting character.

[1] ***Evgenyi Korendyasov*** – PhD (Economy), Head of the Department of Russian-African Relations, Institute for African Studies Russian Academy of Science, Moscow, Russia. Former Ambassador of USSR in Burkina-Faso and Ambassador of Russian Federation in Mali and Niger.

The African continent has found itself' in an extremely difficult position. It has become a stepdaughter of globalization. It seemed that the 21st century would not promise it any change for the better. However, such predictions soon disproved. A British magazine with worldwide reputation, The Economist, in 2000 described Africa as a "hopeless" continent. However, in 2011 the same magazine pictured Africa as "rising", while in March 2011 – as "hopeful".

The Africans themselves are optimistic about their future. The former chairperson of the Commission of African Union, Jean Ping, stated that Africa would soon shed the reputation of a "hopeless continent". It would join the ranks of the key players of the global politics. Jean Ping believed that Africa was going to be in the centre of the struggle between the great powers for the control over the energy resources, that Africa would take an active part in the reformation of the "outdated system of global governance".[1]

When the 21st century came, the processes of structural re-formatting of global political space and of creating the new world order based on the principles of the primacy of the international law, democracy and justice have intensified.

African governments started to re-consider their foreign policy priorities, their close attachment to the national interests and to the aim of overcoming their economic backwardness, keeping in mind the new realities generated by the deepening interdependence and the need to consider the interests of all regions and peoples.

Beginning a new attack on the foreign policy front, the Africans are relying on their improved economic positions. The economic growth of African countries in the past two decades has been an average of 4-6%. In twenty oil not-producing countries of sub-Saharan Africa the annual growth rate from 1998 to 2008 was 4% and above.[2]

Africa's GDP grew (according to purchasing power parity, PPP) from $1.9 trillion in 2000 to $3 trillion – in 2014, i.e. by 70%. In terms of per capita, GDP in 2014 reached $3 thousand (by PPP).[3] Africa occupies the second or third place in terms of the attractiveness for foreign direct investment. From 2000 to 2012, its value increased fourfold (from $154 billion to $630 billion).[4]

The drivers of the "African boom", in our opinion, are long-term.

These include:

- the wealth of natural resources, which are of critical importance to the global economy;
- the demographic trends: by 2040 the continent will account for 90% of the growth of the world population and for 65% of labour force growth;[5]
- the growing consumer demand (by 2020 the Africans' consumption expenditures will amount to $1.4 trillion, whereas today they are at the level of $800 billion).[6]

The development of positive trends in the economy of the continent gave grounds to Jean Ping to declare, "In the context when the evolution of production and the possession of natural resources predetermine the international relations, the whole world realized that it would be more and more difficult and even impossible to continue to systematically ignore the whole continent...".[7]

In these circumstances, the foreign policy of African states underlines new energy and persistence in defending their national interests.

Today there are four strategic factors shaping the main foreign policy priorities of the African states: Pan-Africanism, inter-African bilateral state relations, the priority of the partnership with the emerging countries, and "resource diplomacy".

In 2002, the African Union was created, succeeding the Organization of African Unity, which fulfilled its main mission — the eradication of colonialism and apartheid in the continent. The African Union designed to make the processes of development and integration of the continent irreversible

[1] Jean Ping. La place de FAfrique dans les relations internationals aujourd'hui // http://appablog.wordpress.com/2011/03/25/la-place-de-l'Afique-dans-les-relations-...

[2] Foreign Affairs. May — June 2013; http://foreignaffairs.com

[3] www.africaneconomicoutlook.org/data-statistics.2013.

[4] UNCTAD. World Investment Report 2013; http://www.africaneconomicoutlook. org/data-statistics

[5] БРИКС-Африка: партнёрство и взаимодействие. Отв. ред. Е.Н.Корендясов, Т.Л.Дейч. М. 2013. С.28. / BRICS-Africa. Partnership and Interaction. Editors: E.Korendyasov, T.Deych. M.2013. P. 28.

[6] Оценки Всемирного банка. Data of World Bank.

[7] Jean Ping. Op. cit.

and to base them upon the "common African identity", giving the Africans themselves the decisive role in solving their own problems.[1]

The founding documents of the AU reflected the liberal concepts of democracy and of the open market economy, and highlighted the commitment to "respect democratic principles, human rights, good governance and the rule of law".

In the foreign policy sphere the AU right to intervene (subject to certain procedures) in cases of war crimes, genocide, crimes against humanity, mass human rights violations was proclaimed. The AU condemns the unconstitutional methods of regime change, including *coup-d'etats*. It is envisaged, that the country in which regime change is effected by the coup and other military actions, is temporarily excluded from the AU. Thus, the most important prerequisite for the legitimacy of power is the observance of the rights and freedoms of the individual, the creation of the relevant institutions and mechanisms of social-political and state structure.

However, following these rules is not easy. African ruling elites are reluctant to part with the inviolability of national sovereignty and non-interference in internal affairs. They challenge the decisions of international institutions taken over their heads and against their opinion.

It is indicative in this respect that Africans actively supported Brazil's proposal to change the UN General Assembly resolution "On the responsibility to protect". This resolution sanctions the intervention of the international community in the internal affairs of a state if it does not provide adequate protection for its population against genocide and crimes against humanity. Brazil and African states suggested re-naming that resolution "Responsibility during the operations of protection".

Problems of security and conflict resolution occupy the central place in I he activities of the African Union. "African peace and security architecture" was created. Its core structures include the Peace and Security Council of the African Union, the continental early-warning system, the African Standby Force, and regional mechanisms meant to prevent and resolve conflicts.

During the AU existence, there has been a significant relaxation of tensions on the continent. From 1963 to 2014, there were in total almost 70 coups on the continent, including 11 between 2003 and 2014. It should be emphasized (in order to clarify the extent of instability on the continent) that 54% of coups in 1963-2014 took place in seven countries – Benin, Burkina Faso, Burundi, Ghana, Mauritania, Nigeria, Central African Republic, in each of which 5-6 coups happened.

The African Union has taken part in seven peacekeeping operations and in numerous mediation missions. Nigeria, Sierra Leone, Liberia and South Africa are most active in the AU peacekeeping efforts (in Burundi, Comoros, DRC, Cote d'Ivoire, Rwanda, Sudan, mediation efforts in Zimbabwe and Swaziland). According to the former President of the CAR F.Bozize, there was signed an agreement on defence between South Africa and the Central African Republic in 2007. In 2012, it extended. On January 2013, 300 the South African military was sent to the CAR at the disposal of the President of the Central African Republic.[2]

However, the role of the AU and its institutions in these generally positive developments can hardly considered decisive. Declared solutions and peace plans remain largely on paper. The African Standby Force still has not properly formed. The African Union failed to implement its proposals for overcoming the political crises in Gabon, Togo, and Cote d'Ivoire. Its attempts to achieve peaceful resolution of the Libyan crisis were unsuccessful. African countries had different positions on this problem, and those differences not settled. South Africa, Gabon and Nigeria voted in the Security Council for the resolution 1973, against the advice of the AU high-level mediation team on the Libyan situation, consisting of the presidents of Mali, the Republic of Congo, Uganda and South Africa. The Libyan opposition rejected suggestions of the AU regarding peace settlement. Even before the AU leadership made a decision, African countries have recognized the Libyan transitional government, which seized the power with the decisive support of NATO. French troops have played the leading role in the peacekeeping efforts in Mali and the Central African Republic.

[1] Act Constitutif de l'Union Africaine.

[2] Nguembock S. Le Caric. Thinking Africa. Note d'analyse politique, N 15, fevrier 2014. P.3. www.Thinkingafrica.org. Institut de Recherche et d'Ensegnement sur la Paix. Paris.

AU peacekeeping activities continue to depend critically upon the Western powers. The Union's budget for 2014 is $308 million; the contributions from the participating countries amount to 46% ($138 million), while the assistance of foreign partners – to 54% ($170 million). More than 60% of the budget intended for peacekeeping operations.

It should be borne in mind that 66% of contributions to the budget of the African Union are the contributions of just five countries: Algeria, Libya, Egypt, Tunisia, and South Africa.[1]

The UN and the European Union continue to play a major role in peacekeeping efforts in Africa both in the financial/material and conceptual aspects. The UN has deployed about 100 000 soldiers in Africa in the framework of its peacekeeping missions; its expenses for these purposes reached $7 billion per year.[2]

Currently, seven UN operations are continuing on the continent (FISNUA, MINUL, MINURSO, MINUSCA, MINUSMA, MONUSCO, MINUAD, MINUSS, ONUCI). The largest of them is a "hybrid" (with AU participation) operation in Darfur. As part of this operation, a contingent of 22.4 thousand people was deployed (as of April 30, 2014), including 16.2 thousand of military personnel. The budget for the period from 1 July 2013 to 30 June 2014 was $1.3 billion.

The European Union demonstrates particular activity in Africa. It indicates that the distance between Europe and Africa is only 12 km, thus proclaiming North Africa its southern border. Since 2004, the EU has assigned $740 million for peacekeeping aims.[3] In addition, France, the United States, and the European Union finance the work of several African training centres preparing soldiers-peacekeepers.

France has implemented a training program for peacekeeping forces — RECAMP (Reinforcement of African Peacekeeping Capabilities Program). Americans in the framework of the program ACRI (African Crisis Response Initiative) prepared 9000 African peacekeepers during 1997-2002, allocating for this purpose about $20 million dollars per year. Then, instead of ACRI, a new program, ASOTA (African Contingency Operations Training and Assistance), has been developed, with a budget of $50 million per year.[4]

Therefore, the African Union has no discretion to seek settlement of the conflicts, according to its desired scenarios. On May 27, 2013 the program "African Capacity for Immediate Response to Crises" (Capacite Africaine de Reponse Immediate aux Crises – CARIC) adopted at the initiative of South Africa. The new initiative launched in connection with the postponement of the creation of the African Standby Force. It provided for the immediate creation of collective response forces on a voluntary basis and mostly at the expense of the participating countries in case of conflict. The aim was to create the conditions for an independent, self-reliant policy of the African Union. Speaking at the mini-summit of CARIC in Pretoria on November 5, 2013, South African President Jacob Zama told: "Africa has means to act quickly and decisively".[5] There are grounds for such a statement. Suffice it to recall that military expenditures of African states exceed $39 billion (in 2012), among which sub-Saharan Africa accounts for 22 billion.[6]

However, the new programme has met a mixed reaction. It supported by only ten countries: Algeria, Angola, Guinea, Niger, Uganda, Tanzania, Chad, Sudan, Ethiopia, and South Africa.

The executive bodies of the AU find it increasingly harder to achieve a coordinated position, "one common voice" of African states in many cases. The AU failures in Libya, Cote d'Ivoire, Mali, and the Central African Republic have caused considerable damage to its prestige. At the same time, the image of the regional integration groupings on the continent is improving. In our opinion, it is premature to argue that the African Union (in the form in which it appears in its constituent

[1] Ken A. L'Union Africaine doit s'autosuffir financierement. PA – Union com 29 janvier 2014.

[2] Williams Paul D. The Africa Center for Strategic Studies USA. Les operations de yaix en Afrique depuis 2000. http://www.Africacenter.org

[3] Исследовательский центр «Международные программы мира и безопасности» Университета Лаваля (Франция).Issledovatelskij centre "Mejdunarodnije programmy mira I bezopasnosti Universiteta Lavalle (France). Bulletin N 58 septembre – octobre 2012. Securite mondiale. P.6. http://www.psi.ulaval.ca/publications/securite mondiale/

[4] Bulletin du maintien de la paix N° 97. Janvier 2010. Ministere de la defense na – tionale du Canada (http://www.eepes.uqam.ca)

[5] Nguemboc S. La CARIC. Enjeux politiques et defis de la mise en oeuvre Note d'analyse politique N° 15 – janvier 2014. P. 4.

[6] SIPRI. Yearbook 2013. Summary. P. 6.

documents and ambitions) is accomplished, and it is hard to predict when and in what form it will accomplished.

The ideals of Pan-Africanism, which formed by the middle of the 20th century, were transformed and significantly faded. The cohesion of the continent, based on the commonality of the colonial past, the need for solidarity in the struggle for the complete decolonization of the continent, the similarity of the problems of nation-building, have significantly weakened due to various reasons. However, the key role of the pan-African ideology as one of the building blocks of the foreign policy of African states remains unchanged.

Today the concerns related to the development of bilateral relations between the African countries themselves come to the forefront. The scope of disagreements and even confrontations inside the space of intra-African, intercontinental inland relations in these conditions is expanding. Such a situation emerged largely due to the growing uneven socioeconomic development of African countries.

The UNECA data show that between 1995-2009, the GDP of some countries grew by 500% and above (in Angola – 1200%, in Mozambique – by 590%, in Tanzania – 520%, in Ethiopia by 493%), while in others – by 100 – 200% (in the DRC – 90% in Tunisia – 116%, Gabon – 150%, Zambia – 200%).[1] The group of nineteen oil-producing countries stands out, followed by the states where the extraction and processing of minerals and metals gather pace. The countries whose economies mainly linked with the development of agriculture or forestry resources are falling behind.

Moreover, we may see the destructive tendencies associated with different orientations of individual African regions to emerging global development poles. North African countries are coming closer to the Mediterranean pole, African East coast states – to the countries of the Indian Ocean; Southern Cone countries – to the emerging Latin American and Indian poles. Against this background, there is a competition and a struggle for leadership at the regional and continental levels.

All this makes it difficult to develop a consensus approach of the African countries towards common international problems, weakens the positions of the continent in the international arena, forces African diplomacy to search agreements with the neighbors in order to create local zones of good – neighborliness and mutual security.

The new strategic priority of the foreign policy of African countries has become a comprehensive development of political and economic partnership with the emerging countries – the BRICS, Turkey, Mexico, Indonesia, Vietnam, etc.

The economic strength of this group of countries is becoming a key factor in the evolution of the world economy and world economic relations. Only BRICS now account for over 43% of the world population, 20% of world GDP, 20% of world trade, more than 20% of foreign direct investment.[2]

Over the recent years has taken place a significant reorientation of foreign policy and economic priorities of African countries towards emerging countries. As a result, the traditional monopoly positions of the Euro-Atlantic partners have been significantly undermined. If at the end of the 1980s, Europe accounted for 60% of African foreign economic relations, then in early 2010s – for 30%. The foreign trade turnover of the BRICS states with the countries of the continent exceeds $200 billion; it projected to increase to 530 billion by 2015. The share of the emerging countries in African foreign trade will increase from 20% in 2010 to 33% in 2015.[3] BRICS countries invested more than $70 billion in the countries of the continent during 2003-2012, ranking fourth after Europe, the USA and the Middle East.[4] In 2012, foreign direct investment of the emerging countries amounted to 25% of the total inflow (19% in 2003).[5]

The partnership with emerging countries expands the foreign policy geography of African countries, strengthens its multi-vector character and ensures the access for Africans to new sources of financing for development and to the latest technologies.

The so-called resource diplomacy becomes the separate and essential component of the foreign policy of African states. Today, when structural changes in the global markets of energy and other

[1] http://www.nouvelle-dynamique.org/article-union-africaine

[2] БРИКС-Африка: партнёрство и взаимодействие. Отв. ред. Е.Н.Корендясов, Т.Л.Дейч. М. 2013. С. 49-50. BRICS – Africa: Partnership and interaction. Editors: E.Korendyasov, T.Deych. Moscow, 2013. P. 49-50.

[3] Gaunt J. Building BRICS in Africa. http://blogs/reuter.com. Macroscope 2010/11/2

[4] Подсчитано на основе публикаций Африканского банка развития, ЮНКТАД, ЭКА ООН, МВФ.

[5] UNCTAD. World Investment Report 2013.

natural resources have a direct and decisive impact on the pace of global economic growth and on the reformatting of the system of international relations as a whole, Africa gets a real chance to accelerate its development and expand its influence in the global system of international relations.

In developed countries, and in close proximity to them, the exhaustion of fuel and mineral resources has reached the critical level. At the same time the demand for them has increased – 27 times more for solid minerals in the 20th century, and 5 times for oil from 1960 until the beginning of the 21st century (from 6 billion to 30 billion barrels).[1]

Meanwhile it is known that Africa plays a key role in the production of many minerals/ It accounts for 74% of the world production of platinum-group metals (PGM) 62% – of cobalt, 54% – diamonds, 42% – chromites 30% – manganese, 26/o – phosphates, etc. The PGM production is projected to increase by 33%, cobalt – by 87%, copper – by 86%, iron ore – by 466% by 2017. In the depth of Africa, there aere 33% of world uranium resources, 12% of oil, 8-10% of gas.[2]

In the new situation, the competition in world commodity markets has escalated. "Resource wars" have broken out. Balance of power between the countries producing and consuming raw materials has changed drastically. Resource-rich countries have got the chance to force consumers to consider their conditions of access to raw materials and their sales. Africans thus get a chance to redistribute resource rents, which today are often the main source of replenishment of investment resources. For ten oil-producing countries, for example, the resource rent is on average 39%.[3]

Africa's "resource diplomacy" has to lead to finding the optimal solutions for the twofold task: saving sovereign rights over natural resources and ensuring favorable conditions for partnership with consumer countries in terms of sustainable development of the mining sector and the successful sales of products on the world markets. Meanwhile, in the new battles for control over the natural resources of the continent, multinational companies do not hesitate to seek the support of separatists in regions rich in energy and other critically important raw materials. They do so in order to weaken the jurisdiction of the central authorities and to establish their complete control and ensure the continuous supply of raw materials.

African states have become the key actors of the resource diplomacy. They actively support the adoption of multilateral international agreements governing the exploration, production and marketing of natural resources.

In the past two decades, African foreign policy concepts have undergone significant and dramatic changes. Africa is gradually moving away from the Euro centrism in its foreign policy. Cooperative relations have become more equitable and balanced. Nevertheless, this vector remains dominant and for many countries, dependence on traditional partners retains critical importance. All the more so because in recent years Western countries have been revising their assessments of the role and place of Africa in the future global system of relations and have been vigorously increasing the scale of their ties with the continent. The United States is actively "returning" to Africa, especially in the area of military cooperation. France, which has undertaken military operations in four African countries in the last three years (in Libya, Cote d'Ivoire, the military intervention in Mali and the Central African Republic), demonstrates its desire not to relax its efforts on the African direction. The European Union is implementing a multifaceted expansion programme in Africa.

The overall positions of Africa in the world remain precarious, while new tendencies are paving their way with difficulty. It is so because, first, the entire system of international relations remains unbalanced. Omni directional, contradictory, fickle trends of its evolution are preserved and even enhanced. More or less certain and stable consensus parameters and principles of the future world order have not yet been clearly defined.

[1] Лоран Э., Нефтяные магнаты. М. 2010. С.318.

[2] AfDB, OECD, UNDP, EC A. African Economic Outlook 2013. P. 140.

[3] British Petroleum Statistical Review. World Energy. June 2013. P. 10; Hugon Ph. Des solutions africaines face aux nouveaux enjeux internationaux. Paris, 2013. P. 5

COMPARISON OF AFRICA'S ENGAGEMENT WITH RUSSIA, CHINA AND INDIA: Historical, Cultural, Economic and Political Dimensions

Alexandra Arhangelskaya[1]

Over the past two decades, a fundamental transformation has taken place in the global economy caused by the impressive economic growth of developing countries like China, India, Brazil, and South Africa. Concurrently and since the beginning of the XXI century, the world economy has gone to a new step of globalization, one in which is the existence of new leaders in economic growth. Nowadays, basically all parties agree that the unipolar global architecture is gone. In that context and given Africa's recent strong growth figures, a perceptible shift has moved in the direction of Africa being now a "rising star". As part of such dynamics, there are claims that huge improvements in governance across Africa and consequent rise of interest from above mentioned emerging old and new powers towards continent's affairs is a new page in the history of Africa. This proposal offers a holistic and comprehensive comparative assessment of the Africa's engagement with Russia, China and India with a special focus on historical, cultural, economic and political dimensions. Unrevealing a long history of interaction and the context of growing reciprocal interests of the relationship, the vivid debate and activities on the international arena, together with the importance of a cultural heritage, and a growing China, India and Russia's importance on the continent, its impact on Africa's diplomacy, as well as the efficacy of multilateral bodies in this process and a more complete assessment of such impact on African development prospects to the continent needs to be better understood.

Russian engagement: historical, cultural, economic and political dimensions. Russia never had African colonies, but has had a long history of interaction with the continent, going back to the Middle Ages, when Russian Orthodox pilgrims met fellow Christians from Africa (primarily Egyptians and Ethiopians) in the Holy Land. At the same time, Muslims from Russia met Africans in the holy sites of Islam. In the end of the 18th century Russian consulates were opened in Cairo and Alexandria. Over a hundred years ago, pre-revolutionary Russia established diplomatic relations with Ethiopia and the South African Republic (Transvaal) in 1898. In the same year the Russian Consulate-General was established in Tangiers (Morocco).

Russia's contact with Africa continued after the 1917 revolution, albeit initially in a limited form, mostly through the machinery of the Communist International and the political training of Africans in the USSR. Intergovernmental relations with Ethiopia and South Africa were reestablished during World War Two, when these countries became allies of the USSR. Much more active ties were developed from the late 1950s onwards, when African countries were gaining independence and when Moscow turned to the Afro-Asian world with offers of support for anti-colonial movements and newly independent states.

By the mid-1980s the Soviet Union had signed hundreds of agreements with African countries. About 25,000 Africans were trained in the Soviet universities and technikons in various fields, as well as thousands of graduates of military and political schools. Among such alumni are current political elites. The Soviet Union had agreements with 37 African states on technical and economic assistance, and with 42 countries on trade agreements. The so-called "superpower rivalry" played its role in shaping Moscow's relations with Africa in the 1960s-1980s. A huge assistance to national liberation movements across the continent was granted by the USSR.

However the situation changed on the threshold of the 1990s and especially after the "dissolution" of the Soviet Union and social and political changes. Relations shrank pitifully during the 1990s. The collapse of the Soviet Union broke most of Russia's ties with African countries. Relations with Africa received a relatively low priority, and in 1992 Russia closed nine embassies and four consulates on the continent. Relations with some African states worsened in late 1991 when then President Boris Yeltsin ordered to end all foreign aid and demanded immediate repayment of outstanding debts.

[1] ***Alexandra Arhangelskaya*** – PhD (History), Institute for African Studies, Russian Academy of Science.

Since, things began to gradually change, not only because of Russia's economic recovery, but due to a more broadminded and rational perception of the modern world by the Russian leadership.

Today, Russian sources present the relations with Africa as purely economic, stressing that its goals are to assist Russian business and to develop mutually beneficial relations with African countries. The common interests lie in the field of resources, infrastructural development, particularly in the sphere of energy resources and nuclear power. This seems consequential from a Russian perspective. A number of big Russian companies are either involved in Africa or are seeking deals there, yet Russia's trade with the continent falls far behind that of China or India. Developing Russia's own enormous energy resources would be a much costlier business than developing the same resources in Africa. But the question that emerges is whether the new involvement is indeed strictly of economical nature or where there are political motives as well.

The current state of Russian-African relations can be by and large assessed positively. Russia has established diplomatic relations with each and every African country (the last of them was South Sudan in 2011). Forty embassies of the Russian Federation operate in Africa, whereas thirty-five African countries maintain embassies in Moscow. Besides, Russia has representatives in African Union and the regional economic communities – SADC, ECOWAS, IGAD and EAC.

There is a rather broad range of world problems on which the interests of Russia and Africa are close or coincide, and there are many fields in which both sides can fruitfully cooperate. Some of the areas to highlight are: reform of the United Nations (UN), the promotion of peace and stability, culture and education. The Russian foreign policy doctrine as well as some recent events should be revised to estimate the place and role of Africa in Russian politics. In this context, Russia can develop its geopolitical ambitions throughout the African continent and reciprocally, African countries could find a partner to elaborate collective voice to be heard on the global stage.

The analysis of the current state of relations between the two countries explains the apparent tendencies in trade, investment and development. Russia is developing relations with Africa in the sphere of natural resources. However, engaging in mining of African minerals and oil extraction is a matter of expediency for Russia; yet, it is not as vital as for the rapidly growing economies of China and India. The natural resources discussion, however, also has another angle: 60% of world biogenetical resources – such as fresh water and minerals, are located in either Russia or Africa. Therefore, both sides stand to benefit from joining forces to safeguard their right to control this wealth, especially in the face of recent attempts to declare these resources "an international asset".

Russia's trade with Africa is very low compared to such of other BRICS and is well short of the full potential of economic cooperation between Russia and Africa and overall constitutes less than 2% of the total Russian trade. When Russian FDI to Africa amount to USD 5 billion, while total investments stands at about USD 10 billion. Russia's outward FDI are led by large multinationals. The largest companies operate in oil and gas, and smaller groups, in metals processing.

Alongside with the exploitation of mineral resources the major spheres of Russia cooperation with African countries are energy, infrastructure, telecommunications, fishing, education, health, tourism, military – technical assistance. The approximate value of Russian assets in Africa is USD 3 to– 3.5 billion. The record of state and government exchanges provides a list of Russia's main African partners, including South Africa, Nigeria, Angola, Egypt, etc.

Chinese engagement: historical, cultural, economic and political dimensions. During the 1960s and 1970s, Chinese relations with African countries were driven by ideological considerations, with China presenting itself as an alternative to both the West and the Soviet Union. During that time, China's support consisted mainly of moral and material support for liberation struggles. During the 1980s, the relationship shifted towards economic co-operation based on common aims. After the end of the "Cold war", China attached importance to both political and economic benefits and portrayed itself as an attractive economic partner and political friend. For African governments, this presented an alternative to the "Washington Consensus" and was termed the "Beijing Consensus", i.e. support without interference in internal affairs.

Sino-African relations have profoundly changed in character as a consequence of economic policy shifts in China, coming with readjustments in Chinese foreign policy. China is an emerging

world power – and increasingly an important partner to African states. The Asian engagement in Africa is not new, and we have seen a small wave of literature on Chinese engagement already in the mid-1970s to early 1980s. Chinese government engagement in Africa is a constant feature since the days of Mao Zedong. Yet, China's engagement with Africa with regard to trade, investments, assistance, and – not least – diplomatic activities has been increasing tremendously since 2000. Sino-African relations are becoming more important in their own right, but also as a consequence of the global rise of China. The recent global economic crisis has arguably further accelerated the already rapid change in economic weights in the world, making the shift towards Asia more pronounced. China's relationship with Africa is unequal, whatever the rhetoric around it. China is currently the second biggest economy in the world and it is likely to become even stronger, gaining (or regain, in a historical perspective) global economic weight within the next decade or so. One emerging economy, China, is in need of resources and markets as well as political backing for its peaceful global rise on the one side. And on the other side, we find 49 African states with rather small and often fragile economies engaging with China and other external powers.

China's engagement with Africa today is less motivated by ideological considerations but based on a commercial agenda that aims to sustain rapid industrialization and economic growth rates. China's "socialist market economy" is driven by market oriented State-Owned Enterprises and its interests in Africa are geared towards energy resources and minerals to feed its industrialization programme. Chinese investments in and trade with Africa have increased significantly over the past few years.

Through significant investment in a continent known for political and security risks, China has helped many African countries develop their nascent oil sectors in exchange for advantageous trade deals. However, China faces growing international criticism over its controversial business practices, as well as its failure to promote good governance and human rights. At the same time, Beijing's complex relationship with the continent has challenged its noninterference policy in the affairs of African governments. Since former Chinese President Jiang Zemin inaugurated China's reengagement with Africa in 1996, China has tried to maintain a policy of noninterference in the domestic affairs of African countries.

To assess the political impact of China's growing involvement on the continent, it may be useful to differentiate three groups of African countries. First, China's manifest return to Africa occurs at a time when many countries of the region continue to undergo difficult political transitions from authoritarian to democratic political systems (democratising/transition countries). The belief that China will make a constructive contribution to support transitions to democracy in Africa's fragile states appears farfetched. In contrast to other major donors in the region, except Libya, the promotion of democracy is not an objective of China's foreign policy. Such a policy appears inconceivable, since it does not square with Beijing's relativistic conception of individual human and political rights. In addition, the self-interest of the political elite of the one-party state contravenes the notion of democracy support abroad. Doing so would logically imply that China's Communist leaders would dent their domestic political legitimacy. This is one of the reasons why Beijing doggedly clings to the dogma of noninterference. Its defence of sovereignty, often to the benefit of unsavoury regimes, is likely to undermine existing efforts at political liberalisation at large. Revenues from trade (and taxes), development assistance and other means of support widen the margins of manoeuvre of Africa's autocrats, and help them to rein in domestic demands for democracy and the respect for human rights. These mutually advantageous interactions are at the core of China's attractiveness to African state leaders, and they are likely to be to the detriment of ordinary Africans.

Second, China's impact on mineral-rich countries is also a source of concern. Chinese interest in African resources comes at a time when Western non-governmental organisations, recently supported by governments, have initiated an ever more prominent debate on the relationship between mineral wealth on the one hand and its detrimental effects on developing countries on the other. It revolves around possible options and regulatory frameworks to transform mineral wealth from a 'curse' into a vector of socio-economic development. In light of its rapidly growing reliance on imports, it seems implausible that China will join these efforts, let alone subordinate its economic interests to international attempts to solve the structural problems of richly endowed countries, as these are likely

to hold back its access to resources. What is more, Beijing has no economic incentive to fall in line with Western views on issues such as fiscal transparency and accountability. By rejecting regulation efforts on the grounds of non-interference, China can position itself as a free-rider and is prone to win the political favour of, and by extension economic benefits from, sovereignty-conscious governments (e.g. Angola). In that regard, the case of Darfur/Sudan is illuminating, in so far as it underscores the extent to which China is prepared to defend its economic interests. If Sudan provides any clue to the future, it seems inconceivable that Beijing, unencumbered by the humanitarian tragedy in Darfur, will compromise its interests for the sake of 'minor' (domestic) issues such as transparency.

A third group of countries where China's forays may be particularly perceptible are post-conflict states. One the one hand, China's increasing involvement in UN peacekeeping in those states is certainly a positive development, even more so since only a small minority of Western industrialised states has shown the political willingness to make troops available for peacekeeping on the continent. On the other, however, one has to question the coherence and credibility of Chinese peacekeeping efforts if the country otherwise pursues strategies which may contribute to the eruption or prolongation of violent conflicts. For example, while China is currently an important troop-contributing country to the UN Mission in Liberia, its economic interests helped President Charles Taylor to maintain himself in power. China imported almost half of Liberia's timber in 2000, and thus provided Taylor with considerable wherewithal. It was only in July 2003 that China and France, likewise an important buyer of Liberian timber, brought themselves to reluctantly nod through UN sanctions against Liberia's timber exports, which both had previously opposed on the devious grounds of 'increased unemployment' in Liberia. The plummeting of revenues from timber exports, together with the efforts of rebel groups, forced Taylor to leave the country in August 2003, when the peace process finally began.

While the majority of Africa's exports to China are in oil, it also exports iron ore, metals, and other commodities, as well as a small amount of food and agricultural products. At the same time, China exports a range of machinery and transportation equipment, communications equipment, and electronics to African countries. In 2009, China surpassed the United States as Africa's largest trade partner. According to the Chinese Ministry of Commerce, Sino-African trade reached $126.9 billion for 2010, while the trade volume between China and Africa rose 30 percent year-on-year during the first three quarters of 2011, signaling a new record high. China's top five African trading partners are Angola, South Africa, Sudan, Nigeria, and Egypt.

A well-considered combination of diplomacy and economic incentives forms Beijing's key instrument to lock up African oil supplies. China's major oil companies are owned by the state and act as an extended arm of the Chinese government, which supports the overseas activities of its oil companies through a variety of instruments.

Some analysts say China's efforts in Africa—from building infrastructure to forgiving billions in debt to providing medical support—are for building goodwill for later investment opportunities or stockpiling international support for contentious political issues. Dowden writes in his book, "China is playing a long game for oil and other raw materials in Africa and securing allies who will vote for it in the United Nations." Meanwhile, St. Andrews' Taylor says, "The fundamental problem facing Africa is governance--it doesn't matter how many roads or ports." In addition to international observers, many Africans themselves have expressed frustration over China's role on the continent, having accused Chinese companies of underbidding local firms and not hiring Africans. At the same time, Chinese companies that do hire African workers have been criticized for failing to maintain fair labor relations.

Despite burgeoning trade relations, some African nations are beginning to push back against China's resource development activity. Grievances range from poor compliance with safety and environmental standards to unfair business practices and the flouting of local laws.

The recent growth of Chinese influence and enterprise across Africa has drawn world attention. As a result, both economic and political implications are emerging at the global level, raising concerns among actors in the world economy. Efforts to secure energy sources, among them oil, and to locate natural resources to meet increasing demands of China's domestic industry have spawned an abundance of publications on China's presence in Africa, attempting to address potential

repercussions to the African populace, the estimated consequences to Western interests in Africa and overarching effects at the global level.

India's engagement: historical, cultural, economic and political dimensions. India's history in Africa is already a long one. Glass beads made in India became so popular along the East African coast that in the sixteenth century Portuguese colonists had trouble trading with beads that had been made in Europe. Over the ensuing centuries the trade links between India and Africa became more extensive, and brought not only goods but people from the subcontinent to Africa, which today is home to two million persons of Indian origin. For much of the twentieth century India's relationship with Africa was mostly of a political kind, and based upon solidarity with the African anti-colonial and liberation movements. Jawaharlal Nehru, India's prime minister until 1964, referred to Africa as a 'sister continent'. Today, India's interaction with Africa centres on trade, science and technology.

Relations between India and Africa are said to date back to ancient times. They were contoured around trade relations between India and the Eastern littorals of Africa. Colonialism brought an end to this trading system, but carried large numbers of People of Indian Origin (PIOs) to African countries as workers and artisans. This added a new dimension to Indo-African ties as several Indian leaders, especially Mahatma Gandhi, took up the issue of discrimination against non-whites. While Gandhi was an icon for Indo-African relations, India's first Prime Minister Jawaharlal Nehru gave these relations a political foundation. His association with the Non Alignment Movement, which focused on its anti-racist and anti-colonial agenda, struck an ideological chord among newly independent African countries. India and several African countries were members of the Group of 77 (G77) countries, which voiced concerns about the unequal terms of trade between the North and South. Towards the end of Nehru's tenure, India-Africa relations took a back seat owing to a number of factors. One was India's defeat in its 1962 war with China, which was a setback to its image as a leader. Another was its insistence on the adoption of peaceful means by African liberation movements, which were obtaining arms assistance from China.

After it introduced an economic liberalisation programme in 1991, India's foreign policy shifted from Nehruvian and Gandhian principles to pragmatic economic diplomacy. This shaped its relations with African countries as well. India began to view Africa through a strategic lens and realised that economic engagement with African countries could serve its national interests. Africa's rich energy resources were attractive for a rapidly industrialising India. Further, the strategic location of East African littoral countries fitted very well with India's need to maintain its traditional influence in the Indian Ocean region. Lastly, African countries were potential new markets for Indian private sector companies that had begun to look for opportunities abroad. In the meantime, China was doing the same following its thrust for economic modernisation in the post-Mao era. With similar histories and similar pull factors drawing them to the continent, India and China inevitably brushed against each other. Despite China's more moneyed and coordinated engagement with African countries, India has still managed to maintain a significant presence in the continent. However, the manner with which it engages with African countries is fragmented and ad-hoc. Given India's economic and strategic interests in African countries, it needs a well-defined Africa policy and to shape its engagement with African countries.

India and Africa's partnership has entered a new era. Close political relationships are being invigorated by a flourishing trade and investment relationship. India and Africa's burgeoning trade and investment growth is taking this relationship in new directions. The past decade has seen a burst of activity and initiatives – many of them private sector led – that have injected renewed vitality into India and Africa's historical bond. As this report argues, this new trade and investment connection holds immense promise in the struggle to lift millions out of poverty.

Bilateral India-Africa trade has grown by nearly 32% annually between 2005 and 2011, including through the economic crisis. Even more importantly, Indian private investment in Africa has surged, with major investments having taken place in the telecommunications, IT, energy, and automobiles sectors. Much of the vigour of the current India-Africa trade and investment relationship can be attributed to the steps taken by the Government of India, and the initiatives taken by the Indian private sector. This dynamism on the part of India is coupled with the increasing receptiveness on

the part of African countries to strengthen the partnership with South-South partners. The annual India-Africa Conclave meetings are one clear example of this and have proven to be a particularly successful format. The increasing interest and participation in these meetings are reflective of this expanding relationship.

Indian companies have been investing in several sectors in Africa. Apart from energy, private sector companies are investing in telecommunications, agriculture, health, pharmaceuticals, infrastructure and Information Technology. China has also invested in these sectors. According to the International Monetary Fund's (IMF) 2012 World Economic Outlook, the economies of the oil exporting, middle-income and low-income African countries are projected to grow significantly. The Economist Intelligence Unit forecasts that Africa will undergo rapid urbanisation and 'consumerisation' is beginning to grow. This will increase the disposable income of the African people, which will invariably boost demand for telecom and banking services. The Government of India, through its various agencies, has stepped up efforts to engage with its African counterparts on three main fronts – political, economic and development.

Over the past few years, Indian private companies have made headway in various African sectors than previously. One of the most talked-about Indian ventures is the Bharti Airtel acquisition of Zain Africa, which has a communications network in 15 African countries. Pharmaceuticals, horticulture, biofuels, fast-moving consumer goods, and the power sector are some of the many areas where Indian companies have shown keen interest. Companies such as Reliance, TATA and Essar have also successfully started ventures in Africa's energy sector. Although India's trade and energy presence in Africa is still in its early stages, it will undoubtedly diversify and deepen in the future, given the great potential for growth and closer collaboration. Regional co-operation between India and Africa has focused on several areas, such as healthcare and banking. The Pan-African e-network aims to develop Africa's information and communication technologies (ICTs) by eventually connecting all 53 African countries to a satellite and fibre-optic network for tele-medicine and tele-education. Regional groupings, such as the Common Market for Eastern and Southern Africa, have received credit lines for banking, while India has extended opportunities for enhancing capacity building in the Africa Union (AU) and the Economic Commission for Africa. Notwithstanding these efforts, the Africa–India trade relationship falls short of its potential.

To achieve its economic and development goals, India needs access to secure sources of energy, as 'energy services underpin almost all aspects of human activity'. At present, India faces an immense shortfall in terms of its demand for energy in all sectors. Along with growing demand and a supply shortfall is the fact that about 400 million people remain without access to electricity, and many depend on traditional, inefficient and unhealthy sources of energy (75% in rural areas and 22% in urban areas). In order to ensure its future energy security concerns, India needs to explore all options – not only a diversified energy basket but also a diversified energy import basket. As a result, in recent years, India has scouted for energy sources in not only Africa, but also in faraway Latin America and the Central Asian region.

Many analyses and reports also tend to gloss over the fact that India and China have simply joined the US and other countries as energy partners of African countries. India and China's quest for energy resources in Africa is portrayed as an inherently conflictual and competitive 'contest' between these two countries alone. This zero-sum view of China and India's search for secure sources of energy draws sustenance from projections such as the one by the International Energy Agency (IEA) that asserts the two countries will account for 43% of the global increase in oil demand between 2005 and 2030. India's trade in resources with Africa is substantial, yet comparably less than China's trade with Africa. Mineral products have the largest share, accounting for around 79% of China's total African imports.

What is important to note is that the India–Africa partnership is greatly expanding and deepening. An effort is required so as not to slow down, but rather to gear up for the future, by building a relationship that is multi-dimensional and takes into consideration the viewpoints and interests of the relevant stakeholders across the different sectors.

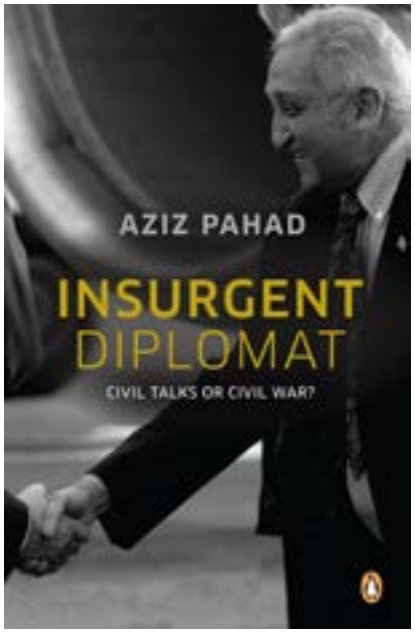
Concluding remarks. Historical events like the Cold War have shown that political conflict is likely to come about when two rising powers are competing for regional influence. While China is far more industrialised than India, the potential for India to threaten China's regional economic dominance is already being displayed in Africa. Africa's reliance on both countries for economic and humanitarian assistance is crucial for its own future development, and it is likely that the escalation of political tension will negatively affect the region. The rapid economic growth experienced by China and India has resulted in an increase in competition for global resources and investment opportunities. Unsurprisingly, the abundance of natural resources in Africa has made the continent a hotspot for Chinese and Indian economic activity. This growing Sino-Indian involvement has been economically beneficial and has resulted in widespread investment and development, with African leaders welcoming the competition. While Chinese and Indian firms have similar interests in African markets, they function in completely different ways in African countries. Unlike Chinese companies, which are mostly state-owned or state-controlled, Indian firms operating in Africa are largely privately owned or are under private-public partnership. They are less vertically integrated than Chinese firms and prefer to procure both materials and labour from local governments. Hence, the operation of Indian firms in African countries appears to be less 'neo-colonialist' than those of China. While international criticism remains relatively muted on the Indian engagement in Africa, letting the primarily profit-seeking private sector guide its way in African countries might change this. This is already being witnessed with India's private sector engagement in Ethiopia's agricultural sector. Meanwhile India and China competing and/or collaborating in Africa Russia is showing signs of new wave of interest in many dimensions towards the African continent. With this new rise of interest from Russia towards Africa, it becomes clearer that Russia and Africa need each other. Russia is a vast market not only for African minerals, but for various other goods and products produced by African countries. At the same time, Russia's activity on the continent strengthens the position of African countries vis-à-vis both old and new external players. Often Moscow's "come back" to Africa is regarded in a competitive view to Chinese involvement in Africa. This approach is flowed – in the field of economic relations Russia and China often have different interests. For instance, Russia is not able to compete with China or any other country, in exporting cheap clothes or footwear, in fact its importing them from China. Work or general migration to Africa does not represent any interest for Russia with its demographical problems. Africa is in a good position to increase its own regional influence by balancing the relationship and encouraging diplomatic cooperation. It is vital for African leaders to be assertive when dealing with China and India, so that both countries are held accountable to ensure that Africa's long term interests are maintained and enhanced.

CONVERSATIONS WITH AN AUTHOR

Aziz Pahad

former Deputy Minister for Foreign Affairs of South Africa

Insurgent Diplomat. Memoirs.
Interview to Kazan Journal of International Law



KJIL&IR (Alex Mezyaev): Mr. Pahad, thank you very much for your extraordinary book. Its reading raises many questions, so thank you also for this interview and the possibility to clarify certain matters….

Your whole life was dedicated to the struggle against the unjust regime… But in your book you always stresses that you was not born as a fighter. Could you please explain us – what made you as a fighter?...

Aziz Pahad: They were circumstances in which we lived. The most discriminated group was Black people. We were born in the community which was identified by the apartheid regime as an Asians. It was the second discriminated group. We went to school for Indians, we could not go to school for other races. I don't think that there were any single young man who was growing up in that system and was not opposed it. … My father was a member of the group of so-called nationalists within the Transvaal Indian Congress. The idea was to improve the conditions of South African Indians, but not in isolation from the struggle of African people. There were informal relations between Indian National Congress, African National Congress and South African Communist Party. We were subjected to discrimination, not to that level as African people, but anyway discriminated. So growing up in such an environment, you inevitably had been involved in the struggle. Let me tell you honestly, even if you would decide not to be involved in the struggle, it was not possible, because just an environment was so politicized… All my family was involved in the struggle: my father, my mother, my brothers. The most involved were me and my older brother… So environment actually made us.

KJIL&IR (Alex Mezyaev): There is one very impressive picture in your book where you stand right behind Nelson Mandela in front of the court during the Treason trial in 1958…

Aziz Pahad: Most of the African liberation leaders lived in so-called black townships. But Nelson Mandela's and Oliver Tambo's first legal office were on the same street where we lived. The Indian Congress offices, the African National Congress offices, the Congress of Democrats offices were all situated within 3 blocks of the area we were lived. So the leadership of all these organization spent a lot of time in our flat. It was just very convenient place to meet outside their offices. It gave us unique opportunity to meet leaders like Tambo, Sisulu, JB Marks, Dadu… The picture you are talking was an historical accident for me. We were a group of demonstrators who came to greet the leaders, and it happened that I stood just behind Madiba and next to Winnie and that picture was taken. I was just fortunate.

KJIL&IR (Alex Mezyaev): You were a member not only of ANC, but also a member of South African Communist Party. Could you please explain the role of these two organizations in the liberation struggle?

Aziz Pahad: African National Congress was the first liberation movement on African continent. Though the Indian Congress was formed even earlier than ANC. Then it was creation of Communist Party of South Africa. It played an excellent role, when during very short time it recruited some of the best members and cadres of the ANC, as well as non-ANC leading thinkers, workers and trade unionists. Communist Party of South Africa took a Marxist-Leninist outlook on the situation in the country and it was very important to interpret Marxism-Leninism in African conditions. This organization was very important for theoretical understanding about the nature of South African struggle without losing basic understandings of the Marxism-Leninism. The role of the Communist Party of South Africa is very distinct from any other communist party in the world. This party never though that its task to enter other movements and to take it over or enter alliance and to want force your leadership. The party's role was an intellectual leadership. Many party leaders were also ANC leaders. It is important to know that in the early years some ANC leaders like Mandela and Tambo opposed the joint campaigns and involvement of the Communist Party and by the way, Indian Congress, though for different reasons. … But later the same leaders realized that this kind

of alliance is the only way we could succeed. I believe that this alliance was very important for the correct understanding of the dialectical relations between the national and class struggle.

KJIL&IR (Alex Mezyaev): The main part of your work was a political one. But you also took part in an armed struggle. What is your understanding of the coordination between political and the armed struggle? In your personal struggle and in the history of South African liberation movement…

Aziz Pahad: The decision to come to the armed struggle was adopted in 1962. It happened when all other possibilities were destroyed: movements were banned, legal activities were no longer allowed, thousands of people were arrested and many had been killed. Thus it was decided to change tactics. That period we did not conceptualized the classical armed struggle, the guerilla war. We started to prepare our cadres to send them abroad for training and hoping to infiltrate them back and that they will create the conditions of the classical insurrection. History proved that it was not possible. Armed struggle must be always led by the political struggle. It was very different from the history of liberation movements of our region, when in some instances the armed struggle led to the development of the political movements. But in South Africa the armed struggle emerged from the political struggle. But most of our cadres understood this supremacy of the politics…

KJIL&IR (Alex Mezyaev): Your book reveals that your military training in Soviet Union and GDR included the making of bombs and shooting from the snow. Could you tell us in more details about this story…

Aziz Pahad *(laughing)***:** Oh, yes, in early 1970s I spent some time in training in USSR and GDR. That time the Central Committee of the South African Communist Party sent a request to its counterpart in the GDR to train small groups of ANC members in counter-intelligence. This was mainly because the South African regime had managed to infiltrate our ranks so we needed to improve and extend our basic counter-espionage skills in order to neutralise this threat. Erich Honekker, had personally agreed to the SACP request and, on the basis of this agreement, a former Wits student and member of the ANC and SACP, Billy Nannan, and I undertook a three-week training programme in the GDR. We were trained in so-called MCW course that included building underground structures, surveillance and counter-surveillance, intelligence and counter-intelligence, secret communication, photography, preparing forged documentation and lock-picking etc. We also received some basic military training, during which we were taught to use weapons, the most popular was AK-47. Practicing shooting in the snow was one of the toughest things I have experienced and the purpose of which I never really understood. I complained that in South Africa we would never have such extremes of winter, but our interlocutors were not interested in my entreaties and insisted that I needed to adjust to conditions.

During eight months I spent in Soviet Union I was trained in MCW course – meaning military combat work training, which was not purely military, it mainly included things like intelligence, counter-intelligence, documentation. But of course this course also included how to use weapons.

As for the bombs, we started to make them in South Africa. One of our key activities was our propaganda efforts, at a time when the ANC structures were decimated and the apartheid juggernaut was moving triumphantly throughout the country. We paid special attention to the increased distribution of ANC educational literature, leaflets and radio broadcasts in South Africa. The leaflet bomb technique was an important innovation. We learnt much about agitprop work from, among others Soviet partisan activities during World War II, as well as the Cuban and Vietnamese experiences. Considerable time was spent experimenting with leaflet bombs, and there were some very amusing incidents. Ronnie Kasrils and I had once gone to Hampstead Heath to test a new version of a leaflet bomb. We set up the device and I took up position to witness the results while Ronnie prepared to set it off. I was still positioning myself when the rocket flew past me and hit a tree. I ended up in a state of shock because, if the trajectory of the projectile had been two or three centimeters in the wrong direction I would certainly have been decapitated. Ronnie was equally shocked and, to help regain our composure, we popped into the nearest pub and downed, a good few

pints before we proceeded to Jack's flat to complain about the leaflet bomb malfunctioning... So my personal activity in making bombs was not that always successful.

KJIL&IR (Alex Mezyaev): The main part of your book dedicated to negotiations. Negotiations as a concept and as real talks that were conducted between ANC and apartheid regime. Let us start from the negotiations as a concept. Was that an obvious choice to start talks with then government instead of the struggle?

***Aziz Pahad*:** I think that the ANC leadership based in Lusaka, especially Oliver Tambo and some others around him understood that we could not defeat the South African army as we did in Cuito Cuanavale. There were a lot of sharp debates about this issue. There were many our people, especially in the camps, who do not necessarily followed the developments inside the country or international developments and consider any attempts to negotiate as a sellout… The tactical approach of the ANC was that we must break the curtain of ignorance around our white constituency. This constituency owned everything: the military, the intelligence, the police, the economy... If we will not break this monolith of the white community, it will take much longer time to defeat the enemy. Our first open big meeting in Lusaka was with the major captains of the South African industry…. We knew that we could not defeat them militarily, but they knew that they could not defeat us politically. … So the negotiations were the only realistic option in those circumstances.

KJIL&IR (Alex Mezyaev): In your book you very sharply showed the opposition to the negotiations from both sides. And in this regard I would like to stress one episode when in 1991 during N.Mandela absence in the country, the NWC (and not NEC) suddenly took a decision to appoint S.Ramaphosa as the head of negotiation team instead of T.Mbeki, and M.Lekota as a head of intelligence replacing J.Zuma[1]…

***Aziz Pahad*:** Well, those changes by NWC have not changed the substance of the negotiations. I think it was just a tactical decision. But talking generally, many of those who opposed negotiations were not opposing to negotiation in principle. It was because of the very nature of the secret negotiations: you could not brief everybody. The fact of the secret negotiations was actually known to a very few people. Moreover, the negotiations have not meant the negotiations meant that we must stop mass struggle inside the country. In fact to strengthen the negotiations we had to strengthen our internal struggle. Yes, there were people who had a concept that we should take a power by the gun. But the discussion as such was a good thing...

KJIL&IR (Alex Mezyaev): Your book finishes in a way that gives us a feeling that there will be a continuation, because you have stopped at the moment when you were appointed as a Deputy Minister for Foreign Affairs. And this was a whole epoch when the new democratic South Africa was creating. Let me ask you how was the new South African foreign policy was created at that time?

***Aziz Pahad*:** Since its formation, the ANC had a Pan-Africanist outlook. During our struggle we were developing our position and gained international experience. All ANC documents always had progressive sections on the international politics. We had department of international affairs, leaded by Johnny Makatini, Josiah Jele, Thabo Mbeki. We had more international offices than the South African government had embassies. We were engaged in an active international politics much before we came to power. So our foreign policy post 1994 based on our historical documents, but changed to a new realities.

[1] «*In August 1991, while Mandela was on a trip to Cuba, and Mbeki and Zuma were attending a conference in Cambridge, England, the ANC's NWC [National Working Committee] decided that Mosioua (Terror) Lekota should replace Zuma as head of intelligence and Cyril Ramaphosa should replace Mbeki as head of the negotiating team. The decision troubled us, especially as the reasons were never explained. Many of us did not understand. In fact, on his return, Mandela demanded to know why such important decisions were taken by the NWC, which was not full committee since many of its key members were not present. It was not decision of the NEC, and one that otherwise may have had a very different conclusion*». (Aziz Pahad, Insurgent Diplomat. P.243).

INTERNATIONAL LAW & INTERNATIONAL RELATIONS PERIODICALS

“The Thinker” – Magazine for Thought Leaders

The Thinker was first published in 2009. Since then it has become a leading intellectual journal in South Africa. “The Thinker” seeks to open up the space for public discourse, the clash of ideas, to stimulate intellectual debate and scientific discourse. It is a partisan journal for progressive change, but non-partisan with respect to party-political positions and activities. The Journal strives to give all its contributors the freedom to express what they think; understanding that openness in the context of ideas, theoretical divergences and multi-dimensional practice is a necessary condition for fundamental social transformation.

As the Editor of the Journal says himself: We are committed providing a forum for honestly-expressed views, mindful that the ideas, analyses and commentaries that we will publish may be uncomfortable for some and anathema for other.” Already a number of academics, scholars and intellectuals in South Africa, Africa and the diaspora have acceded to our request to become regular contributors. Through The Thinker we will seek to enhance the capacity of individual countries and the continent to consolidate, protect and enhance democracy, peace and justice in Africa. We are convinced that our continent can and must be successful, democratic, non-racial, non-sexist and prosperous. As a journal we shall be part of the struggle for the empowerment and emancipation of women. Without it the continent will continue to under-utilise the great capacity and talents of women in Africa. We shall devote special attention to the on-going processes for an African Agenda and the African Renaissance. African challenges, problems and conflicts require African responses and solutions.

From 2014 The Thinker turned from a monthly into a Pan-African quarterly.

Here we publish some extracts from the articles, published in last issues of «The Thinker»

AN IMPERATIVE OF OUR TIME

Thabo Mbeki

… The fact is that largely, as Africans, we did not have the hard borders of individual "nation states", even in the Sudan, Egyptian and Carthaginian antiquity. These were imposed on the Continent as a result of the infamous 1885 Berlin Conference, which carved up Africa into geographically defined territories owned by the various European colonial powers. These boundaries largely serve as Africa's current State borders. Over the millennia the Africans migrated freely and widely across our Continent, effectively treating our Continent as a common patrimony and matrimony.

This is the reason that even today large swathes of our Continent, across and without regard to the many colonially imposed boundaries, share the same languages and cultures, and therefore a common African identity. It is because of this common African identity that we find that the various languages, such as Hausa in Nigeria, the indigenous languages in Southern Africa, and kiSwahili in East Africa, to some extent, share some common words, proverbs and idiomatic expressions.

Indeed, in antiquity, some Africans, part of the very first members of the species homo sapiens, the global modern humanity, migrated out of Africa, not bound by any physical or political boundaries, to constitute the founding base of today's diverse world community of peoples, in all Continents. In effect, by the time of the Berlin Conference, the Africans had established the fact in practice, through the millennia, that they were bound together by a common identity, not defined by any borders or boundaries. The periods of slavery and colonialism obliged the then African leadership, certainly during the 19th Century, to recall and evoke the fact of this historical common African identity….

…To answer the vital and historic question – what is to be done? – concerning the challenge to achieve the unity of Africa, so vital to the future of our Continent, we will have to respond honestly and frankly to the stark summary of our condition which Emperor Haile Selassie described when he said: "In a very real sense, our Continent is unmade. It still awaits its creation and its creators." I am convinced that the Centuries-long period of the violent seizure and export of African slaves to the Americas and Arabia, and the European imperialist and colonial domination of Africa, 'unmade Africa'.

Accordingly, our striving to achieve the Renaissance of Africa must focus on the 'remaking' of Africa! That 'remaking' must aim to achieve exactly the objectives which Mwalimu Julius Nyerere, Emperor Haile Selassie and Kwame Nkrumah set before and during the establishment of the OAU. Some of the central questions we will have to answer in this regard, to respond to the challenges posed by Emperor Haile Selassie, are: of what should this remaking of Africa (and re-creation) consist and who will be the creators? Kwame Nkrumah answered the second of these questions when he said at Addis Ababa in 1963, "the popular and progressive forces and movements within Africa will condemn us…(if we disappoint) "the (call of the) people of Africa…for the breaking down of the boundaries that keep them apart…"

As I have said, these boundaries were imposed on Africa as a consequence of the Berlin Conference and were therefore themselves part of the colonial legacy which anti-colonial and anti-imperialist Africa had to address! In reality, the 'boundary' that Kwame Nkrumah was talking about was the divide between "the popular and progressive forces and movements within Africa" on one hand, and the opposed tendency on the other, which had coalesced as the 'Monrovia' and 'Casablanca' groups, prior to the 1963 founding Conference of the OAU. …

… The hard reality is that, if indeed African unity is a fundamental condition for the Renaissance of Africa, then we must ask the critical questions: what indigenous forces in Africa will serve as the vanguard (organising) movement to lead the African masses to engage in struggle to achieve this unity; and around what specific objectives would this movement coalesce which would define the content and purposes of this unity?

What African unity?

Our objective reality is that in fact and in practice, we have not achieved the objective of African unity. In a sense, to put this matter broadly, we can say that we have not succeeded in bridging

the divide between the 'Monrovia' and 'Casablanca' groups. This is necessary to build the African political coalition which would lead the sustained offensive for genuine and durable African unity.

In this regard I would like to quote a famous observation made by Karl Marx in his treatise, "The 18th Brumaire of Louis Bonaparte". He wrote: "Men make their own history, but they do not make it as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living."

As Africans we have had the obligation to make our own history. … As Marx had said, the African leaders gathered in Addis Ababa in 1963 did not have the liberty, as Nyerere and Nkrumah had argued, indeed from different perspectives, freely to "mould the future (of Africa)", as they pleased. …

…Practically, objectively and in strategic terms, it is not possible to achieve the strategic goal of meaningful African unity, and therefore the Continent-wide transformation of Africa, its Renaissance, in the absence of, and without the leadership of these forces and movements. However, we must understand that objective reality, bearing in mind what Marx said, will bear heavily on Africa's ability to develop and sustain these popular and progressive forces.

In this regard, on the face of it, we had the advantage that much of our political leadership, especially in the immediate aftermath of the victory of the anti-colonial struggles, had been steeled in these struggles to understand and be inspired by the imperatives of what would make for the Renaissance of Africa.

Nevertheless, great theoreticians of the African Revolution, among them Frantz Fanon, had warned us about what might go wrong. Among others, Fanon warned that because of "circumstances directly encountered, given and transmitted from the past", the very same militant African fighters against imperialism and colonialism might very well be recaptured by this past, willingly or otherwise obliged "to return to the fold of the former colonial rulers", in Nkrumah's words. … We must ponder the correctness or otherwise of this prediction, which emerged from the profound reflections, researches and practical experience on our Continent of a brilliant mind. These came to all of us, as Africans, through African Algeria, but originally from the African Diaspora in Martinique in the Caribbean, home both to Fanon and also the celebrated poet and Pan Africanist, Aimé Césaire. Fanon warned us that it was possible that the African Revolution might be betrayed during the period of what Mwalimu Julius Nyerere described as the Second Scramble for Africa, against the objectives which Haile Selassie and Kwame Nkrumah detailed. Thus would we have to contend with the possible defeat of the objective to achieve African unity, and its use to realise the Renaissance of Africa.

What is to be done? The challenging question that faces all of us … is – what is to be done to defeat this entrenched elite, and thus re-open the road towards the genuine unity of Africa and the realisation of its purposes?

What shall we do genuinely to pursue the future visualised by such outstanding African patriots as Julius Nyerere, Haile Selassie, Kwame Nkrumah, Modibo Keita of Mali, Patrice Lumumba of Congo, Abdul Gamal Nasser of Egypt, Ahmed Ben Bella of Algeria, Mohamed V of Morocco, Kenneth Kaunda of Zambia, Seewoosagur Ramgoolam of Mauritius, Albert Luthuli of South Africa, and others? In the end, whatever the challenges in this regard, to realise the objective that 'Africa Must Unite', and thus create the conditions for the Renaissance of Africa, we must work to re-build and activate "the popular and progressive forces and movements within Africa" of which Kwame Nkrumah spoke during the historic moment of the establishment of the Organisation of African Unity. Indeed, in our collective interest as Africans, we must act together to realise the objective – ***Africa Must Unite!***[1]

[1] Extracts from the article published in ***TheThinker, vol. 51***

THE ROLE OF THE JUDICIARY IN THE RESTORATION OF AFRICA'S LOST GLORY

Mogoeng Mogoeng[1]

…The African Judiciary has come to recognise the special role it has to play to contribute to the renaissance of Africa. To this end, the Conference of Constitutional Jurisdictions of Africa (CCJA), comprising the Heads of the highest courts in our continent, recalls in its Statute that the Constitutive Act of the African Union enshrines the commitment of Heads of State and Government "to promote and protect human and people's rights, to consolidate democratic institutions and culture, and to ensure good governance and the rule of law". The CCJA also undertakes to supplement the AU mechanisms to consolidate the rule of law, democracy and human rights. It goes on to recognise that the achievement of these objectives is "closely linked to the independence and impartiality of Judges". The draft Memorandum of Understanding, soon to be concluded by the AU Commission and the CCJA, also goes a long way towards reaffirming the role of the Judiciary in the realisation of the African renaissance project. When the Judiciary is under unfair attack in any country, it must be a concern of regional bodies like the CCJA. We must be our brothers' and sisters' keepers. …

…What are the key challenges that inhibit the effective and efficient performance of courts in Africa? Is the process of appointing Judicial Officers transparent and inclusive? Does the Judiciary in each African country enjoy the kind of independence which can insulate it from undue influence and corruption? Do Judicial Officers have real security of tenure or is their tenure short and renewable? Are they paid fairly well in relation to the fiscal muscle of each country? Do they have the essential tools of trade? Is there proper judicial self-governance in the area of court administration with own budget? Even if there is no self-governance, is the Executive or hybrid court administration system in place compatible with judicial independence and does it provide the support required? Is the court budget adequate for the execution of key court operations? Is there an effective judicial education system in place?

Does the Judiciary broadly enjoy the confidence of the populace? If not, why and what should be done to address those perceptions or realities, as the case may be? Affirmative or negative answers to these questions are, respectively, important and reliable pointers to the independence of the Judiciary or lack thereof. The institutional arrangements must reinforce judicial independence. Ideally the Judiciary must take full responsibility for court administration, particularly in relation to matters that are intimate to court operations, be able to determine the size and competence of its support staff complement, set its strategic objectives and priorities and execute them as determined by the Judiciary itself.

The Executive and Legislative branches of Government in Africa, from the national all the way down to the municipal level, run virtually every important facet of their business. Not so with the Judiciary. There is no defensible reason for not leaving the Judiciary to do what it is best placed and arguably best qualified to do, including the execution of administrative functions that are intimate court operations. Failure to do so is very likely to yield a weak, manipulable and corrupt Judiciary potentially available to the highest bidder. Given Africa's position of historical disadvantage and marginalisation, we dare not take comfort in the similarity of our wrongs to those of well-developed economies, some of which were aided by imperialism to achieve their wealth. It bears repetition that the Judiciary must never be made to look like an appendage of the Executive, dependent on it for the resources required to drive even strategic programmes like case management, court modernization as well as performance monitoring and evaluation. It must claim and be allowed to occupy its rightful place fully as the third arm of the State.

The African Judiciary must identify and address the challenges that undermine the efficiency and effectiveness of the court system in the continent. That responsibility should be narrowed down to the regions and individual countries. Such an emancipation of all African courts would enable them to rise to an acceptable level of independence and develop the necessary capacities, for greater efficiency and effectiveness.

[1] *Chief Justice of the Republic of South Africa. Head of both the Constitutional Court and the Judiciary in the country*.

Peer review mechanisms among national and regional Judiciaries, as well as best practice and effective ways for the delivery of quality service, require urgent attention. There is also a need to develop effective communication strategies to create greater public awareness about the Judiciary, its critical role and the enormous challenges it faces. Everybody is concerned about the snail's pace at which criminal, civil and commercial cases often move. A disturbing public perception seems to be firming up that Judges and Magistrates either do not care about the plight of litigants, particularly the poor, or are incompetent. Equally concerning are incidents of corruption within the Judiciary that have been exposed. …

…A legitimate way must be found for the leadership collective of the Judiciary to influence decisions about changes needed to secure judicial independence in all African countries, without interfering unduly in the affairs of any sovereign State, given the sensitivities attendant thereto. It would of course be very naive and unrealistic to embark on the process of ensuring that Judiciaries in Africa are independent, efficient and effective, in total disregard for the practical and historical peculiarities, the budgetary constraints, the unarticulated sensitivities and realities that obtain in each African country.

Another avenue to explore is the establishment of a link between regional structures of Presidents and Ministers as well as Parliaments on the one hand and those of the Judiciary on the other. It should not be left to the regional executive structures to take decisions that affect judicial institutions without the meaningful involvement of the leadership of the Judiciary. The Judiciary must also have a voice at AU level about important matters that affect them. Their role should not be limited to the appointment of Judges to regional and continental courts established without any real engagement or consultation. The Judiciary should be involved in the creation and restructuring of all courts.

The dangers of apparent disinterest are evident in the SADC Tribunal saga. This is a regional court that was initially empowered to adjudicate disputes between citizens and their Government involving, among other things, human rights, rule of law and democracy issues. After some individuals had litigated successfully against Zimbabwe, the Tribunal was virtually denuded of its powers to handle disputes between citizens and the State even if domestic courts have no jurisdiction in those cases. This is a setback and a retreat of this region and by extension the continent's commitment to the rule of law, human rights and respect for judicial authority as set out in our regional and continental instruments and protocols.

I am optimistic, for the sake of SADC, the image of Africa and the renaissance, that the forum of Heads of State and Government will revisit this retrogressive step they have taken and demonstrate the necessary political will to tolerate and accept judicial authority however uncomfortable it may be.

When the Judiciary of each African country operates with the ever-abiding consciousness of its constitutional responsibility to contribute to peace and stability, the observance of the rule of law, crime-prevention and the eradication of corruption, it will help that country to create a climate conducive to sustainable economic development, entrench good governance and realise the legitimate and constitutional aspirations of the citizens.

One of the major game-changers in this project is the Judiciary. The possibility of addressing these challenges will forever be remote for as long as courts at all levels are not left free to occupy their operational space fully and given the resources and support necessary to fulfil the role they were originally created to play.

All of the above can create an investor-friendly climate. When potential investors know that in Africa, they will get justice – against any fraudster, any law-breaker, government or business partners or any entity that tries to take unfair or unlawful advantage of them – it will become an investment destination of choice, given the labour force, the vast tracts of fertile and productive land, the very rich mineral deposits and abundant natural resources Africa has to offer. An urgent and radical paradigm shift of the prevailing mindset of many African Governments is required in relation to the status, independence and original role of the Judiciary and the resources and capacities they need to discharge their mandate properly. When the collective voices of the concerned are added to the cry for more resources, capacities and independence in the broader justice system and these critical needs are met, we will have contributed immeasurably to the rebirth of Africa as a democratic and caring economic giant that we can all be proud of.[1]

[1] Extracts from the article published in ***TheThinker, vol. 64.***

THINKING ABOUT UBUNTU IN THE JURISPRUDENCE OF THE SOUTH AFRICAN CONSTITUTIONAL COURT: A critique of the emerging cases

Thato Vincent Rakatane[1]

Ubuntu is like an umbrella under which some people like to hide from rain, and also to shade themselves from the sun. But sometimes you need to fold it." The concept of Ubuntu has formed part of the formidable jurisprudence of the South African law. It has been correctly described by authors varying from Justice Yvonne Mokgoro and Justice Albie Sachs to Professor S.F Khunou and Professor Phillip Iya; and of course the list is endless. Justice Madala has correctly held that Ubuntu is an integral part of our law. It is indeed correct that Ubuntu is only recognised when it is seen or when it is experienced, hence it is submitted that It echoes Understanding and not vengeance It emphasises Reparation and not Retaliation It is indeed Ubuntu and not Victimisation and Hatred. At this stage it is appropriate to unpack the nature, content, extent, interpretation and the application of the concept and the principle of Ubuntu. Ubuntu assists us to shape a society which was deeply divided by hatred, fear, guilt and revenge. Our task is to examine the features of Ubuntu apparent in case law in order to navigate the stormy waters in a manner that can be permissible both morally and intellectually.

Does Ubuntu have a place in the South African Legal System? That the postamble to the Interim Constitution contained Ubuntu can be reasonably inferred from the manner in which most of the Judges employed Ubuntu in *S v Makwanyane*. The final Constitution does not contain the principle of Ubuntu in express terms. Ubuntu is implied in the provisions of the South African Constitution. One can argue that the drafters of the Constitution had Ubuntu in mind during the drafting of the Constitution. For example when we speak of equality in terms of section 9 of the Constitution we are talking of Ubuntu. The inclusion of Ubuntu in our legal system is indeed an inescapable and overarching achievement in and amongst other considerations pertinent to our democracy. Ubuntu has also been incorporated into Restorative Justice, i.e. the child justice system within the Child Justice Act 75 of 2008.

Ubuntu in the Judgments of the Apartheid regime. The judgements made by courts at the time of Apartheid were the antithesis of Ubuntu. Such judgments were the very epitome of unfairness, injustice, inequality and prejudice. Those judgments were indeed bad in every possible sense. However, there were exceptions in relation to the judges in that bad system. The steadfast support of Ubuntu was evident in the judgements of Oliver Schreiner. He was indeed an exception and his work cannot be overlooked. "He had very little material to work with, and yet he made so much out of it." He is indeed the greatest Chief Justice South Africa did not have. In the absence of a supreme Constitution he accomplished a great deal. He refused to sit on benches reserved for "whites only''. Schreiner dissented in three sittings of the case of *Ndlwana v Hofmeyer*, and concurred with the judgement of Centlivres CJ, which set aside the legislation removing coloureds from the voting roll in the case of *Harris v Minister of Interior*. The relevance of Ubuntu should be interrogated as well as the extent to which judges are allowed to use Ubuntu in their judgements. Are Ubuntu and Human Dignity opposite sides of the same coin? Does the employment of Ubuntu in the task of adjudication not transverse the legal principles pertinent to a particular branch of law within which an envisaged judgment is due? My concern is that judges use Ubuntu to push their personal agendas. If so, our task is to delineate the safeguards against such a perversion.

Is there an Ubuntu Mist in the Constitutional Court? The multiple strands of conversation among all facets of our society are increasing in volume and intensity about the relevance and the extent in which the Courts of the land are permitted to use Ubuntu.

The Constitutional Court has in its painstaking judgements used Ubuntu in almost all cases emanating from all branches of our legal system. Judges are allowed to use Ubuntu within the framework of logic and morality. Ubuntu should not defy critical thinking and logic. Honest and critical thinking is still required of the judges. Furthermore judges should be steadfast in protecting legal principles. Ubuntu should not be used to transverse the legal principles pertinent to a particular

[1] ***Thato Vincent Rakatane*** *– LLB, LLM, North West University. Specialising in Customary Law, Labour Law, Social Sciences and Constitutional Law.*

branch of law within which the contemplated judgment is due. Ubuntu should be linked to various concepts such as "mercy" and judges should approach issues before them with the spirit of Ubuntu. It is evident from the judgment of Corbet JA in *S v Rabie* that when the trial court decides the sentence it must blend it with the element of mercy according to the circumstances. It is also evident from the judgement of Cameron and Lewis JJA in *S v Nkomo* that the substantial and compelling circumstances of the accused should be taken into account when deciding a sentence.

The Assessment: Does the Ubuntu Smile turn us on? A critical assessment of the judgement of Skweyiya J in *Le Roux v Dey* and the judgment of Mogoeng J in *The Citizen v McBride* will assist us to deepen our understanding of the issues raised in this article.

Le Roux v Dey. This case concerned a delictual claim against children. Even though the judge did not refer directly to Ubuntu, it is evident that he approached the issues with the spirit of Ubuntu. This can be traced to the contention that the mere fact that the delict was committed by children should change the adjudication mindset of that case. The learned Judge argued that children should be treated differently in our social structures. The Judge held that we must create different worlds for children so that they can make mistakes and learn from such mistakes. Children should be given leeway and held to a lower standard of accountability as we accept that they lack the emotional maturity and wisdom to clearly distinguish right from wrong. It is my view that the learned Judge navigated the stormy waters quite correctly. He is indeed correct that adjudication should be in context. Even if Ubuntu is not patent, its spirit cannot be overlooked in the judgement of Skweyiya. This judgment could possibly give rise to questions about whether or not the learned judge transversed the legal principles pertinent to claims of defamation.

The Citizen v McBride. Mogoeng J dissented from the view reached by his colleagues Ngcobo CJ and Cameron J that the statements which were made by The Citizen about McBride being a murderer and a criminal are protected by fair comment and therefore not malicious. In his judgment Mogoeng J held that freedom of expression does not have to be malicious; it must not draw its force from insults or highly inflammatory language. Freedom of expression should not trump the intrinsic worth of another person. Human Dignity should always assume its rightful place even when freedom of expression enters the equation. The express violation of the rights of others is only permitted if it is within the Constitutional boundaries. On that note Mogoeng found that The Citizen waged a well-orchestrated character assassination campaign against McBride. The Reconciliation Act and Ubuntu have set down the essential definition in which all South Africans should forge a glorious future as mapped in our Constitution. The espoused principle of Ubuntu is indeed based on mutual respect. We must not allow conduct which is bereft of Ubuntu, including adjudication. Our deportment in all respects should be governed by the unwavering principle of Ubuntu.

After-thoughts: Where to from now? I tend to share the sentiments of Mokgoro J that if the values of Ubuntu could be consciously harnessed, it could become central to the process of harnessing all existing legal values and practices within the Constitution. Like Froneman J said in *Matiso v Commanding Officer Port Elizabeth Prison*, The Courts bear the responsibility of giving a specific content to the values and principles of Ubuntu in any given situation. In doing so the Judges are invariably creating the law. In opining, I hold that there is no need to regulate and legislate the usage of Ubuntu. The Judges should have the inherent responsibility guiding them in relation to the use of Ubuntu. Ubuntu should not cause us to lose sight of legal principles. Ubuntu does not at all make Judges immune from critical and logical thinking.

Conclusion. In view of the preceding discussion it is indeed evident that the issues around Ubuntu are not clear cut. There is a lot to be said, a lot to be done and a lot to be expected in future. Over and above, Ubuntu has attempted to incorporate quality into our legal system. That attempt is characterised by reconciliation, sharing, caring, trust, harmony, respect and responsibility. The contribution of Ubuntu to the development of Constitutional Jurisprudence in a democratic South Africa cannot be overlooked or jettisoned. The application of Ubuntu in our land has indeed improved the quality of our life in the context of justice and human rights. It is indeed a trite truth that the essential component of transformation is to cultivate a judiciary that embraces the jurisprudence dictated by Ubuntu and the Constitution. All facets of our law are continuing to be impacted by the beneficial effect of Ubuntu. I endorse the argument that our Constitutional Court is the second to none in growing the very imperatives of our Constitution. We nourish the hope that some, if not all, members of the bench have the insight and the willingness to cherish Ubuntu in a positive manner.[1]

[1] Extracts from the article published in ***TheThinker vol.57.***

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SOUTH AFRICAN POETRY

Mongane Wally Serote

1. Madiba
2. City Johannesburg
3. Ville Johannesburg (*City Johannesburg* in French)
4. Йоханнесбург (*City Johannesburg* in Russian)
5. Чёрт с ним, Боже! (*Damn, my Lord!* in Russian)

MADIBA

we must accept
you will walk
stop
sit a bit
and then
you will lie down
you will take a deep breath
a relief
and say
oliver how are you
you will
we must accept
and oliver I can see him
with his pondo marks
and a bright warm smile and laughter

he will hug you
he will say
welcome nelson
and you both will take a walk
as he introduces you
or reminds you
this is dube
this is mamphosho remember
kate
walter will come just now
he is in council
with thabo and zuma on earth
i can hear you both
break into laughter
he holding your hand to cross
you must cross over to become an
ancestor
you will look back at us
and you will wonder
when will we learn
that everything comes to pass
but you madiba will be light kilometers
away
and
although still near us
we will not hear what you and fischer
talk about
what you and dadoo talk about
and when you ask shaka
with your husky voice and guttural
laughter
how are you
and all of you will break into this
laughter
which signals the joy in your beings
you will be amused by what you all left
behind
us
flesh and blood
brain and spirit
still struggling to make sense about all
of this
and you
then
will be in communion with hundreds
and millions
and billions of freedom fighters
generations upon generations of them

we hope
you will then remember
do ancestors have memory
you will remember
that we mean it when we say
freedom
peace
we mean so because there is no other
you all of you died so
so many different types of death
mini
singing to the gallows
sizobadubulangembaibai
and fisher the chess man
with that most beautiful smile of his
and those starry eyes which were like
windows into his soul
agrees for cancer to take him away
and kotane
allows stroke to wrench his life away
how come I only remember you all
in smiles
and eyes filled with laughter
and facial expressions filled with joy
oh
it is because your senses
your sight
your touch
your sense of smell
your sense of taste
and your sense of hearing
all of these things madiba
exude from deep down your spirituality
you all men and women of sacrifice
must we remember you like that
all I know
is that you will walk
you will stop
and then you will lie down a little
you will take a deep breath
a relief from this earth
you will have passed on
into communion
i do not know if dadoo still needs his
pipe
to smoke
does he
does tambo need his spectacles and his

pondo marks
does mamposho still need her blueblack
beauty spot on her cheek
does shope still need his hard rough
palms which were like hard stone
all of you had such clean facial
expressions
all of you had such quite whispering
eyes
perhaps that is what we must remember
about you
you fighters for freedom
you who spoke with amplified voices
that the world heard
you who strode the world and straddled
it with great familiarity
you who starred into the distant
horizon
whose speech looked like a wink
and you focused in attention
because you knew that the sun rises
you knew that the sun sets
the moon rises and sets
because nothing is for ever
even the birds as you know
and that is why they migrate
they hop
they perch on distant trees
they glide above clouds
they ride different breezes
and they know even different billows
of the seas
even ants know this
that is why they gather food all the time
they disappear a little
and they come back again
when the heat of the sun talks to
different types of life
madiba
you and others disappeared for 27
years
you came back
do you remember how tambo left with
his stern face
and elias disappeared like a snowflake
so did omgov
and you also watched mhlaba and
mqayi leave

often I wondered what you thought
as one by one your peers left
you used to look watchful and at times
starry eyed
and one day
like the good soldier you are you
handed over the baton
and now you have walked off the
screen
and now and then your shadow
appears
i is tall this shadow too tall
it elongates along the earth
and it walks like the second arm of the
clock
i
i smile at times
as I imitate your dignity and integrity
as I rehearse your wisdom in my head
we must accept
you will walk
stop
you will sit down a bit
and then you will lie down and sigh
it is ok tata.[1]

[1] First published in *The Thinker* Vol 29, July 2011

CITY JOHANNESBURG

This way I salute you:
My hand pulses to my back trousers pocket
Or into my inner jacket pocket
For my pass, my life,
Jo'burg City.
My hand like a starved snake rears my pockets
For my thin, ever lean wallet,
While my stomach groans a friendly smile to hunger,
Jo'burg City.
My stomach also devours coppers and papers
Don't you know?
Jo'burg City, I salute you;
When I run out, or roar in a bus to you,
I leave behind me, my love,
My comic houses and people, my dongas and my ever whirling dust,
My death
That's so related to me as a wink to the eye.
Jo'burg City
I travel on your black and white and roboted roads
Through your thick iron breath that you inhale
At six in the morning and exhale from five noon.
Jo'burg City
That is the time when I come to you,
When your neon flowers flaunt from your electrical wind,
That is the time when I leave you,
When your neon flowers flaunt their way through the falling darkness
On your cement trees.
And as I go back, to my love,
My dongas, my dust, my people, my death,
Where death lurks in the dark like a blade in the flesh,
I can feel your roots, anchoring your might, my feebleness
In my flesh, in my mind, in my blood,
And everything about you says it, That, that is all you need of me.
Jo'burg City, Johannesburg,
Listen when I tell you,
There is no fun, nothing, in it,
When you leave the women and men with such frozen expressions,
Expressions that have tears like furrows of soil erosion,
Jo'burg City, you are dry like death,
Jo'burg City, Johannesburg, Jo'burg City.[1]

[1] Originally published in: *Mongane Serote, Yakhal'inkomo (1972).*

CITY JOHANNESBURG
(French translation)

Je te salue : regarde
le vol rythmé de ma main, des poches de mon pantalon,
à celle de ma veste, en quête
de mon Pass, ma vie.
Jo'burg City.
Serpent affamé, ma main retourne toutes mes poches,
cherche mon portefeuille, toujours si mince, si maigre,
tandis que mon ventre grogne un sourire complice à la faim.
Jo'burg City.
Il dévore, lui aussi, les sous et les papiers, mon ventre, tu
ne le savais pas ?
Jo'burg City, je te salue.
Lorsque je cours vers toi dans le rugissement des autobus,
je laisse derrière moi mon amour,
et mon peuple et mes maisons grotesques, mes *donga*s,
et mes éternels tourbillons de poussière,
ma mort,
inséparable de moi comme le regard de l'œil.
Jo'burg City.
Je roule dans tes rues noires et blanches, robotisées,
Dans la lourde haleine d'acier que tu inhales
à six heures du matin, que tu exhales dès cinq heures
le soir.
Jo'burg City.
Voici l'heure où je viens vers toi,
quand tes fleurs de néon clignotent dans l'ombre qui s'enfuit,
sur tes arbres de béton.
Et quand je reviens vers mon amour,
vers mes *dongas*, mes ravins, ma poussière, mon peuple,
ma mort
– vers le lieu où ma mort me guette dans l'ombre comme
une lame dans la chair
je sens tes racines qui ancrent ta puissance et ma faiblesse
dans mon corps, dans ma tête, dans mon sang,
tout en toi le proclame :
c'est cela, exactement cela que tu exiges de moi.
Jo'burg City, Johannesburg.
Ecoute quand je te parle,
ce n'est pas drôle, pas drôle du tout,
de mettre comme tu le fais ces expressions glacées
sur les visages des hommes et des femmes,
expressions des visages où les larmes creusent des sillons
comme les traces d'érosion dans la terre,
Jo'burg City, tu es sèche comme la mort.
Jo'burg City, Johannesburg, Jo'burg City...[1]

[1] Translated by Claire Malroux.

CITY JOHANNESBURG
(Russian translation)

ГОРОД ЙОХАННЕСБУРГ

Мой привет тебе,
Йобург-сити;
Шарит моя рука по карманам брюк
И пиджака:
В каком-то — мой пропуск,
Моя свобода,
Йобург-сити.
Голодной змеей рука моя ищет
Завалящий, ледащий бумажник,
И весело в брюхе икает голод,
Йобург-сити.
Ты знаешь — он ест медяки и бумажки,
Все без разбору?!
Йоханни, привет!
Устремляясь к тебе,
Я бросаю, любимый,
Развалюхи свои, свой народ, и канавы, и пыль,
Мой убийца,
Неотвязный, словно дрожанье век.
Йобург-с.ити.
Черно-белый асфальт и огни светофоров
Провожают меня в твою глотку
В шесть утра, в пять пополудни — встречают.
Йобург-сити,
Я — твой в те часы,
Когда электрический ветер оживляет цветы из неона,
Я прощаюсь с тобой в те часы,
Когда цветы разбредаются в ночь,
Павшую на цементные парки.
А я возвращаюсь к любимой.
К своему народу, канавам, пыли, к убийцам своим,
Туда, где блики во мраке, как нож — в спине.
Корни твои — глубоко во мне,
В слабом разуме, духе и плоти;
Все в тебе говорит мне,
Что я тебе нужен.
Йобург-сити, Йоганнесбург,
Послушай меня:
Не до смеха, совсем не до смеха,
Если ты надеваешь на лица людей
Такие личины,
На которых видны овраги от слез.
Это значит— ты высох, как смерть,
Йобург-сити, Йоханни, Йоганнесбург![1]

[1] *Перевод с английского Э. Шустера. Печатается по публикации: «Восточный альманах» Выпуск 4.*

DAMN, MY LORD!
(Russian translation)

ЧЕРТ С НИМ, БОЖЕ!

Не знаю, где я пропадал,
Но, Брат мой,
Я знаю, что иду.
Не знаю, где я пропадал,
Но, Брат мой,
Я знаю, что иду,
Дьявол! Там, где пропадал, я беззвучно плакал
И не мог подняться.
Не знаю, где я пропадал,
Но, Брат мой,
Я знаю, что иду,
Иду, как воды в час прилива,
Но ох! — песок проклятый.
Не знаю, где я пропадал,
Но, Боже, как измучен!
О, Брат мой,
Манкунку[1] ли я слышал?
Дьявол! Душа болит, как тело после плети,
И я терпел все это.
Не знаю, где я пропадал,
Но, Брат мой,
Я знаю, что иду,
Не знаю, где я пропадал,
Но, Брат мой, прошел я, как гроза над вельдом
И ох! — уткнулся в камень стен.
Не знаю, где я пропадал,
Но страх всесилен мой, как смерч (умрет ли так же скоро?),
Но, Брат мой,
Я знаю, что иду,
Не знаю, где я пропадал,
Но, Брат мой,
Думиле[2] статую ль я видел?
Дьявол! Мозг бьется, словно сердце, мира нету,
Ноют раны — и когда рубцами станут.
Но могу я и смеяться, и работать, и идти.
Не знаю, где я пропадал,
Но, Брат мой,
Я знаю, что иду,
Не знаю, где я пропадал,
Но, Брат мой,
Голос мой подобен грому над горами,

[1] Манкунку — африканский композитор и музыкант
[2] Думиле — африканский скульптор

Но ох! — молнии на стуле ждут меня.
Не знаю, где я пропадал,
Но отчаянью нет меры, нет и нет.
О, Брат мой,
Я знаю, что иду,
Не знаю, где я пропадал,
Но, Брат мой,
Не Тхоко[1] ли пропел?
Черт с ним, Боже![2]

[1] Тхоко — певец-африканец

[2] *Перевод с английского Э. Шустера. Печатается по публикации: «Восточный альманах» Выпуск 4.*

ISBN 978-5-93593-229-9

Подписано в печать 21.03.2016. Печать ризографическая.
Формат бумаги 60 х 84/8. Гарнитура Times. Объем п.л. 13,9
Тираж 60 экз. Заказ № 29

Издательский центр Университета управления «ТИСБИ»
(лицензия № 0272 от 23.08.1999 г.)
420012, г. Казань, ул. Муштари, 13