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The United Nations and Regional Challenges in Africa – 50 Years After Dag Hammarskjöld

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The United Nations and Regional Challenges in Africa – 50 Years After Dag Hammarskjöld

Edited by Henning Melber and Maxi Schoeman

14 August 1960

Elisabethville, Republic of the Congo

Secretary-General Dag Hammarskjöld at the airport prior to his return to Leopoldville. The Secretary-General arrived in Democratic Republic of the Congo to carry out the terms of the Security Council resolution calling upon Belgium to withdraw its troops and allowing the entry of the UN force into the province of Katanga. Photo: UN Photo/HP

Preface

Henning Melber and Maxi Schoeman

This volume contains a selection of the original contributions and revised versions of the papers delivered during the international conference entitled 'The United Nations and Regional Challenges: Africa 50 Years after Hammarskjöld', jointly organised by the Dag Hammarskjöld Foundation and the Department of Political Sciences at the University of Pretoria. The conference took place from 13 to 15 July 2011 on the campus of that university and over 120 participants from several countries in Africa and Europe were in attendance.

It was by no means coincidental that the death of the second Secretary-General of the United Nations half a century earlier was the original point of reference and departure for this event. Dag Hammarskjöld, and with him 15 other members of his entourage and crew, died on the night of 17-18 September 1961 in the wreckage of the DC6 aeroplane that crashed a few miles from the airport while approaching the Northern Rhodesian mining town of Ndola. He was to meet close to the border of the Congo with the leader of the Katangese secessionist movement, Moise Tshombe, in an effort to negotiate a peaceful solution to the civil war, after earlier efforts by the United Nations to bring an end to the Katangese secession had failed dismally. The circumstances of the plane crash remain a matter of speculation, despite the findings of several official commissions of inquiry that it was most probably the result of pilot error. Too many questions remain to be answered satisfactorily, so it is no surprise that half a century later they resurface.[1]

1 For a concise overview on the different speculations and explanations, see Manuel Fröhlich, '"The Unknown Assignation": Dag Hammarskjöld in the Papers of George Ivan Smith', in *Beyond Diplomacy. Perspectives on Dag Hammarskjöld,*. Uppsala: Dag Hammarskjöld Foundation 2008 (Critical Currents, no. 2), pp. 27-33. See for the latest, most coherent and comprehensive effort to explore the dubious aspects of the plane crash, Susan Williams, *Who Killed Hammarskjöld? The UN, the Cold War and White Supremacy in Africa,* London: Hurst 2011 and Rolf Rembe and Anders Hellberg, *Midnatt i Kongo. Dag Hammarskjölds förlorade seger,* Stockholm: Atlantis 2011.

The legacy Dag Hammarskjöld created during his lifetime, however, transcends the efforts to reinvestigate the circumstances of his death.[2] His ethics, his concept of solidarity, his sense of fundamental universal values and human rights in combination with his respect for the multitude of identities within the human family have lost none of their value and relevance, and neither have the standards he set in discharging his responsibilities as the world's highest international civil servant and in playing a global leadership role.[3] In particular, the way he defined and executed his duties with regard to the people of Africa can be confidently characterised as an act of international solidarity of a sort often painfully lacking today.

Hammarskjöld's steadfastness in navigating the manifold international interests at play in the Congo and in seeking to implement his policies remains exemplary. Photo: UN Photo

Hammarskjöld's steadfastness in navigating the manifold international interests at play in the Congo and in seeking to implement his policies remains exemplary. He resisted all the efforts and pressures from the hegemonic states both in the East and West to give in. When the Soviet government and its allies campaigned for Hammarskjöld's removal as a lackey of Western imperialism, he delivered his famous speech in the General Assembly in early October 1960, which included the following memorable lines:

> It is not the Soviet Union or indeed any other Big Power who needs the United Nations for their protection, but all the others. In this sense, the Organisation is first of all their Organisation, and I deeply believe in the wisdom with which they will be able to use it and guide it. I shall remain in my post during the term of my Office as a servant of the Organisation in the interest of all those other nations, as long as they wish me to do so.[4]

2 Suffice it to conclude that suspicions that certain Western interests could have been at play in the plane crash are not completely unfounded or dismissed. This in itself points to the outstanding relevance of Hammarskjöld's role as second Secretary-General of the United Nations, as also highlighted in some of the contributions to this volume and in the special issue of the *African Journal on Conflict Resolution*, vol. 11, no. 1, July 2011, on "Southern Africa – 50 years after Hammarskjöld", published by the African Centre for the Constructive Resolution of Disputes (ACCORD) in partnership with the Dag Hammarskjöld in connection with the conference, at which it was launched.

3 See for recent acknowledgments of this role, Manuel Fröhlich, Helmut Klumpjan and Henning Melber, *Dag Hammarskjöld (1905-1961). Für eine friedliche Welt – Ideen und Impulse des zweiten UN-Generalsekretärs*, Frankfurt am Main: Brandes & Apsel 2011; Manuel Fröhlich, *Political Ethics and the United Nations. Dag Hammarskjöld as Secretary-General*, Abingdon: Routledge 2008.

4 General Assembly Official Records, Fifteenth Session, 883rd plenary meeting. New York, 3 October 1960, in Andrew W. Cordier and Wilder Foote (eds), *Public Papers of the Secretaries-General of the United Nations. Volume V: Dag Hammarskjöld 1960-1961*, New York and London: Columbia University Press 1975, pp. 200f. As the record notes: 'Here the speech was interrupted for several minutes by a standing ovation.'

He continued to stay on course in the subsequent debates in the Security Council. On 13 February 1961, he stated in another response in the Security Council to continued demands for his resignation over the policy in the Congo:

> For seven or eight months, through efforts far beyond the imagination of those who founded this Organization, it has tried to counter tendencies to introduce the Big-Power conflict into Africa and put the young African countries under the shadow of the cold war. It has done so with great risks and against heavy odds. It has done so at the cost of very great personal sacrifices for a great number of people. In the beginning the effort was successful, and I do not now hesitate to say that on more than one occasion the drift into a war with foreign-power intervention of the Korean or Spanish type was avoided only thanks to the work done by the Organization, basing itself on African solidarity. We effectively countered efforts from all sides to make the Congo a happy hunting ground for national interests. To be a roadblock to such efforts is to make yourself the target of attacks from all those who find their plans thwarted[…]From both sides the main accusation was a lack of objectivity. The historian will undoubtedly find in this balance of accusations the very evidence of that objectivity we were accused of lacking, but also of the fact that very many Member nations have not yet accepted the limits put on their national ambitions by the very existence of the United Nations and by the membership of that Organization.[5]

Another instance of his even-handedness towards the big powers was shared by Sture Linnér (1917-2010) during his presentation of the annual Dag Hammarskjöld lecture in October 2007 in Uppsala. Linnér was at the time of Hammarskjöld's death Under-Secretary-General in charge of the UN mission in the Congo. In July 1961, President J.F. Kennedy tried to intervene directly. Afraid that Antoine Gizenga, suspected of representing Soviet interests, would come to political power and then campaign for election as prime minister, Kennedy demanded the UN should prevent Gizenga from seizing office. If the UN did not comply, Kennedy intimated, the United States of America and other Western powers might withdraw their support from the UN. Reportedly, Hammarskjöld, in a phone conversation with Linnér, dismissed this unveiled threat with the following words: 'I do not intend to give way to any pressure, be it from the East or the West; we shall sink or swim. Continue to follow the line you find to be in accordance with the UN Charter.'[6]

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5 Second Statement after Soviet Demand for His Dismissal. New York, 13 February 1961. Security Council Official Records, Sixteenth Year, 933rd meeting in ibid., pp. 349f.

6 Sture Linnér, 'Dag Hammarskjöld and the Congo Crisis, 1960-61', in Sture Linnér and Sverker Åström, *UN Secretary-General Hammarskjöld. Reflections and Personal Experiences. The 2007 Dag Hammarskjöld Lecture*, Uppsala: Dag Hammarskjöld Foundation and Uppsala University 2008, p. 26.

Sture Linnér ended his Dag Hammarskjöld lecture with these words:

> The Congo crisis could easily have provoked armed conflicts in other parts of Africa, even led to a world war. It was Dag Hammarskjöld and no one else who prevented that. And it is certain that for a suffering people he came to be seen as a model; he brought light into the heart of darkness.[7]

Sture Linnér

Since then, African peoples, people and states have assumed more ownership over their affairs and achieved further emancipation from colonialism and the direct external influences imposed on their societies through the big powers. Some of the challenges they face today are the reference points for the conference contributions included in this volume. We have, however, also maintained the link to the Hammarskjöld legacy, which was the original intention of the conference. One of the striking features of the deliberations was indeed the extent to which so many of the participants could relate to the values and norms represented by the Secretary-General so long ago. The times have changed, as has the United Nations, but many of the daunting challenges then remain to be tackled today. We trust that the various dimensions and perspectives presented in the contributions to follow testify to the relevance of the United Nations, the legacy of Dag Hammarskjöld and the need for local and regional ownership in responsibly addressing the obstacles on the road to greater justice and equality in our world.

★★★

7 Ibid., p. 29.

We acknowledge our appreciation for the dedicated work of the teams at the Dag Hammarskjöld Foundation and the Department of Political Sciences, University of Pretoria in making this high calibre event such a success. We are also grateful to the Department of Security Policy at the Ministry for Foreign Affairs of Sweden for granting us the funds to organise this academic and policy-relevant exchange as part of the activities commemorating Dag Hammarskjöld's legacy in this, the 50th anniversary of his untimely death on 18 September 1961. The Embassy of Sweden in South Africa provided much appreciated additional support and added value to this endeavour.

We also wish to thank Mattias Lasson, Peter Colenbrander, Wendy Davies and Robert Österbergh for their reliable and capable support in editing and laying out the papers for publication. We trust this volume will serve as a valuable contribution to further discussion of current topical issues and will underscore the fact that the Hammarskjöld legacy is not simply of historical significance but also remains relevant for the debates of today.


ARGENT

Opening Contributions

» Welcome by Professor Cheryl de la Rey, Vice-Chancellor and Principal of the University of Pretoria

Welcome to the University of Pretoria on the occasion of this event that marks the 50th anniversary of second Secretary-General of the United Nations Dag Hammarskjöld. On behalf of the University of Pretoria community we are honoured to host this seminar as it is of direct relevance not only to South Africa and the African region but it resonates with contemporary issues within the University itself.

Over the past two decades the University of Pretoria has changed substantially. What was once a white Afrikaans university is now the largest contact university in South Africa with a diverse, multicultural and multilingual student population of over 45 000 contact education students and another 20 000 enrolled in distance education. With a total of over 65 000 students, we have asked ourselves fundamental questions about the values embedded in our curricula and our institutional culture. An outcome of these discussions is that as a public university in a developing democracy, we have committed ourselves to educating graduates who will not only have high quality degrees but graduates who will also demonstrate qualities of good citizenship – the qualities and values that are inherent in Hammarskjöld's legacy; a legacy that is undoubtedly relevant to the challenges we are facing in Africa today.

Current events here in South Africa and in our African region – from levels of interpersonal violence to public violence of all forms – leave little doubt that we have much to learn in relation to deliberation, debate and dialogue. Dag Hammarskjöld's deep belief in dialogue and inter-cultural exchange was exemplified in his leadership behaviour. He engaged with those portrayed as "the other" and he was willing to engage in dialogue with those with whom he differed. In this seminar we have an opportunity to reflect upon and learn from his commitment to dialogue and debate in order to foster democracy and peace-building in our communities.

I wish to express appreciation to the Dag Hammarskjöld Foundation based in Uppsala, Sweden and our Department for Political Sciences for creating this opportunity to learn through this seminar. Thank you too for the financial support of the Ministry for Foreign Affairs in Sweden and the Embassy of Sweden to South Africa.

The Administration Building of the University of Pretoria, or 'The Ship' as it is colloquially known.

The University of Pretoria as a changing African institution is a well-chosen venue for this seminar, which during the following two days will reflect on "The United Nations and Regional Challenges in Africa – 50 Years after the Death of Dag Hammarskjöld".

» Statement by Peter Tejler Ambassador of Sweden to South Africa

Both the life of Hammarskjöld, the man who came from a small then-neutral country to become the Secretary-General of the United Nations without even being aware of his candidacy beforehand, and his death in pursuit of the values he always tried to uphold, have given rise to many opinions. Innumerable books and papers have dealt with these issues. I will allow myself a more personal point of departure and give some Swedish perspectives on Hammarskjöld. In my view, these Swedish perspectives are clearly visible in Hammarskjöld's stewardship of the UN.

The first relates to his family. Let's start with his father. The Hammarskjöld family is well-known in Sweden. A number of military men and civil servants have through the centuries borne this name and still do. His father, Hjalmar, was a law professor, minister of justice, minister of education and provincial governor. During the First World War, he was Sweden's prime minister, even though he was not a member of any political party. He was criticised for his principled or perhaps inflexible view of international law. He also seems to have been what we today would call a loner. The father obviously had an impact on Dag and I will revert to this later. On his mother's side, the family background was different and we meet scientists, clergymen and authors. This heritage also had an influence on Dag, who, in parallel with his impeccable career as a civil servant, also had a rich intellectual and spiritual life.

Dag had three siblings. Two became specialists in international law and one became a writer. He studied law at the university and graduated with a bachelor of laws and a master's degree in political economy. He went on to study economics at Stockholm University, writing a thesis entitled 'The Spread of the Business Cycle'. In 1936, at the age of 31, he was appointed deputy minister of finance. Twelve years later, he became the permanent undersecretary – the equivalent of deputy minister – at the ministry for foreign affairs, dealing mainly with international economic matters. At that time the world was dealing with the aftermath of the Second World War and saw the onset of the Cold War and a bipolar world.

A few years later, he was appointed minister without portfolio at the foreign ministry and became a member of the cabinet. At that time, the Social Democrats were in power in Sweden, but Hammarskjöld was not a member of any political party. He was a civil servant, nothing more and nothing less.

To clarify his non-political position he published an article in a magazine closely associated with the Social Democratic party. In it, he wrote that the basic and self-evident tenet in the political ethics of a civil servant is that he serves the society and not any group, party or any other special interests. Later in the same article, he made direct reference to Albert Schweitzer, the German-speaking doctor from Alsace, writer and philosopher, who for half a century worked in today's Gabon and was one of Hammarskjöld's most valued contemporary role models, although 30 years his senior. Hammarskjöld noted that Schweitzer's brand of ethics led to the obvious subordination of one's personal interest to the whole, with a morally mandatory loyalty first to society as it emerges in a nation, but second to the greater concept of society represented by internationalism.

With this early statement of convictions in mind, Hammarskjöld's later refusal in the UN to bow to the great powers, be they the US, UK, France or Soviet Union, cannot have been unexpected. In his historic confrontation with Nikita Khrushchev over UN involvement in the Congo crisis, he refused to comply with the Soviet leader's demand that he resign. He made it clear that 'it is not the Soviet Union or indeed any other Big Power who needs the United Nations for their protection, but the others', and continued that he saw his mandate as advocating the interests of weaker countries. He reiterated his determination to continue on this course by stating that, 'if it is the wish of those nations who see in the Organisation their best protection in the present world, I shall now do so again'. For me, this is only the logical corollary of his explanation of why he had once agreed to serve in government as a non-political member of the Swedish cabinet.

It has also been said that it was Hammarskjöld who minted the term 'international civil servant'. Whether this claim is right or wrong, his interpretation of his own mandate and obligations and the mandate and obligations of those who worked with him in the UN from 1953 to 1961 was clear. In the same vein, it is striking how often Hammarskjöld used the word 'integrity'. It is a term we hear so often today that, I would argue, it risks losing some of its real value. But things were different in Hammarskjöld's day and his usage of 'integrity' fits snugly into his understanding of the role of the civil servant.

Against this backdrop, Hammarskjöld's attitude to the media is also worth noting. Again, we must remember the times. News, views and information were disseminated mainly through radio and print media. It was early days for TV and the internet, mobile phones and blogs did not exist. But Hammarskjöld was quick to understand the importance of reaching out to the media to get his message across.

He held regular press briefings, made himself available for interviews and made public appearances. Hammarskjöld mastered four languages – English, German, French and Swedish – and although his delivery seems to have been slightly wooden and stiff, he knew how to create punch lines, as the following examples amply illustrate:

> 'The UN was not created to take humanity to heaven but to save it from hell.'
>
> 'Never, for the sake of peace and quiet, deny your own experience or convictions.'
>
> 'Freedom from fear could be said to sum up the whole philosophy of human rights.'

All three sentences have less than 150 characters – What a Twitter!

30 December 1954

Before his departure on the first leg of his mission to Beijing, the Secretary-General issued a statement, while movie and television cameras recorded the proceedings. Photo: UN Photo

In this respect, and in the way he looked at his own role as civil servant, for me Dag Hammarskjöld was a modern leader. He had a clear vision for the UN and knew where he wanted to take the organisation, which, when he took over, had more or less fallen into disrepute and had a dispirited Secretariat. It was he who developed two of UN's most used instruments: the peacekeeping operation – first used during the Suez crisis in 1956 – and the good offices of the Secretary-General – a precursor to modern preventive diplomacy. But it is also said by some of Hammarskjöld that he was a loner, that he didn't know how to delegate and that he was an authoritarian leader. There is also some truth in that. He didn't suffer fools gladly, but who does? He also wrote many of his speeches himself and often took his own minutes.

So how did he see himself? Let me give you but one example. As I have already noted, Hammarskjöld was also a classic intellectual: he translated poetry into Swedish, wrote his book *Markings* – in which one-sixth of the entries are haiku aphorisms – and kept up friendships with a number of well-known authors, Swedish and foreign. Upon the death of this father – and now we return to him – Dag succeeded him as a member of the Royal Swedish Academy, which awards the Nobel prize for literature. As tradition has it, the new academy member speaks of his predecessor. Of his father, this is what Dag said: 'a mature man is his own judge.' In the end, his only solid support is his faithfulness to his own convictions. Advice from others may be welcome and valuable, but does not absolve a person from responsibility. Thus he may become very lonely.

This seems like a proper description of the son himself. But as is clear from *Markings*, he was his own harshest critic. At the same time, his personal friends describe him as warm, stimulating, intellectually challenging and with a memory of unusual capacity. For me, the fundamental legacy of Dag Hammarskjöld is the mantra, 'Don't shun your responsibility and remain faithful to your convictions.' It's as valid today as it was then.

» Keynote by Marius Fransman Member of Parliament and Deputy Minister for International Relations and Cooperation / Republic of South Africa

We meet on the eve after the birth of Africa's newest state and the UN's latest member state. Few things can symbolise so closely the intimate and intricate relationship between the role of the UN in Africa in general and particularly her role in addressing regional challenges.

At the outset I want to say that I feel greatly honoured to have been invited to participate in this Seminar, especially organized around such an important topic that relates to the United Nations and its historic association with the Continent of Africa. Allow me to express my words of appreciation and those of the Department of International Relations and Cooperation (DIRCO) to the joint organizers of this Seminar, i.e. the Department of Political Sciences of the University of Pretoria; the Dag Hammarskjöld Foundation; and the Embassy of Sweden resident here in Pretoria.

I believe it would not be out of place on this occasion to also acknowledge the role of Sweden and its people, in our liberation struggle and the continued support in the democratic era in a myriad of ways. Strengthening this valuable relationship in the context of the broader regional challenges in Africa could perhaps be the best tribute to life and ideals of Dag Hammarskjöld.

I feel even more humbled to have been requested to speak not only on the United Nations and its long relationship with the African Continent, but more so to reflect on the contributions of one of the UN's best diplomats and former Second Secretary General, Dag Hammarskjöld.

As we meet here today and take time to reflect on the legacy of this great man, we are encouraged by his selfless dedication to "serving the family of nations" and his open rebellion against the often-times unfair "influence of big powers". It was Hammarskjöld who said that he will "remain in his post as a servant of the United Nations in the interest of all those other nations". Fifty-years after his death - we who still remain behind – can only applaud and live the values that Hammarskjöld espoused.

As South Africa, we find areas of convergence between Hammarskjöld's values of peace-building, security and respect to human rights – and the values that underpin our foreign policy. As DIRCO, our argument is that there will never be sustainable development in Africa in the absence of peace, and vice versa. In the same breath, we can also associate ourselves with Hammarskjöld's argument that "without the recognition of human rights we shall never have peace, and that it is only within the framework of peace that human rights can be fully developed."

We read with much appreciation on the level of philosophical intellect of Hammarskjöld, especially his assertion that the "UN Security Council exists primarily for settling conflicts; whilst the UN Economic and Social Council exists primarily to eliminate the causes of conflicts by working to change these economic, emotional and social conditions, that create these conflicts".

Multilateralism remains important in our foreign policy, as the growing complexity of international interaction in almost every sphere of human life, makes it imperative for us to reconcile and harmonize the frequently conflicting interests of countries. Our vision remains that of building an African continent that is prosperous, peaceful, democratic, non-racial, non-sexist and united - which contributes to a world that is just and equitable. In our participation within the multilateral system, we embrace the space in the knowledge that it affords us an opportunity to significantly contribute to the promotion and protection of multilateralism and the respect for international law.

We take particular interest in the strengthening of effective partnerships between the UN and regional organisations, in particular the African Union in the maintenance of international peace and security, as well as the intensification of our shared work. Our brief history within the multilateral system attests to the fact that we have already undertaken programmes in conflict prevention, resolution, management and post-conflict reconstruction and peace-building in African countries such as Sudan, Côte d'Ivoire, Burundi, the DRC and elsewhere.

Founded on October 24, 1945, among the rubble of two devastating World Wars, the UN was established with the aim of stabilizing international relations and to give peace a more secure, global foundation. Despite the inevitable ongoing global challenges being faced by humankind, the UN system has achieved a remarkable degree of success in so many important areas.

Among these successes that have left a lasting legacy are: maintaining peace and security; helping to prevent nuclear proliferation; helping to provide humanitarian aid to refugees and other victims of conflict; promoting democracy, development and human rights, especially the rights of women, children and other vulnerable groups; protecting the environment; and generating and maintaining worldwide commitment in support of the achievement of the Millennium Development Goals (MDGs) – the goals that underpin our collective vision of a development strategy for a better, more prosperous and secure future.

South Africa remains a committed participant in the multilateral system, principally because, amongst others, we seek to promote a culture of collective responsibility and collective responses in dealing with challenges of the contemporary world. We have committed ourselves to working with other like-minded member-states towards improving the working methods of the Security Council – in order to make it a more legitimate, accountable, transparent, representative and effective international body.

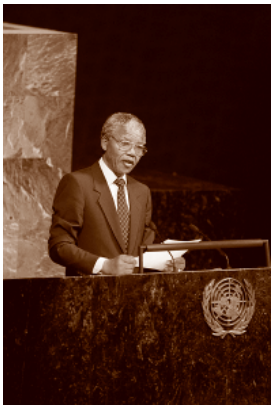
Like Hammarskjöld whose views oftentimes left his audience bewildered by his honesty and desire to positively change the working of the United Nations, so does South Africa aspire to amend the rules formulated in the past by specific interest groups, whether political or institutional – because we believe some of those rules have been rendered irrelevant by the march of time. Despite the attempt by some

UN Secretary-General Dag Hammarskjöld (right), photographed at London Airport in 1956, upon arriving here on the first lap of a six-week world tour during which he would visit 15 UN member countries. With him is Mr. Ahmed S. Bokhari, Under-Secretary in charge of Public Information. Photo: UN Photo

to paint us as non-conformists, our approach is neither intended to be confrontational towards the major economic powers of the world or towards institutions of global governance. It is also not amounting to "ganging-up with the weak and poor against the powerful and rich."

Our view instead is that we believe that rather than complaining to ourselves, we would be better-off engaging those that hold different viewpoints and following different value-systems, no matter how unpopular our ideals may seem today. Just like Hammarskjöld's views in the early 1950s, we believe we owe this not only to ourselves and the generations that came before us, but most importantly we owe this to the generations that will come after us, who will wonder how we were able to turn a blind eye to in-equality, unfairness and injustice.

South Africa remains ready to forge alliances with other interested nations, in a thorough analysis of these global systems and rules created over time – that we believe disadvantage us and perpetuate inequality and unfairness. We draw our courage from what Nelson Mandela said in his Autobiography "The Long Walk to Freedom" that *"I learned that courage was not the absence of fear, but the triumph over it. The brave man is not he who does not feel afraid, but he who conquers that fear."*



22 June 1990

Nelson Mandela, Deputy President of the African National Congress, addresses the Special Committee against Apartheid convened in his honour in the General Assembly hall.
Photo: UN Photo/ Pernaca Sudhakaran

These words of wisdom deeply inform the honesty with which we pursue our search to find equitable solutions to the political, social, economic and security challenges that confront our modern day global environment.

We want to believe that Dag Hammarskjöld, who passed-on seeking to find a peaceful solution to the unrest, which followed the Independence of the former Belgian Congo in 1960, will be proud to know that South Africa picked-up his baton and ensured that the Democratic Republic of Congo eventually embraced peace, despite the challenges. He will also be relieved to know that the DRC was, as we speak, busy preparing to hold its second democratic elections and that South Africa is helping her. When last year the DRC celebrated 50 years of Independence from Belgium, it was a confirmation of Dag's work and the enduring nature of his impeccable legacy of the triumph of peaceful resolution of conflict within a multilateral framework.

In the past decade the winds of change have swept across the African continent, leaving behind an Africa that is a lot more stable than it was in the 1980s and early 1990s. For example, in the 1980s there were only four democracies, and parts of the continent took on an image of a war

zone. Many countries had written off the African continent as a lost cause with little hope that it could ever rise from the ashes.

With time, a number of countries, individually and collectively, started to take initiatives aimed at creating political stability, promoting social cohesion and respect for cultural diversity. At our last count in early 2010, at least 30 African countries had acceded to the African Peer Review Mechanism. In the year 2010, we also witnessed more than 20 African countries celebrating their 50th Year of Independence from Colonialism, Apartheid and political subjugation. These are the living testimonies of the seeds that Hammarskjöld planted those 50-odd years ago.

South Africa has and will always regard the African continent as the centerpiece of its foreign policy, to which it should mobilize a significant amount of resources towards peacemaking, peacebuilding, peacekeeping and post-conflict reconstruction. This is because our vision is that of an African continent that is prosperous, peaceful, democratic, non-racial, non-sexist, united and which contributes to a world that is just and equitable.

Our view is that, our Non-Permanent Membership of the Security Council would, amongst others, present South Africa with an opportunity to promote the African agenda; promote our national priorities; and advance the maintenance of international peace and security for socio-economic development to prosper. It would also afford South Africa an opportunity to significantly contribute to the promotion and protection of multilateralism and the respect for international law; including heightening the profile of our country as a champion and agent of change towards making our continent and the world better.

This would be a continuation of South Africa's firm resolve of strengthening effective partnerships between the UN and regional organizations, in particular the African Union in the maintenance of international peace and security. Similarly, being a member of both the UNSC and AU Peace and Security Council (AUPSC) presents an opportunity for South Africa to continue its efforts of bringing greater alignment to the work of the UNSC and that of the AU, especially the AUPSC. Membership in these two organs would enhance South Africa's resolve of strengthening effective partnerships between UN and regional organizations, in particular the African Union in the maintenance of peace and security.

We look back with appreciation at the theme of the 65th session of the General Assembly on "reaffirming the central role of the United

Nations in global governance", which as South Africa, we felt resonated with what our global citizen, Nelson Mandela, said about this body on the occasion of its 50th anniversary, that (and I quote):

> The United Nations has to reassess its role, redefine its profile and reshape its structures. It should truly reflect the diversity of our universe and ensure equity among the nations in the exercise of power within the system of international relations in general, and the Security Council, in particular.

In closing and notwithstanding the above, our role in the Security Council during 2011 until 2012 will seek to support and take forward, some of the views, vision and values that Dag Hammarskjöld sought to pursue during his time. Our approach will be informed by and resonate with the central thrust of our foreign policy, which stands on four pillars – these are:

» Promoting and advancing the interests of our continent, including the SADC sub-region;

» Working with countries of the South to address challenges of underdevelopment, our marginalization in the international system, and promote equity and social justice globally;

» Work with countries of the North to develop a true and effective partnership for a better world; and

» Do our part to strengthen the multilateral system, including its transformation to reflect the diversity of our nations, and ensure its centrality in global governance.

Let me take this time to thank the organizers of this seminar for inviting the Department of International Relations and Cooperation to participate and learn from all the various inputs by other speakers. DIRCO remains ready to partner with our non-state actors in the exchange of views and the sharing of ideas.

I want to invite this forum to consider that the most dire regional challenges that we are confronted with are not very different from the priority focus areas that Africa's oldest liberation movement (nearly 100 years old) the African National Congress has identified here in South Africa. These challenges are:

» Job Creation

» Eradicating poverty

» Health and Education

» Land reform and Rural Devolopment

» Uprooting crime and corruption

It is in the measure that we address the impact of what we do on the lives of ordinary citizens, that history and future generations will judge us. In this respect the legacy of Dag Hammarskjold lives on in the daily struggle to improve the quality of life of the people of Africa.

I thank you!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Contributions to Panel Debate

» Mediation, Conflict Prevention, Resolution and Post-conflict Reconstruction

Carlos Lopes

The challenges faced by the UN continue unabated. What few people recognise is that the organisation's means keep decreasing rather than increasing, as a result of so many new complexities and mandates. For instance, the so-called zero growth of the UN's regular budgets over the last decade (excluding peacekeeping operations) is in fact a significant decrease, if inflation and US dollar depreciation are taken into account. A quick comparison with the European Commission's size and budget trends over the same period is revealing. Even the exponential growth of peacekeeping, from about 10,000 peacekeepers a decade ago, to more than 120,000 today, is misleading. Most of the growth occurred because of the use of the UN for non-priority peace efforts. For a number of donor countries it is convenient that less strategic or key conflicts are handled on the cheap by the UN traditional troop-contributing countries, which are normally from the South.

There is growing international polarisation, substantiated by a higher level of uneasiness with concepts and methodologies used in multilateralism; as well as power shifts that have undermined the traditional predictability of decision-making in organs such as the UN Security Council. The concept of sovereignty, for instance, is being eroded on the one hand, and is hostage to defensive positions on the other. Sovereignty is being questioned by international humanitarian law, Responsibility to Protect, international criminal justice or even in the areas of health and the environment, to name a few. Yet it is sovereignty that is invoked to stop most of the far-reaching intergovernmental processes – such as those relating to trade, environment, disarmament and nuclear proliferation – from moving forward.

Such levels of complexity strongly influence the perceptions we have of peace and security as well as the role the UN should play in them. The way we define conflicts is a good illustration of this truth.

Research conducted at Uppsala University[1] found that between the 1960s and 1991, there was a constant rise in the number of wars and armed violence, which was followed by a peak in 1992 with over 50 ongoing armed conflicts. Thereafter the trend has reversed, and in 2009 only 36 active armed conflicts were recorded by the same study (including the conflicts in Afghanistan, Iraq, Pakistan, Rwanda, Sri Lanka and Somalia). Over the last few years, the number of recorded conflicts has hovered around 30.

In order to understand the rationale behind the reduction in the number of armed conflicts, it is important to recognise that many factors play a role and, often, the positive impact that economic growth and democratisation can have is overlooked. Mediation efforts are also fundamental to reducing the number of possible conflicts, but mediation is being made difficult by new challenges in relation to concepts, theory and practice.

The majority of current conflicts are internal and eminently political. About 70 per cent of these are taking place in Africa (including Sudan, Ethiopia, Somalia and the Democratic Republic of the Congo). The overall reduction in the number of violent conflicts can, in part, be attributed to the collective efforts of the United Nations, other international actors and regional organisations. We have seen African states taking increased responsibility through their sub-regional formations, while at the same time recognising that the peaceful resolution of disputes remains a sovereign duty.

The above raises a number of questions, such as: why has a 'plateau' been reached in the trend of a diminishing number of ongoing conflicts? What

The overall reduction in the number of violent conflicts can, in part, be attributed to the collective efforts of the United Nations, other international actors and regional organisations. Photo: UN Photo/Eric Kanalstein

1 Uppsala Conflict Data Program (www.ucdp.uu.se)

needs to improve with regard to conflict prevention and mediation efforts in order to 'jump start' the downward trend again? Can the downward trend alone be attributed to the increased mediation efforts and a sustained preventive effort aimed at fostering economic growth and democratisation? Are our peacemaking initiatives bearing fruit? If this is the case, what might be some of the reasons for the positive trend not continuing?

It is difficult to find a consensus in response to these questions. It is possible to accept, nevertheless, that the nature of conflicts has clearly changed in the past few years. The focus on identity, access to political decision-making and citizenship are just a few areas that have clearly influenced why people are willing to engage in violent struggle, if need be, for their cause. Social conditions, economic disparities and access – or denial of access – to political power and decision-making determine and influence how these wars are fought today.

This changing nature of conflicts, together with the increase in internal wars in peripheral areas, poses several dilemmas, especially with reference to vulnerable actors, such as children and women. Three 'dilemmas of war' confront us today with acute complexity:

1. The increasing lack of distinction between civilians and combatants, resulting in the majority of casualties today being among civilians. This is further encouraged by the more and more common use of civilians as human shields and by the 'collateral damage' resulting from aerial bombardments, drone attacks and other tactical directives.

2. The changing nature of combatants, which today often includes women and children as active players. This raises questions for international law, such as whether to try a child perpetrator as an adult or as a child; whether the rules of engagement should be different when encountering a child; and whether children in detention need to be treated differently. In addition, the new phenomenon of entities outside command and control structures such as private contractors and rogue Special Forces adds to the complex challenge of ensuring that human rights and international humanitarian law are respected.

3. The blurring of lines between military and criminal activities and between military and humanitarian/development activities. Powerful armed gangs control political activities and shift between criminal acts and political action. The question arises as to whether they can be seen as conflict parties, who should be bound by the Geneva Conventions and by standards of international humanitarian law, or whether they only abide by criminal law. In addition, the lines are

increasingly blurred between military and humanitarian actors, with humanitarian and development activities being carried out by the military, and in some situations relying on the military for security coverage. This has led to the debate on the protection of humanitarian space and how the UN can best serve the people. It also raises new dilemmas related to the UN being accused of complicity in war crimes, especially in relation to humanitarian actors.

Averting violent conflict and promoting peace is central to the United Nation's mission. The UN Secretary-General's High Level Panel on Threats, Challenges and Change noted in 2004[2] that 'the primary challenge for the United Nations and its members is to ensure that… [threats] that are distant do not become imminent and those that are imminent do not actually become destructive'. The Panel thereby placed preventive action at the very centre of collective security and the UN's role in the world.

We need to prioritise conflict prevention as part of the development agenda and identify a clear threshold for 'constructive involvement', if we are serious about preventing armed conflict and violations of universal human rights. Photo: UN Photo/ Albert Gonzalez Farran

The changing dynamics require making the protection of civilians, especially women and children, a primary goal for the UN. Advances have been made through the inclusion of the protection of civilians in peacekeeping mandates, but more thinking needs to be done to ensure the image of the UN is not at stake when it is given a mandate that is not possible to fulfil due to limited numbers of troops on the ground or other constraints. Strong emphasis needs to be placed on the protection of civilians and to this end the UN ought to be prepared to be assertive, including undertaking robust peacekeeping for humanitarian purposes, if need be.

As indicated in the 2011 *World Development Report on Conflict, Security, and Development*,[3] not only have the threats changed, but also 'insecurity has become the primary development challenge of our time'. The expression of violence has also changed. Today, although statistically we see a decrease in the number of reported armed conflicts, we can observe nevertheless a steady increase in organised crime and criminal activities. The absence of the state, in all or part of its territories, irrespective of the reasons behind this absence (for example, lack of capacity; resource challenges; unwillingness to engage; politically motivated interests; corruption) leaves room for drug-trafficking, money-laundering, financial criminal acts, suicide bombings, human

2 Report of the High-level Panel on Threats, Challenges and Change: 'A more secure world: Our shared responsibility' (A/59/565, p.12).

3 *World Development Report, Conflict, Security and Development* (2011), World Bank: Washington DC.

trafficking and the availability and use of small arms to increase and flourish. These are certainly not just 'African problems', but present in many parts of the world, as evident, for example, in Colombian and Mexican drug cartels, Central American, politically motivated gang wars – *maras* – human and organ trafficking in Eastern Europe, money-laundering activities in Central Asia and criminality within ghettos in European metropolises.

Transnational organised crime is an additional threat, which calls for a revisiting of some of the traditional conflict prevention analysis and approaches. Conflict prevention is a term used to cover a wide range of engagement and tools, from proximate or operational prevention (including response to crises) to structural prevention (addressing political, social and economic fault-lines), peacemaking efforts carried out in a timely manner and peacebuilding initiatives, to prevent the recurrence of violent conflict. Recent work on measuring the impact of peacebuilding in the immediate aftermath of conflict has shown that the sequencing and prioritising of actions is fundamental.

We need to prioritise conflict prevention as part of the development agenda and identify a clear threshold for 'constructive involvement', if we are serious about preventing armed conflict and violations of universal human rights. Recent experiences in Libya and Côte d'Ivoire show that the response has come too late. There is a renewed need to move from reaction to prevention.

At the same time, there are already numerous mechanisms – articulating a wide range of norms and values – all aimed at conflict prevention, resolution and post-conflict reconstruction. In addition to the United Nations, the African Union Peace and Security Architecture (APSA), launched in 2002, includes mechanisms such as the Peace and Security Council, a Continental Early Warning System, a Panel of the Wise (as an enhanced mediation capacity), an African stand-by force and a post-conflict reconstruction and development framework. This is an impressive change.

Available 'tools' such as mediation have been used to address mutual mistrust and lack of confidence. Mediators facilitate the transformation of actors' perceptions of the conflict issues at stake and aim to help parties identify root causes as well as the critical needs and interests of all concerned so that mutually beneficial and sustainable solutions may be forged. They also play a significant role in facilitating ceasefire

agreements, which demonstrates that mediation can be a high-risk process for which confidence-building is at the core. Another mechanism that is often utilised is diplomatic action (for example, through the good offices of the Secretary-General) to bring hostile parties to an agreement, essentially through non-military means such as those envisaged in Chapter VI of the UN Charter. Third-party facilitation is also often used to re-establish a stable political process and dialogue between contending political leaders and elites.

Focusing specifically on Africa, it is important to reiterate that the protocol that established the AU Peace and Security Council also specifically stipulates that 'in the fulfilment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate and work closely with the United Nations Security Council'. A number of joint meetings of the UN Security Council and the AU Peace and Security Council have taken place.

To conclude, refined, timely and strategic early warning information and analysis can help inform concerned actors. However, as we know, it is early *action* that is required to save lives and promote social cohesion, stability and, ultimately, prosperity, and Dag Hammarskjöld's legacy in the area of 'preventive diplomacy' is today more enlightening than ever. Our modern global challenges with their complexity and interconnectedness have transformed the nature of conflicts, as we have seen. Nevertheless, the ability to prevent such conflicts should still be at the heart of the international community's goals. New, complex and innovative solutions are required. This is where Dag Hammarskjöld's talent in resolving and preventing conflicts, rather than managing them, should still serve as a lesson to all modern mediators. His skilful diplomatic preventive actions, models for coalition-making, and ability to accept risks during mediations paved the way for a new, modern type of early warning and action that still represents a beacon for today's multilateral diplomacy. He was also the real developer of the peacekeeping tools the UN still uses today. The best recognition we can offer his memory is to keep the high moral standards he enshrined, while renewing our approaches to better meet today's challenges.

» Dag Hammarskjöld's Legacy – The United Nations and Africa

Jan Axel Nordlander

Dag Hammarskjöld's vision was a United Nations Organisation as a tool for the common good of mankind: for peace, justice, human rights and democratic principles.

The UN legacy in Africa is of course first and foremost decolonisation. During Hammarskjöld's term of office, some 25 African nations became independent. It is against this background that the Secretary-General's strong emphasis on the United Nations as not only a forum but also a safeguard for small and emerging states – whether in terms of surface, population or strength – is of crucial importance.

Hammarskjöld also introduced the first armed peacekeeping force, the United Nations Emergency Force, in Egypt and Israel, thus partly in Africa. Still today the United Nations provides six peacekeeping operations in this continent.

International public law is a prerequisite for the emancipation of small and emerging states as well as for mounting international peacekeeping operations. During the 50 years that have passed since Hammarskjöld's demise, the body of international law as an elaboration and codification of the Universal Declaration of Human Rights of 1948 has grown tremendously, and so have related areas, such as humanitarian law and the law of war, including pioneering legislation on genocide, crimes against humanity and other areas.

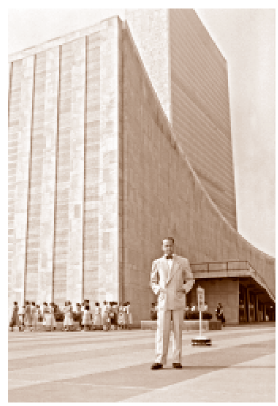
It could be said that we now have a fairly satisfactory international legal framework for the protection of human rights and against violations by states. The implementation of these laws is, however, far less satisfactory, for the application of international public law rests upon the rule of law in individual states and, unfortunately, law does not rule everywhere or else it rules only when seen as convenient. Narrow and shortsighted interests often obstruct such things as the respect for an independent judiciary, and for enforcing verdicts, and therefore impede the implementation of international law. According to the World Justice Project and their 2011 Rule of Law Index, South Africa ranks best in sub-Saharan Africa, closely followed by Ghana, while all other states

figure in the last tier of the global ranking of the rule of law – a fact important to consider when we want to discuss regional challenges!

It is not my intention to grade states or to point fingers, but to explore reasons and possible remedies. In the beginning I mentioned the legacy of the United Nations in the decolonisation of Africa. The right to self-determination, the first article of the Covenant on Civil and Political Rights, indeed stands as both a result and a tool of the decolonisation process.

During the many sessions of the UN Human Rights Council which I have attended, I have often heard representatives of so-called Third World countries speak against proposed actions of the Council, such as adopting a country resolution, calling a special session or dispatching a commission of inquiry to a country where suspected human rights abuses were taking place. Sometimes there would be sombre motives for the resistance, but more often than not, those representatives were not speaking against respect for human rights but trying to safeguard what was to them the overriding principle of national sovereignty, understandably dear especially to those nations that have been independent only for some 50 years.

Let me just state that I believe it necessary to de-dramatise the concept of sovereignty in order to promote the implementation of international public law. After all, 192 states gave up a piece of their sovereignty already when they became members of the UN. Did that hurt a lot? UN Under-Secretary-General Kigo Akasaka said, at another Hammarskjöld commemorative event in Finland earlier this year, that '[g]overnments should give priority to the general global good rather than to specific national interests'. A pious expectation, but I would hope not totally unrealistic since the future of individual states is increasingly linked to our interdependent global future.



Hammarskjöld's main legacy, as we have seen, is peace, although peace has evaded many African nations for long years. Photo: UN Photo/MB

Hammarskjöld's main legacy, as we have seen, is peace, although peace has evaded many African nations for long years. Another legacy is humanitarian principles in international relations, including joint humanitarian actions by the international community, perhaps best illustrated by the work of the UNHCR, a Nobel Peace Prize winner in 1954. In the 1960s the decolonisation process produced mass migration and the first of Africa's numerous refugee crises. The responsibility of the UNHCR now also encompasses a large number of internally displaced persons – although their mandate is unclear in that respect. The needs of the refugees or the displaced are not limited to humanitarian support but include a very important protection mechanism, ideally a mirror of international solidarity.

The number of refugees and displaced persons in sub-Saharan Africa has declined from 3.4 million to 2 million in 10 years. That is a sign that peace and stability is gaining ground, but the figures remain high. South Africa alone hosts 222,000 asylum seekers, as compared to 236,000 in all of the European Union's 27 member states. Still, certain countries of the European Union are so upset at these numbers that new measures to construct a 'Fortress Europe' are being proposed.

Here in Africa the foremost UN legacy in human rights is the role the world organisation played in dismantling apartheid and in adopting the Convention on Elimination of all forms of Racial Discrimination in 1965.

I don't think that Hammarskjöld believed that his legacy could be implemented quickly: yes, he was an idealist, but also very aware of the requirements of *realpolitik*. Peace is not yet attained everywhere, but the United Nations plays a very important role in maintaining peace where it has been attained, the very recent example is of course the United Nations Mission in South Sudan. Democracy has gained ground in Africa, at least as an uncontested principle. Justice and rule of law remains a dream for many, but there is an African Human Rights Commission and Court. The annual survey of human rights in the world, presented by Sweden's foreign minister last week, indicates that while there are several dark spots of serious violations, the general trend is encouraging, including in Africa. And last but not least, poverty is being beaten back.

» A Legacy of the UN and Africa

Dumisani S. Kumalo

One cannot discuss the legacy of Secretary-General Dag Hammarskjöld without recalling the time at which he was at the helm of the United Nations.

Many African countries gained independence and joined the UN during Hammarskjöld's final years as Secretary-General. It really mattered who was the person to receive the credentials of the representatives of those countries and listen to the issues they brought along to this premier international forum. Having served for ten years in the United Nations in New York, and also having been associated with the UN for several years before that, I can assure you that this was an important dimension for Africa, and this comes out in everything that is written about Dag Hammarskjöld as Secretary-General.

The fact that these days the UN's role and impartiality is being questioned, especially in Africa, can also be traced to the leadership of the United Nations in this current period.

Let us remember that the UN is a crossroads – literally on First Avenue and 42nd Street in New York – where humanity, in the form of the General Assembly, gathers once a year to meet and discuss challenges and lay down burdens we all face. For those working within the UN, it remains forever a complicated institution. For those on the outside who come once a year, it can be an almost bewildering place.

So, for the new and decolonised African countries that came to be represented in New York at the end of the 1950s and the beginning of the 1960s, it mattered that there was a person like Secretary-General Hammarskjöld. The fact that he was, as Henning Melber has put it, a man 'of uncompromising integrity', helped African states find their confidence and, indeed, their own direction in the UN.

There are many qualities that Hammarskjöld left as a legacy to the UN. The papers before this conference, particularly the commemorative issue published by ACCORD, have captured those qualities in great detail. For me, however, two fundamental qualities stand out in the legacy that Hammarskjöld left the UN and the world.

The first one of these was his steadfast adherence to the principle of impartiality as Secretary-General. Article 100 of the UN Charter states that 'the Secretary-General and his or her staff shall not seek or receive instructions from any Government or from any authority external to the Organization.' It further states that 'each Member of the UN undertakes to respect exclusively the international character and responsibilities of the Secretary-General and the staff and not seek to influence them in discharge of their responsibilities.'

Anyone one who has served either as Secretary-General or even on the senior staff of the UN can give many examples of how the powerful members of the UN have often ignored Article 100 and tried to bully their way through the organisation to get what they want.

I can give you many personal examples of occasions when I have stood up to some of the big powers, and sometimes succeeded in embarrassing them into remembering that there is such an article in the Charter. Very often, they have got things their own way. As Secretary-General, even Hammarskjöld was not immune to these pressures.

Perhaps Hammarskjöld best demonstrated the protection of sovereignty in 1960 when he dispatched a peacekeeping mission to the Congo 'in order to protect the sovereignty of the Congo', as he himself described it.

Left: Nurse Ayana with Nurse Zenawit Ayele, leaving the Brigade Headquarters. 1960. Photo: UN Photo/JH

The second principle Hammarskjöld emphasised was the sovereignty of states, which is enshrined in the UN Charter. I am aware that sovereignty has become controversial over the years as some leaders try to hide behind it so as to get away with denying their citizens their human rights. However, I still believe that just because sovereignty has been abused by some, does not mean it should be denied to everyone else. Perhaps Hammarskjöld best demonstrated the protection of sovereignty in 1960 when he dispatched a peacekeeping mission to the Congo 'in order to protect the sovereignty of the Congo', as he himself described it. The fact that the situation in the Congo has remained challenging since then does not mean that Congolese sovereignty was not important then or is not equally important now.

We have recently witnessed two events in Africa that show how things can go wrong when the principles of sovereignty and the impartiality of the UN are compromised. In Côte Ivoire, we watched for the first time ever – and I dare say that for some of us it was with absolute horror and sadness – UN peacekeepers being instructed to fight alongside the army of one of the powerful members of the UN and to attack a sovereign African member state, one which ironically, could not even be defined as an enemy under Article 53 of the UN Charter.

In Côte Ivoire, we watched for the first time ever UN peacekeepers being instructed to fight alongside the army of one of the powerful members of the UN and to attack a sovereign African member state.
Photo: UN Photo/Basile Zoma

In Libya, once again we watched the UN side with NATO and its powerful supporters to engage in 'regime change' under the guise of protecting civilians. Ironically, it was the same NATO that sided with the Belgian forces and against Dag Hammarskjöld when the sovereignty of the Congo was threatened in 1960.

The question before us, then, is: how do we try to protect and promote the legacy that Hammarskjöld left us?

I believe that in Africa, we have to become more committed to resolving our own conflicts on the continent. We must protect and promote human rights and women's rights, and fight against the scourge of poverty and disease. These are things we can do in partnership with our friends from other countries but not under the direction and control of such friends. The ultimate challenge is for us as Africans to show leadership and take responsibility for our affairs. There is a saying, which I first heard as a child, that God helps those who help themselves. Maybe a variation on this could be that the world should help those who help themselves, but without interference.

Dag Hammarsjöld came out of his native Sweden convinced that the world would be a better place if the spiritual otherness of each of us were recognised and respected. Against great odds, and in the face of the powerful countries, which did not want to be contradicted, Dag Hammarskjöld stood for what he believed was right. In the end, he lost his life so doing. And the UN, Africa and indeed the whole world is a better place for his selfless contributions. It is up to us to walk in his footsteps.

Keynote Lectures

» # Dag Hammarskjöld – Ethics, Solidarity and Global Leadership

Henning Melber

> 'Sit on the ground and talk to people.
> That's the most important thing.'

It was not a social anthropologist who provided this advice. Rather, this was the answer given by Dag Hammarskjöld, the second Secretary-General of the United Nations, when asked over dinner by his friend John Steinbeck what would matter most during a world tour.[1] He had followed a similar approach (though not necessarily sitting on the ground while talking to the people) during a five-week trip through large parts of Africa. The journey, from 22 December 1959 to the end of January 1960, took him to more than 20 countries on the continent, over which the 'winds of change' had begun to blow. Upon his return on 31 January, he declared:

> I would say that this experience over this long journey makes me less inclined than ever to generalize, less than ever willing to say this or that about Africa or this or that about the Africans, because just as there is very much in common, especially the aspirations, there is also an enormous diversity of problems, of attitudes, and of traditions. In such a way, the journey makes me both a little bit wiser and a lot more humble.[2]

In a subsequent press conference, Hammarskjöld elaborated on the approach he had outlined to his friend Steinbeck:

1 Per Lind and Bengt Thelin, 'Nature and Culture: Two Necessities of Life', in Sten Ask and Anna Mark-Jungkvist (eds), *The Adventure of Peace: Dag Hammarskjöld and the Future of the UN*, New York and London: Palgrave Macmillan 2005, p. 99 (quoted in Roger Lipsey, 'Dag Hammarskjöld and *Markings*: A Reconsideration', *Spiritus. A Journal of Christian Spirituality*, vol. 11, no. 1, spring 2011, p. 89).

2 'Airport Statement on Return from African Trip', New York, 31 January 1960 (UN Press Release SG/895, 31 January 1960), in Andrew W. Cordier and Wilder Foote (eds), *Public Papers of the Secretaries-General of the United Nations. Volume V: Dag Hammarskjöld 1960-1961*, New York and London: Columbia University Press 1975, p. 522.

> You can say that to stay in a country one night or two nights cannot give much of an experience. Well, first of all, it can. It can because, if you break through the walls and if you have the necessary background knowledge, even a talk of one hour can tell you more than volumes […] It is not in particular what you can learn in this or that city or from this or that man that gives you valuable understanding of the situation. It is what he says and what you see in one city seen in the light of what you have heard others say and what you have seen in other cities.[3]

Hammarskjöld's journey to Africa was not a mere sightseeing excursion, nor what we in current jargon would call a 'quick and dirty' consultancy job. It was not merely a symbolic gesture by someone already preoccupied with all the problems of the world at the height of the Cold War. Hammarskjöld described it in the same press conference as 'a strictly professional trip for study, for information'.[4] The trip attested to his general mindset and practice of seeking dialogue with others to explore the common ground of humanity.

During the inauguration of the Congress for International Cooperation in Africa at the University Institute of Somalia on 14 January 1960 he made reference to the Renaissance (a catchword that would resurface in the African context 40 years later). Commenting on the main challenges facing African leaders, he stated:

> The two problems they will have to solve is to create an international world, a world of universality and unity, and on the other hand to save not only what I would like to call the personality of Africa, but the personality of each country, each group, in this wonderfully rich continent […] what is needed is unity with diversity, diversity respected within the framework of an even deeper respect for unity.[5]

This pledge to reconcile the unique with the universal was by no means an appeal to abandon globally applicable standards, values and norms in favour of particularism. For him, there existed a dialectical relationship between the local and the global in the sense of the national and the international. At Stanford University in Palo Alto nearly five years earlier, in June 1955, he had devoted an address entitled 'The World and the Nation' to this inter-relatedness. In his talk, he defined the fundamental challenge as follows: 'The question is not either the nation *or* the world.

3 'From Transcript of Press Conference.' New York, 4 February 1960 (UN Note to Correspondents No. 2108, 4 February 1960), in *ibid.*, p. 525.

4 *Ibid.*, p. 524.

5 'Extemporaneous Remarks at Inauguration of the Congress for International Cooperation in Africa at the University Institute of Somalia', Mogadiscio, Somalia, 14 January 1960, in *ibid.*, p. 515.

It is rather, how to serve the world by service to our nation, and how to serve the nation by service to the world.'[6]

He considered the United Nations as the relevant link to enhance this cross-fertilisation and to ensure that we do not get lost in particular obscurantism in hiding behind the shield of national sovereignty. For him, the United Nations was 'an expression of our will to find a synthesis between the nation and the world'.[7] When upon his return from his visit to the African countries, a journalist inquired at the press conference whether the ideological trends in Africa 'stem from the inner realities facing African life today or whether they reflect the often repeated clichés of foreign ideology', Hammarskjöld's clarification left no doubt:

> I do not think that the rights of man is a foreign ideology to any people and that, I think, is the key to the whole ideological structure in Africa at present. It may be that the most eloquent and the most revolutionary expressions of the rights of man are to be found in Western philosophers and Western thinking, but that certainly does not make the idea a Western idea imposed on anybody.[8]

Partnership and solidarity are the foundations of the United Nations. Photo: Paul Fris

The fundamental ethics that were his moral compass in his commitments as a global leader are obvious in these convictions, which guided his engagement not only with African realities. Not surprisingly, his role as the highest international civil servant representing the global governance institution established after the Second World War as the United Nations was based on values that were permeated by a notion of solidarity. On 26 January 1960, towards the end of his African journey, he declared at the second session of the Economic Commission of Africa in Tangier:

> Partnership and solidarity are the foundations of the United Nations and it is in order to translate these principles into practical measures of economic cooperation that we are gathered today in this hall […] The emergence of Africa on the world scene, more than any other single phenomenon, has forced us to reappraise and rethink the nature of relationships among peoples at different stages of development, and the conditions of a new synthesis making room for an accelerated growth and development of Africa.[9]

6 'The World and the Nation', Commencement Address at Stanford University, Palo Alto, California, 19 June 1955 (UN Press Release SG/426, 18 June 1955), in Andrew W. Cordier and Wilder Foote (eds), *Public Papers of the Secretaries-General of the United Nations. Volume II: Dag Hammarskjöld 1953-1956*, New York and London: Columbia University Press 1975, p. 509.

7 *Ibid.*, p. 512.

8 'From Transcript of Press Conference', *op. cit.*, pp. 533-4.

9 'Statement at the Second Session of the Economic Commission for Africa', Tangier, Morocco, 26 January 1960 (UN Press Release SG/890, 25 January 1960), in Andrew W. Cordier and Wilder Foote (eds), *Public Papers … Volume V*, *op. cit.*, p. 517.

Hammarskjöld then reverted to a speech he had given a few months earlier at the University of Lund in Sweden, with the title 'Asia, Africa, and the West'. It attests to the enlightened views of the Secretary-General. On that occasion, he had reminded his audience that 'nobody should forget that colonization reflected a basic approach which may have been well founded in certain limited respects, but which often mirrored false claims, particularly when it touched on spiritual development. Applied generally, it was untenable.'[10]

Commenting on the Western perspectives of the early 20th century, Hammarskjöld found it striking 'how much they did *not* see and did *not* hear, and how even their most positive attempts at entering into a world of different thoughts and emotions were colored by an unthinking, self-assured superiority'.[11] For Hammarskjöld, the 'richest satisfaction' lay in 'meeting different spiritual traditions and their representatives', provided one 'approaches them on an equal footing and with a common future goal in mind'. He was confident that this approach would ensure progress 'in the direction of a human community which, while retaining the special character of individuals and groups, has made use of what the various branches of the family of man have attained along different paths over thousands of years'.[12]

He clearly dismissed any claims to superiority over others based on any kind of naturalist concept of dominance rooted in supposed biological advancement and also questioned the legitimacy sought by dominant classes to justify their privileges:

> The health and strength of a community depend on every citizen's feeling of solidarity with the other citizens, and on his willingness, in the name of this solidarity, to shoulder his part of the burdens and responsibilities of the community. The same is of course true of humanity as a whole. And just [as] it cannot be argued that within a community an economic upper class holds its favored position by virtue of greater ability, as a quality which is, as it were, vested in the group by nature, so it is, of course, impossible to maintain this in regard to nations in their mutual relationships.[13]

He therefore concluded:

> We thus live in a world where, no more internationally than nationally, any distinct group can claim superiority in mental gifts and potentialities

10 'Asia, Africa, and the West', Address Before the Academic Association of the University of Lund, Lund, Sweden, 4 May 1959 (UN Press Release SG/813, 4 May 1959), in Andrew W. Cordier and Wilder Foote (eds), *Public Papers of the Secretaries-General of the United Nations. Volume IV: Dag Hammarskjöld 1958-1960*, New York and London: Columbia University Press 1974, p. 381.

11 *Ibid.*, p. 382 (original emphasis).

12 *Ibid.*

13 *Ibid.*, p. 383.

> of development […] Those democratic ideals which demand equal opportunities for all should be applied also to peoples and races […] no nation or group of nations can base its future on a claim of supremacy.[14]

He confidently proclaimed that 'the Organization I represent…is based on a philosophy of solidarity'.[15] His advice to Europe was that 'the best and soundest way to perpetuate (its) cultural heritage is to meet other peoples and other cultures in humble respect for the unique gifts that they, in turn, have offered and still offer to humanity' and reminds the continent's peoples 'that it is a sign of the highest culture to be really capable of listening, learning, and therefore also responding'.[16]

He concludes with a telling personal anecdote, shared with him by a colleague from Asia who was educated at European universities.[17]

> He once told me how, in his early youth, he lived with and loved the Rubaiyat of Omar Khayyam. He thought he had made the original text entirely his own, until he came to Britain and became acquainted with Fitzgerald's translation. Then, this in turn became – in the academic surroundings that began to transform him – his 'real' Rubaiyat [...] He returned home, however, and again found Omar Khayyam's poems such as he had once made them his own. The pendulum kept swinging, and, he concluded, 'even today I do not know which Rubaiyat is mine, Omar's or Fitzgerald's'.[18]

Hammarskjöld ends the story and his speech with the vision: 'We must reach the day when…all of us can enjoy in common the Rubaiyat and the fact that we have it both in Omar's and in Fitzgerald's version.'[19]

His multicultural vision challenges the predominant hegemonic worldviews. It promotes a counter-culture of global humanity seeking for commonalities while being based on respect for differences. By being a Swedish world citizen, combining a strong sense of cultural belonging with cosmopolitan openness, Hammarskjöld showed that firm roots in one's own society, in its history and culture, are not obstacles or limitations but a valuable point of departure, provided they are not taken as the one and only absolute 'truth'. Awareness of one's own upbringing in a specific social context, anchoring one's identity in a framework guided

14 *Ibid.*, p. 384.

15 *Ibid.*

16 *Ibid.*, p. 385.

17 According to the editors it was Ahmed Bokhári, a UN Under-Secretary who died in December 1958. *Ibid.*, p. 380.

18 *Ibid.*, pp. 386f.

19 *Ibid.*, p. 387.

by a set of values, allows for curiosity towards otherness and explorations of the unknown for one's own benefit and gain. There are no risks in entering a dialogue with 'strangers' if one knows where one comes from.

Hammarskjöld's exchanges with the Jewish philosopher Martin Buber testify to this conviction as does the dialogue he practised in search of solutions to conflicts and differences deeply entrenched in specific sets of values, norms or cultural socialisations. On 16 April 1958, five days after his re-election as the UN Secretary-General, Dag Hammarskjöld, in a letter to Buber expressed his admiration for Buber's philosophy 'of unity created "out of the manyfold".'[20]

The introduction to the 16th annual report of the United Nations became Hammarskjöld's last programmatic statement. Submitted a month before his untimely death, it summarises his legacy in terms of ethics, solidarity and global leadership. Photo: UN Photo/MB

Perhaps a little surprisingly, this exchange in its substance resonated to some extent with the later emancipatory gospel of the *Pedagogy of the Oppressed:* seeming strangers, as Paulo Freire emphasised, can through mutual empathy become fellow human beings who can relate to one another despite all distinctions. In becoming aware of their commonality as human beings, specific knowledge – wrongly generalised as universal knowledge – can be modified and transformed through interaction and exchange among equals and thereby turned into common knowledge across boundaries. As Freire puts it:

> The radical committed to human liberation, does not become the prisoner of a 'circle of certainty' within which reality is also imprisoned. On the contrary, the more radical the person is, the more fully he or she enters into reality so that, knowing it better, he or she can better transform it. This person is not afraid to meet people or enter into dialogue with them. This person does not consider himself or herself the proprietor of history or of all people, or the liberator of the oppressed; but he or she does commit himself or herself, within history, to fight at their side.[21]

In this sense, Dag Hammarskjöld – as the measured diplomat and loyal civil servant he was – displayed the virtues of a radical person.

Hammarskjöld also had a strong sense of the need for economic justice. In his last address to ECOSOC, he linked the principles of national sovereignty to the belief that international solidarity and social consciousness must go hand in hand by:

> […] accepting as a basic postulate the existence of a world community for which all nations share a common responsibility […] to reduce the dis-

20 Quoted in Lou Marin, *Can we save true dialogue in an age of mistrust? The encounter of Dag Hammarskjöld and Martin Buber*, Uppsala: Dag Hammarskjöld Foundation 2010 (Critical Currents, no. 8), p. 11.

21 Paulo Freire, *Pedagogy of the Oppressed,* New York: Continuum 1996, p. 21.

> parities in levels of living between nations, a responsibility parallel to that accepted earlier for greater economic and social equality within nations.[22]

The introduction to the 16th annual report of the United Nations became Hammarskjöld's last programmatic statement. Submitted a month before his untimely death, it summarises his legacy in terms of ethics, solidarity and global leadership. It reiterated his firm belief in the equality of peoples and societies, as different from each other as these might be perceived to be:

> In the Preamble to the Charter, Member nations have reaffirmed their faith 'in the equal rights of men and women and of nations large and small,' a principle which also has found many other expressions in the Charter. Thus, it restates the basic democratic principle of equal political rights, independently of the position of the individual or of the Member country in respect of its strength, as determined by territory, population or wealth. The words just quoted must, however, be considered as going further and imply an endorsement as well of a right to equal economic opportunities.[23]

Importantly, Hammarskjöld once again does not content himself with proclaiming noble postulates by making lofty reference to an abstract equality. As a trained economist, who defended his PhD with no less a person than Gunnar Myrdal as disputant (who disagreed with Hammarskjöld on the argument in his thesis but advocated the award of the highest mark for the undisputable quality of his analyses), he never loses sight of the socioeconomic dimensions of inequality. It is therefore no coincidence that he returns to stress the right to equal economic opportunities:

> So as to avoid any misunderstanding, the Charter directly states that the basic democratic principles are applicable to nations 'large and small' and to individuals without distinction 'as to race, sex, language and religion,' qualifications that obviously could be extended to cover other criteria such as, for example, those of an ideological character which have been used or may be used as a basis for political or economic discrimination […] The demand for equal economic opportunities has, likewise, been – and remains – of specific significance in relation to those very countries which have more recently entered the international arena as new states. This is natural in view of the fact that, mostly, they have been in an unfavourable economic position, which is reflected in a much lower *per capita* income, rate of capital supply, and degree of technical

22 Quoted in Sakiko Fukuda-Parr, 'Poverty and Inequality – Challenges in the Era of Globalisation', in Sten Ask and Anna Mark-Jungkvist (eds), *op. cit.*, p. 222.

23 'Introduction to the Sixteenth Annual Report', New York, 17 August 1961, in Andrew W. Cordier and Wilder Foote (eds), *Public Papers … Volume V*, *op.cit.*, p. 544.

> development, while their political independence and sovereignty require a fair measure of economic stability and economic possibilities in order to gain substance and full viability.[24]

This corresponds with his earlier and continued emphasis on the need to address the economic imbalances inherent in the existing world order. As he stressed in an address as early as February 1956:

> The main trouble with the Economic and Social Council at present is that, in public opinion and in practice, the Council has not been given the place it should have in the hierarchy of the main organs of the United Nations. I guess that we are all agreed that economic and social problems should rank equal with political problems. In fact, sometimes I feel that they should, if anything, have priority.[25]

He testified further to his awareness of the needs for global economic justice only a few months later in his opening statement during a debate on the world economic situation in ECOSOC. In his remarks, he bemoaned

> the absence of a framework of international policy that compels the underdeveloped countries each to seek its own salvation in its own way without reference to wider horizons. How often have we not heard the voices of those who bewail the fact that this underdeveloped country is moving along the slippery path to autarky, that that country is neglecting its exports, whether agricultural or mineral, or that yet a third country is manipulating its exchange rates in a manner contrary to the letter and spirit of the Bretton Woods agreements? And yet how many of those who belabor the underdeveloped countries in this fashion have given adequate thought to the structure of world economic relationships which has forced these countries into unorthodox patterns of behavior?[26]

The truly internationalist spirit in which the second Secretary-General acted, without fear or favour, during most of his eight years in office included awareness that gross socioeconomic disparities continued to contribute to global challenges. Tackling these disparities within a mindset of global solidarity was among the essentials Hammarskjöld reiterated in his last introduction to an annual report:

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24 *Ibid.*, p. 545 (original italics).

25 'The UN – Its Ideologies and Activities' , in Andrew W. Cordier and Wilder Foote (eds), *Public Papers … Volume II*, *op. cit.*, p. 668.

26 '1. Statement in the Economic and Social Council Introducing Debate on the World Economic Situation', Geneva, 16 July 1956 (UN Press Release SG/493, 16 July 1956), in Andrew W. Cordier and Wilder Foote (eds), *Public Papers of the Secretaries-General of the United Nations. Volume III: Dag Hammarskjöld 1956-1957*, New York and London: Columbia University Press 1973, pp. 190f.

> The exclusively international character of the Secretariat is not tied to its composition, but to the spirit in which it works and to its insulation from outside influences […] Anyone of integrity, not subjected to undue pressure, can, regardless of his own views, readily act in an 'exclusively international' spirit.[27]

As early as 1955, he had insisted on a definition of loyalty and integrity – two values at the core of his ethics – for the international civil service in a series of pioneering speeches over the space of ten days at three US universities, during which he emphasised the universal character of duties by transcending national confinements and adopting an international dimension. At Johns Hopkins University, he addressed the question

The concept of loyalty is distorted when it is understood to mean blind acceptance.

> whether international service is possible without split loyalties in a divided world. The problem as posed here is to my mind unreal. We are true to this or that ideal, and this or that interest, because we have in openness and responsibility recognized it as an ideal and an interest true to us. We embrace ideals and interests in their own right, not because they are those of our environment or of this or that group. Our relations to our fellow men do not determine our attitude to ideals, but are determined by our ideals. If our attitude is consistent, we shall be consistent in our loyalties. If our attitude is confused, then our loyalties will also be divided. In the world of today there is an urge to conformism which sometimes makes people complain of a lack of loyalty in those who criticize the attitudes prevalent in their environment. May I ask: Who shows true loyalty to that environment, one who before his conscience has arrived at the conclusion that something is wrong and in all sincerity gives voice to his criticism, or the one who in self-protection closes his eyes to what is objectionable and shuts his lips on his criticism? The concept of loyalty is distorted when it is understood to mean blind acceptance.[28]

He insisted that the problem of loyalties is 'common to us in all walks of life':

> In fact, it is a national problem; and a problem within whatever group of friends and associates you may be working, just as much as it is an international problem. The essence of international service, and the problem of loyalty as it presents itself in the light of such service, is the essence of all service to fellow men, and it is the problem of loyalty as we face it everywhere.[29]

27 'Introduction to the Sixteenth Annual Report', *op. cit.*, p. 556.

28 'International Service', Address at Johns Hopkins University Commencement Exercise, Baltimore, Maryland, 14 June 1955 (UN Press Release SG/424, 13 June 1955), in Andrew W. Cordier and Wilder Foote (eds), *Public Papers … Volume II*, *op. cit.*, p. 504.

29 *Ibid.*, p. 505.

He ends this, the first of the three lectures, with a strikingly unbiased appeal to combine the universal values enshrined in the Charter of the United Nations with the moral guiding principles of one's own convictions as the ultimate compass:

> The attitude basic to international service places the pursuit of happiness under laws of conscience which alone can justify freedom […] the final issue is what dignity we are willing to give to man. It is part of the American creed, part of the inherited ideology of all Western civilization, that each man is an end in himself, of infinite value as an individual. To pay lip-service to this view or to invoke it in favor of our actions is easy. But what is in fact the central tenet of this ideology becomes a reality only when we, ourselves, follow a way of life, individually and as members of a group, which entitles us personally to the freedom of a mature individual, living under the rules of his conscience. And it becomes the key to our dealings with others only when inspired by a faith which in truth and spirit gives to them the value which is theirs according to what we profess to be our creed.[30]

Hammarskjöld's firm belief in the fundamental values and principles guiding human beings as their individual moral compasses, wherever they come from or live and on whichever assignments they work, also anchored his understanding and concept of service to the family of nations. He felt strongly that such service would have to respect and embrace the individual's undivided loyalty to his or her own faith and truth. This was for him an integral part of the framework to orient the fulfilment of duties as an international civil servant. In his famous Oxford speech on 'The International Civil Servant in Law and in Fact', which he delivered a few months before his death, he reiterated this conviction in no uncertain terms by dismissing the view that a civil service requires neutrality, in the sense of non-commitment to basic moral convictions:

> It is obvious from what I have said that the international civil servant cannot be accused of lack of neutrality simply for taking a stand on a controversial issue when this is his duty and cannot be avoided. But there remains a serious intellectual and moral problem as we move within an area inside which personal judgment must come into play. Finally, we have to deal here with a question of integrity or with, if you please, a question of conscience […] if integrity in the sense of respect for law and respect for truth were to drive [the international civil servant] into positions of conflict with this or that interest, then that conflict is a sign of his neutrality and not of his

30 *Ibid.*, p. 506.

> failure to observe neutrality – then it is in line, not in conflict with his duties as an international civil servant.[31]

He once again returns at the end of this paradigmatic lecture to the latent tension between national interests and international advocacy and commitment, when he warns that:

Secretary-General Dag Hammarskjöld on 1 October 1958. Photo: UN Photo

> Recently, it has been said, this time in Western circles, that as the international Secretariat is going forward on the road of international thought and action, while Member states depart from it, a gap develops between them and they are growing into being mutually hostile elements; and this is said to increase the tension in the world which it was the purpose of the United Nations to diminish. From this view the conclusion has been drawn that we may have to switch from an international Secretariat, ruled by the principles described in this lecture, to an intergovernmental Secretariat, the members of which obviously would not be supposed to work in the direction of an internationalism considered unpalatable to their governments. Such a passive acceptance of a nationalism rendering it necessary to abandon present efforts in the direction of internationalism symbolized by the international civil service – somewhat surprisingly regarded as a cause of tension – might, if accepted by the Member nations, well prove to be the Munich of international cooperation as conceived after the First World War and further developed under the impression of the tragedy of the Second World War. To abandon or to compromise with principles on which such cooperation is built may be no less dangerous than to compromise with principles regarding the rights of a nation. In both cases the price to be paid may be peace.[32]

In his last words to his staff, Hammarskjöld reiterated again one of his fundamental principles: 'If the Secretariat is regarded as truly international, and its individual members as owing no allegiance to any national government, then the Secretariat may develop as an instrument for the preservation of peace and security of increasing significance and responsibilities.'[33]

Ten days before his death, Hammarskjöld, concluded his remarks on the occasion of the UN's staff day with the following words, which were

31 The International Civil Servant in Law and in Fact', Lecture Delivered in Congregation at Oxford University, Oxford, England, 30 May 1961 (UN Press Release SG/1035), in Andrew W. Cordier and Wilder Foote (eds), *Public Papers … Volume V*, *op. cit.*, pp. 488 and 489.

32 *Ibid.*, p. 489.

33 'Last Words to the Staff – from Remarks on Staff Day', New York, 8 September 1961, in *ibid.*, p. 564.

indeed his final ones to his colleagues. They resonate with the personal tone and philosophy of his diary, which he had left beside his bed in his New York apartment and which was posthumously published as *Vägmärken* (*Markings*):

> It is false pride to register and to boast to the world about the importance of one's work, but it is false humility, and finally just as destructive, not to recognize – and recognize with gratitude – that one's work has a sense. Let us avoid the second fallacy as carefully as the first, and let us work in the conviction that our work *has* a meaning beyond the narrow individual one and *has* meant something for man.[34]

For Hammarskjöld, the work of the UN was to build on the commonality of humankind, its conduct and experience. During a visit to India in early February 1956, he addressed the Indian Council of World Affairs. Prompted by a moving encounter during a local cultural event performed in his honour, his mainly extemporaneous speech explored the dimensions of human universalism. A commonality beyond Western – or, indeed, any culturally, religiously or geographically limited – ideology or conviction is what he spoke to:

> It is no news to anybody, but we sense it in different degrees, that our world of today is more than ever before *one* world. The weakness of one is the weakness of all, and the strength of one – not the military strength, but the real strength, the economic and social strength, the happiness of people – is indirectly the strength of all. Through various developments which are familiar to all, world solidarity has, so to say, been forced upon us. This is no longer a choice of enlightened spirits; it is something which those whose temperament leads them in the direction of isolationism have also to accept […] With respect to the United Nations as a symbol of faith, it may […] be said that to every man it stands as a kind of 'yes' to the ability of man to form his own destiny, and form his own destiny so as to create a world where the dignity of man can come fully into its own.[35]

Through various developments which are familiar to all, world solidarity has, so to say, been forced upon us. This is no longer a choice of enlightened spirits.

Dag Hammarskjöld's ethics, his concept of solidarity, his sense of fundamental universal values and human rights in combination with his respect for the multitude of identities within the human family, as well as his responsibility as the world's highest international civil servant to assume global leadership, set standards that have to this day lost none of their value and relevance.

34 *Ibid.*, p. 566 (original emphasis).

35 Quoted in Andrew W. Cordier and Wilder Foote (eds), *Public Papers … Volume II*, *op. cit.*, pp. 660 and 661.

» The Hammarskjöld Approach to International Law

Ove Bring

Dag Hammarskjöld, the second Secretary-General of the United Nations, had a flexible approach to international law. On the one hand, he strongly relied on the principles of the UN Charter and general international law, while on the other he used a flexible and balanced *ad hoc* technique, taking into account values and policy factors whenever possible to resolve concrete problems. Hammarskjöld was inclined to express basic principles in terms of opposing tendencies, to apply a discourse of polarity or dualism, stressing, for example, that the observance of human rights was balanced by the concept of non-intervention, or the concept of intervention by national sovereignty, and recognising that principles and precepts could not provide automatic answers in concrete cases. Rather, such norms would serve 'as criteria which had to be weighed and balanced in order to achieve a rational solution of the particular problem'.[1] Very often it worked.

Dag Hammarskjöld has gone down in history as an inspiring international personality, injecting a dose of moral leadership and personal integrity into a world of power politics. He succeeded Trygve Lie as Secretary-General in April 1953, in the midst of the Cold War. In addition to East-West rivalry, he was confronted with Third World problems and the agonising birth of the new Republic of Congo, a tumultuous crisis, during which he lost his life in the Ndola air crash of September 1961.

Personal approach and philosophy

Dag Hammarskjöld was born in 1905 in a small town in middle Sweden where his father, Hjalmar Hammarskjöld, was at the time the president of the district court of appeal. His father was later, between 1914 and 1917, prime minister of Sweden. Dag's elder brother Åke became a member of the League of Nations secretariat in 1920. From 1922 until 1936, his brother was registrar of the Permanent Court of International

1 Oscar Schachter, 'Dag Hammarskjold and the Relation of Law to Politics', *American Journal of International Law,* vol. 56, 1962, pp. 2-5. Quotation from p. 5. Hammarskjöld recognised that there was a tension between principles and concrete needs. By taking account of both, he sought to achieve (in his own words) 'that combination of steadfastness of purpose and flexibility of approach which alone can guarantee that the possibilities which we are exploring will have been tested to the full'. *Ibid.*

Justice in the Hague. The father and his sons were groomed in a typical Swedish civil service tradition in which the concepts of 'duty' and 'responsibility' reflected time-honoured values. It has been said of Dag Hammarskjöld that he had a manifest pride in his family's legal background and that he 'regarded himself as a man of law'. Nevertheless, he was a professional economist. Although he studied law at Uppsala University, he later produced a doctoral thesis in economics.

Not long after his appointment as Secretary-General in 1953, it was already becoming clear that he had an innovative approach to the possibilities of the United Nations. He was not a formalist, but wanted to go forward and act in line with the purposes of the UN Charter. These purposes were fixed and binding, but the working methods of the Organisation had to be flexible and innovative. He did not want to be fettered by the concrete provisions of the Charter that did not explicitly provide for things he wanted to do, options he wanted to test in his capacity as Secretary-General. If he felt that the purposes of the UN made it possible, he would envision a mandate flowing from the Charter to act in accordance with his conscience as an international civil servant.

Hammarskjöld set out his views on the role of the UN Organisation and his approach to the UN Charter in the annual reports to the General Assembly. In this context, he developed a doctrine on the independence of the international civil servant, including an active role for the Secretary-General under an expansive interpretation of Articles 97-100 of the Charter. He introduced new mechanisms for a UN presence in conflict areas, for example the appointment of Special Representatives of the Secretary-General (SRSGs).

He did not make a very sharp distinction between law and politics. Nor did he look upon international law as mainly 'written law', but emphasised the whole international pattern of rules and behaviour. Even before Wolfgang Friedman had published his famous book, *The Changing Structure of International Law* (1964), Hammarskjöld used the distinction between the traditional 'law of coexistence' and the more dynamic 'law of cooperation'. The world, in his view, was slowly moving into the latter more advanced area, which included supranational decision-making.

During his time as Secretary-General (1953-61), Hammarskjöld set forth a number of general themes regarding the role of the UN, but he did not articulate specific doctrines on human rights, intervention or security. Nevertheless, as we shall see, he developed new methods for the functioning of the system of collective security, and he was a forerunner in the field of what today is called human security.

Hammarskjöld's visit to Beijing in January 1955 was marked by fruitful intellectual dialogue with Chinese Premier Chou En-lai. Photo: UN Photo

Hammarskjöld was interested in the ethics of Albert Schweitzer. He was much attracted to Schweitzer's emphasis on the sanctity of human life and to an individual and concrete approach to human needs. Hammarskjold was also interested in mediaeval religious thinking. He was inspired by Thomas Aquinas and others to focus on a man's inner life in relation to God in preparation for individual choices and individual action. Hammarskjöld was not afraid of uphill battles. He saw his appointment as Secretary-General as a challenge and a chance to be of real service to the international community. He felt he was placed in a position to put into action the ethics of Albert Schweitzer, the ideal of service to mankind.

One of Hammarskjöld's first tasks as Secretary-General was to negotiate, in the aftermath of the Korean War, the release of American pilots taken prisoner by China. In this context, he felt the support of the wisdom of the Jewish philosopher Martin Buber as expressed in the book *Ich und Du* (1923). Buber stressed the importance of human dialogue and Hammarskjöld's visit to Beijing in January 1955 was marked by fruitful intellectual dialogue with Chinese Premier Chou En-lai. The chemistry between the two men made the conversation sparkle. Later the same year, the US airmen were released. The release coincided with Chou En-lai's personal congratulations to the Secretary-General on his 50th birthday. Hammarskjöld is famous for having coined the concepts of preventive and quiet diplomacy, but in this case it was more a matter of personal diplomacy.

The introduction of peacekeeping

Hammarskjöld is best known for his innovative approach to the UN Charter. The first example here is the matter of peacekeeping, which was not, and still is not, mentioned in the Charter.

Hammarskjöld elaborated the new concept during the Suez crisis of 1956. As the Security Council was blocked by a joint British and French veto, the Secretary-General had to rely on the General Assembly. As a procedural matter, he used the Uniting for Peace resolution of 1950 to summon an extra emergency session of the Assembly. Together with Canadian External Affairs Minister Lester Pearson, he thereafter introduced the option of a UN-mandated military peace operation in the conflict area, with the consent of the parties to the conflict. On 7 November 1956, the General Assembly adopted a resolution that launched the first peacekeeping operation in UN history, the UN Emergency Force in the Middle East (UNEF).

Although UN observer missions had been fielded in 1948 and 1949, the deployment of *armed troops* to assist in the implementation of agreements reached between the UN and parties to a conflict added a new dimension to international relations. To govern these operations, Hammarskjöld laid down three principles: (1) consent from the territorial state and other parties involved; (2) impartiality on the UN side to secure credibility in the operation; and (3) non-use of force by the UN side, unless in individual self-defence or collective mission defence.

Over the years, it became clear that the Security Council should be the UN body to decide on all forms of UN peace operations, not only with regard to peace *enforcement* under Chapter VII of the Charter, but also with regard to cooperative peacekeeping.

When UNEF was established, Hammarskjöld considered it a new departure. 'It is', he said, 'certainly not contrary to the Charter, but is in a certain sense outside the explicit terms of the Charter.'

Thus peacekeeping operations, PKOs, were not foreseen under either Chapter VI or VII of the Charter, but fell somewhere in between, and not surprisingly the unwritten Chapter VI½ has been suggested as their legal basis. It is submitted that this 'VI½ perception' is appropriate and useful: appropriate because PKOs *are* a more ambitious involvement than anything provided for in Chapter VI; and politically useful because it shows that innovations, even without textual support, can be legitimised under the system of the Charter if they fulfil the purposes of the UN Organisation.

Hammarskjöld's dynamic approach to the law of the UN

Dag Hammarskjöld was appointed Secretary-General five years after Hans Morgenthau had published his influential realist opus *Politics among Nations*. In a speech in 1956, Hammarskjöld had reason to comment on the divide between idealism and realism. Assertions that the UN had failed were often misleading, he said:

> Do we refer to the purposes of the Charter? They are expressions of universally shared ideals which cannot fail us, though we, alas, often fail them. Or do we think of the institutions of the United Nations? They are our tools. We fashioned them. We use them. It is our responsibility to remedy any flaws there may be in them.

And he continued: 'This is a difficult lesson for both idealists and realists, though for different reasons. I suppose that, just as the first temptation

Just as the first temptation of the realist is the illusion of cynicism, so the first temptation of the idealist is the illusion of Utopia.

of the realist is the illusion of cynicism, so the first temptation of the idealist is the illusion of Utopia.'[2]

Hammarskjöld was an idealist in the sense that he believed in the purposes and principles of the UN Charter and in the possibilities of the UN Organisation. At the same time, he was a realist in that he did not want to stretch the potential capacities of the Organisation too much if member states were not ready for it. For example, he opposed the idea of a standing UN military force, because he felt it was politically premature in view of the strong feelings related to national sovereignty, and also because he felt it was impractical to have a ready-made military unit standing by, when it was much better to tailor a unit to the specific demands of an impending situation.[3]

It goes without saying that he wanted the UN to respond to the demands of the international community, and in reflecting how that should be done he fell back on a distinction between existing legal norms and innovative procedures. On the one hand, he could refer to the UN normative framework in a natural law-oriented manner that included an implicit static element. Thus, in 1956 he stated that 'the principles of the Charter are, by far, greater than the Organization in which they are embodied, and the aims which they are to safeguard are holier than the policies of any single nation or people.'[4]

On the other hand, he often used a dynamic and evolutionary approach to the system of the UN Charter, arguing, for example, that although the objectives and rules of the Charter were binding, the working methods of the system could be supplemented by new procedures:

As is well known, such an evolution has in fact taken place, and it has […] been recognized that […] new procedures may be developed when they prove productive in practice for [...] the objectives of the Charter. In this respect, the United Nations, as a living organism, has the necessary scope for a continuous adaptation of its […] [system] to the needs [of the international community].[5]

2 'An International Administrative Service', from an address to the International Law Association at McGill University, Montreal, 30 May 1956. See Wilder Foote (ed.), *The Servant of Peace, A Selection of the Speeches and Statements of Dag Hammarskjöld* (hereafter referred to as *Speeches*), Bodley Head, London 1962, p. 116.

3 Brian Urquhart, *Hammarskjold,* Bodley Head, London/Sydney/Toronto 1973, p. 230.

4 'Statement during the Suez Crisis', 31 October 1956. *Official Records of the Security Council,* 751 meeting. Quoted in *ibid.,* p. 174.

5 From the 'Introduction to the Annual Report of the Secretary-General on the Activities of the Organization 1958-59', 22 August 1959, *Speeches,* p. 223.

This organic approach was in line with his views on the Uniting for Peace resolution and the establishment of UNEF. But Hammarskjöld developed it further into a dynamic conception of the UN Organisation. His successor, U Thant, once remarked that Hammarskjöld was prone to use his great gift for innovation and improvisation. He 'discovered new ways to help keep the peace' – an emergency force in one situation, an observer group in another and a UN presence in a third context.[6]

The dynamic approach of Hammarskjöld was also stressed by his collaborator in the UN Secretariat, Ralph Bunche. Bunche indicated in a speech in 1964 that Hammarskjöld consciously strove to make the UN a progressive force for human advancement. Wherever there was a conflict, actual or threatening, he believed the UN should actively seek to contain or avert it 'by quiet diplomacy when the circumstances permitted, in the form of good offices if the parties themselves demonstrated an inability to deal with the situation; and, if necessary by overt United Nations action'.

Bunch added that Hammarskjöld saw clearly that the UN 'must do more than hold meetings and talk and adopt resolutions'.[7] Hammarskjöld himself said at a press conference in early 1959 that the UN simply must respond to those demands which might be placed upon it. If those demands go beyond the 'present capacity', that must not in itself be a reason to exclude action. The capacity of the UN could prove to be greater than expected. He referred to the Organisation as a machine, thrusting its way through the terrain of international politics. He said: 'I do not know the exact capacity of this machine. It did take the very steep hill of Suez; it may take other and even steeper hills.'[8]

Hammarskjöld himself said at a press conference in early 1959 that the UN simply must respond to those demands which might be placed upon it. If those demands go beyond the 'present capacity', that must not in itself be a reason to exclude action. Photo: UN Photo

Hammarskjöld was not confronted with the issues of human security and UN intervention until the summer of 1960, but he had reason before that to comment on some of the elements of that discourse. With regard to the protection of national sovereignty, he referred in a speech in 1953 to the classical Chinese philosopher and poet Tao-Tse Tung, who is reported as stating that whoever wants to grip the world and shape it will fail, because the world is a spiritual thing that cannot be shaped. Hammarskjöld later in his speech made clear that the United

6 U Thant, 'Looking ahead', Address given at Columbia University, 7 January 1964. See Andrew N. Cordier and Wilder Foote (eds), *The Quest for Peace, The Dag Hammarskjöld Memorial Lectures,* Columbia University Press, New York and London 1965, p. 40.

7 Ralph J. Bunche, 'The United Nations Operation in the Congo', in Andrew N. Cordier and Wilder Foote (eds), *The Quest for Peace, op. cit.,* pp. 121f.

8 Quotation by Lester B. Pearson in Andrew N. Cordier and Wilder Foote (eds), *The Quest for Peace, op. cit.,* p. 100.

Nations has no power to encroach upon the national sovereignty of any state against the will of its government and people. It would indeed not only be against the letter and the spirit of the Charter […] to attempt to impose its will in domestic matters. It would also be against the elementary wisdom expressed […] [by] Tao-Tse Tung.[9]

With regard to the protection of *human rights* Hammarskjöld said at one point that behind the Universal Declaration of Human Rights 'we find literally thousands of people who directly or indirectly participated actively in its drafting'.[10] He thereby implied that the Declaration was *not* mainly a contribution of the West. He further stated that the Declaration could be called a 'universal expression' on the subject in a world where the memory was still fresh of some of the worst infringements of human rights ever experienced in history.

With regard to the principle of *collective security*, Hammarskjöld sometimes referred to the Chapter VII procedure as a necessary requirement for armed action. At the same time, he was prone to relate the matter of collective peacemaking to the other objectives of the Charter. Not surprisingly, he then used a contextual approach. In his view, peace was not solid without human rights, and human rights could not be fully realised unless peace was at hand.[11]

In similar vein he also saw the creation of the UN as something going beyond the exclusive interests of states and governments. In 1958 he made the point that a global cooperative project was not a new idea. The UN Organisation was a body for collective efforts established after centuries of human struggle. He said: 'It is the logical and natural development from lines of thought and aspiration going far back into all corners of the earth since a few men first began to think about the decency and dignity of other men.'[12]

The choice of emphasis on 'men' instead of 'states', and on 'dignity' instead of security, is perhaps telling about how Hammarskjöld regarded the objectives of the UN Charter. Collective security included human dignity. Or, as we would express it today, collective security is not only state security but also human security. The interests of the international society of states could and should not differ from the interests of mankind.

9 *Speeches*, p. 43.

10 'The International Significance of the Bill of Rights', Address at Celebration of the 180th Anniversary of the Virginia Declaration of Rights 1776-1956, Williamsburg, Virginia, 14 May 1956, *Speeches*, p. 106.

11 Address in New York, 10 April 1957, *Speeches*, p. 127.

12 'The Uses of Private Diplomacy', Address in the Houses of Parliament, London, 2 April 1958, *Speeches*, p. 174.

The issue of UN humanitarian intervention in peace operations

When the political situation in the Republic of Congo deteriorated in the summer of 1960, a UN peace operation was launched, ONUC. In August, there were tribal massacres in the province of Kasai: hundreds of Balubas were killed by government soldiers. Villages were pillaged and burned and their inhabitants, including children, killed simply by reason of their ethnicity.

Hammarskjöld felt – and made clear to his associates – that the UN could not stand aside and remain passive in what he called 'a case of incipient genocide'. He indicated that the Central Government had to accept this responsibility of the UN. True, the Kasai situation was a delicate one for the UN to interfere in, against the background of an unclear mandate and the non-intervention principle of Article 2(7) of the Charter. But, on the other hand, Hammarskjöld concluded in a cable to his emissary in Leopoldville: 'Prohibition against intervention in internal conflicts cannot be considered to apply to senseless slaughter of civilians or fighting arising from tribal hostilities.'[13]

After a meeting with his advisors in New York, he authorised the interposing of UN troops, using force if necessary, to stop the massacres.[14] As it happened, at the beginning of September 1960 the situation calmed down and there was no need to act upon these instructions.

In reporting to the Security Council on 9 September, Hammarskjöld referred to the atrocities as international crimes. He stated:

> They involve a most flagrant violation of elementary human rights and have the characteristics of the crime of genocide since they appear to be directed towards the extermination of a specific ethnic group, the Balubas.[15]

Hammarskjöld did not at this point ask for an extended ONUC mandate to deal with the humanitarian threats. His moral gut reaction was – as is shown by the cable to Leopoldville – that it was not necessary. But diplomatic prudence would of course have it that any humanitarian crossing of the borderline between peacekeeping and peace enforcement should be mandated by the Security Council, and if there is no time for that, that Council approval should at least be registered *ex post facto.*

13 Unpublished statement quoted in Brian Urquhart, *Hammarskjold, op. cit.,* p. 438.

14 *Ibid.,* p. 438.

15 *Security Council Official Records,* 896th Meeting, 9 September 1960, para 101.

Hammarskjöld's position in principle was clear. We can assume that it was not exclusively a legal position. His moral 'do good' inclination was probably influenced by his Christian values and he was not prepared to compromise with his personal convictions. In his report to the General Assembly he made clear: 'You try to save a drowning man without prior authorization.'[16]

There was probably also a policy element of human rights involved. Hammarskjöld was normally not a driving force in the field of human rights. The issue was tainted with Cold War controversy and he regularly approached it with caution. In this case, however, he was prepared to use the Secretary-General's power of interpretation to protect human rights and play the card of 'incipient genocide' to increase his power of persuasion. To him, obviously, this was a matter of values and a mix of law and morality. He was not alien to the incorporation of extra-legal elements in the process of international law. Although he laid heavy emphasis on the non-intervention principle of Article 2(7) of the Charter, he nevertheless thought that the Kasai massacres were outside the scope of that provision. His personal ethics coincided with the natural law proposition that *lex scripta* had to be reconciled with a law of higher order.

Hammarskjöld's policy-related instincts, focused on a kind of 'UN responsibility to protect' perception, did not leave a significant imprint on the peacekeeping discourse during the Cold War. It is noteworthy, though, that the principle of protecting civilians during peace operations has been brought into the present millennium by the Brahimi report (2000)[17] and through the broader concept of Responsibility to Protect (2005).[18] Hammarskjöld's instinctive approach to the matter has come to stay and is now codified in the peacekeeping doctrine of the United Nations.[19]

16 'Statement on UN Operations in Congo before the General Assembly, 17 October 1960'. See Andrew W. Cordier and Wilder Foot (eds), *Public Papers of the Secretaries-General of the United Nations, Vol. V: Dag Hammarskjöld 1960-1961,* Columbia University Press, New York 1975, p. 154.

17 'Report of the Panel on United Nations Peace Operations', chaired by Ambassador Lakhdar Brahimi (Algeria), transmitted to the Secretary-General on 17 August 2000 (UN Doc. A/55/305-S/2000/809).

18 General Assembly Resolution 60/1, World Summit Outcome Document (2005), paras 138-9.

19 'Report of the Secretary-General, Implementation of the Recommendations of the Special Committee on Peacekeeping Operations' (UN Doc. A/60/640 (2005)).

Concluding remarks: Leadership and legal development

The future of the UN Organisation lies, as always in the case of Inter-Governmental Organisations, in the hands of member states. Political will is essential, as is international leadership. Unfortunately, the world today suffers from a lack of both. As to political will, Hammarskjöld did not expect it to surface in multilaterally negotiated documents. Rather, he saw it develop through precedents created by a responsible international leadership. Thus the Hammarskjöld approach to the UN and international law was not to rely on drawn out political compromise, but on *ad hoc* arrangements responding to urgent and concrete needs in line with the purposes of the UN. As Hammarskjöld's biographer Brian Urquhart has pointed out, the then Secretary-General believed that a just and reliable world order had to rely on precedents (state practice) made possible through political acquiescence. In that sense, he was a political realist.

The future of the UN Organisation lies, as always in the case of Inter-Governmental Organisations, in the hands of member states.

Hammarskjöld's contribution to international law, beyond his innovative and flexible use of the UN Charter, lies in his emphasis on value-based collective decision-making in response to pressing needs. He realised that a progressive development of international law could not be achieved exclusively through multilateral treaty-making, but that, in addition, an element of *development through practice* would be needed. However, development through precedents presumes that those international actors prepared to take the lead, statesmen of governments and organisations, can inspire confidence in their initiatives vis-à-vis the rest of the international community. To find and promote such actors of global leadership, sensitive to political feelings and aware of political opportunities, with distinct trans-cultural outlooks, will be a challenge for nation states and international organisations alike. Statesmen of the calibre of Dag Hammarskjold are hard to find.

» Dag Hammarskjöld and Apartheid South Africa[1]

Chris Saunders

The involvement of the second Secretary-General of the United Nations in the Congo in the year before his untimely death while trying to stabilise that country is well known. What is much less well-known is that in the last 18 months of his life Dag Hammarskjöld had also to deal with another major African issue, that of apartheid in South Africa. He was already actively involved in this before the Congo crisis broke, and he would have continued to be engaged with it had he not died. He was the first UN Secretary-General to visit South Africa and his intervention, though unsuccessful in changing apartheid, was not without significant consequences.

From soon after he became UN Secretary-General in 1953, Hammarskjöld had had to deal with Southern African issues at the world body, but they did not loom large before 1960 and none reached the Security Council. Throughout the 1950s, there was the mounting criticism at the UN of South Africa's apartheid policy, to which the South African government responded that the UN had no role to play because apartheid was a domestic affair and Article 2 of Chapter 7 of the UN Charter stated that that nothing in the Charter 'shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. There was also in the 1950s a growing campaign at the UN to challenge South Africa's occupation of its *de facto* colony of South West Africa, where it was implementing apartheid policies. From the late 1940s, the Herero people of that territory had, through their Chiefs' Council, been petitioning the UN and asking that it take over the mandate role of the League of Nations and end South African rule. By the end of the 1950s, thanks in part to the advocacy work of the Reverend Michael Scott, long-time petitioner at the UN, a case was about to be taken to the International Court of Justice in The

1 This paper is drawn from two articles that appeared in *The African Journal on Conflict Resolution*, vol. 11, no. 1, July 2011: C. Saunders, 'Hammarskjöld's Visit to South Africa', and T. Sellstrom, 'Hammarskjöld and Apartheid South Africa: Mission Unaccomplished'. I thank Henning Melber for inviting me to present this paper at the conference on 'UN and Regional Challenges', Pretoria, July 2011 and Tor Sellstrom for agreeing to let me use material from his article here. Fuller references to the sources on which this chapter is based may be found in those two articles.

Hague claiming that South Africa was, in extending apartheid to South West Africa, violating the mandate. After the police shot and killed 12 unarmed protestors in Windhoek, the capital, in December that year, the idea was floated that the UN Secretary-General might visit the territory, but nothing came of it, for the South African government was quick to hint that it would not welcome such a visit.

It was the issue of apartheid in South Africa itself, not South West Africa, that took Hammarskjöld to South Africa for six days in January 1961. His visit was the direct result of another police shooting of unarmed protestors, this time in Sharpeville, south of Johannesburg, and in the township of Langa outside Cape Town on 21 March 1960. After this, and as further violence and unrest followed, a group of African and Asian members of the UN urgently requested the Security Council to take up the matter as having 'grave potentialities for international friction, which endangers the maintenance of international peace and security'. As members of the Council discussed an appropriate resolution to indicate the world body's abhorrence at what apartheid meant, the South African government declared a state of emergency on 30 March. Two days later, the Council by nine votes to none, with two abstentions, adopted a resolution deploring 'the policies and actions of the Government of the Union of South Africa which have given rise to the present situation', calling upon that government 'to initiate measures aimed at bringing about racial harmony based on equality…and to abandon its policies of apartheid and racial discrimination', and requesting the Secretary-General, 'in consultation with the Government of the Union of South Africa, to make such arrangements as would adequately help in upholding the purposes and principles of the Charter and to report to the Security Council whenever necessary and appropriate'.[2]

This was a compromise resolution. The only African country with a seat on the Security Council, Tunisia, had wanted a stronger resolution, and the Soviet Union preferred one that did not transfer responsibility from the Council to the Secretary-General and did not ask him to consult with the apartheid government. On the other hand, France and Britain abstained from the vote on the resolution because they agreed with the South African government that it went beyond what the Charter permitted. The United States representative, who was also chair of the Council, saw the resolution that was passed as designed to build a bridge, not a wall, between the UN and South Africa, while a number of speakers said that they trusted the 'political acumen' of the Secretary-General and thought the resolution was admirably non-specific about the precise steps he should take.[3]

2 *The United Nations and Apartheid 1948-1994,* New York: United Nations 1994, pp. 244-5.

3 *New York Times,* 2 April 1960.

Hammarskjöld interpreted the resolution as meaning he should visit South Africa and engage with the government there. That government's consent to his visit was by no means a foregone conclusion, however, given its opposition to what it saw as any interference in its domestic affairs, but Hammarskjöld knew that a number of prominent South Africans, including the minister of lands, had responded to the crisis after Sharpeville by calling for the relaxation of apartheid laws. Though the idea that a crisis would end apartheid, perhaps through UN intervention, was not new,[4] few in 1960 thought that the white minority government could be overthrown, and Hammarskjöld and those he worked with believed that change was most likely to come from within the South African government. A believer in dialogue, he hoped that he could help move the South African government away from apartheid by pointing out the fallacies in the policy and warning of the consequences were it not abandoned.

4 February 1960

UN Secretary-General Dag Hammarskjöld holds his first press conference since his return from the six-week journey during which he visited more than twenty countries and territories on the African continent. Photo: UN Photo

At the first press conference he held after the Security Council resolution, Hammarskjöld asked rhetorically: 'How do you go about building bridges? The building of a firm bridge, of course, over which you can pass without any difficulties, may be a long story, but you can at least put the first stones down into the water or get a first piece of wood across the water, a little bit out into it.'[5] Were he not allowed to visit, or were he to report no progress to the Security Council, the likelihood was that tougher action would follow, such as the ending of South African representation at the UN. The African and Asian countries at the UN probably hoped that South Africa would refuse him permission to visit, and that this would trigger stronger action against it. In the event, however, the British put pressure on South Africa to agree to his visit, though with the proviso that it 'did not imply any recognition by the Union government of UN authority in relation to South Africa's domestic affairs'.[6]

Practical arrangements for the visit were made in London when Hammarskjöld met the South African minister for external affairs, Eric Louw – Prime Minister Hendrik Verwoerd was recovering from a gunshot wound to the head received during an attempted assassination – immediately after the Commonwealth prime ministers' conference in May. Hammarskjöld was told that it would be best if his visit took place after the judicial commissions into the shootings at Sharpeville and Langa had reported, so it was agreed that he would visit in July.

4 It had been put forward, for example, by Arthur Keppel-Jones in *When Smuts Goes*, London: Gollancz 1947.

5 Hammarskjöldblog.com: www.dag-hammarskjold.com/

6 United Nations Security Council (UNSC), Second Interim Report by the Secretary-General under Security Council Resolution S/4300, 11 October 1960.

He planned to report to the Security Council before the annual UN General Assembly session beginning in September.

At the London meeting, Hammarskjöld asked Louw for 'free access to such non-governmental persons as it might be useful for him to see'. Louw replied that though there would be no strings attached to his visit, there were certain 'risks and possible objections against other contacts'. Hammarskjöld accepted that contacts 'with any specific people or groups would have to be decided upon as the means to an end' and that such a decision 'was a question of "wisdom" which it was no use to discuss at the present stage'.[7] He had been approached by leading members of the resistance in South Africa then in London, including Oliver Tambo of the African National Congress (ANC), who wanted him to insist that when he visited South Africa he should talk to Chief Albert Luthuli, the president-general of the ANC and Robert Sobukwe, president of the Pan-Africanist Congress, though the former was banned and restricted and the latter was in jail. The tentative schedule for Hammarskjöld's visit provided for a 10-day stay, in which he would have discussions with 'representative Africans' in Johannesburg and 'representatives of "Cape Coloureds"' in Cape Town, and would travel to Umtata and Durban for 'discussions with representatives of Africans and Indians'.[8]

As the date of Hammarskjöld's visit approached, Alan Paton, the famous novelist who was also chairman of the non-racial Liberal Party in South Africa, issued a statement calling for him to meet people across the political spectrum. Paton also wrote to Eleanor Roosevelt, widow of the former American president, in New York to ask her to use her influence to ensure that this happened. The South African Indian Congress and the Congress of Democrats urged him to meet 'representative leaders', mentioning Luthuli in particular. Duma Nokwe, secretary-general of the now banned ANC and a lawyer, wrote to Hammarskjöld from Pretoria Central prison, where he was detained, to appeal to him to meet Luthuli.[9] From Windhoek, the acting president-general of the South West Africa National Union asked for an interview so that he could explain the impact of apartheid in South West Africa. He added, referring to the Herero petitions, that such a meeting would 'obviate suspicion on the part of those who have called on the United Nations for the past 13 years' and so enhance the prestige of the UN in the region.[10] Hammarskjöld's focus was on South Africa alone, however, and nothing came of this.

7 National Library of Sweden: Hammarskjöld Papers, box L, 179-91.

8 Ibid.

9 E.S. Reddy Collection, Yale University Library, MS 1499, box 57, folder Wieschhoff.

10 *Cape Times*, 29 July 1960.

Hammarskjöld was not to visit anywhere in the region in 1960, for from early July the Congo crisis became his chief priority. It was first announced that his visit to South Africa would be shortened, so that he would only meet the government, then that his visit would be postponed until late August or early September, and then, when he had to return to UN headquarters in New York to report on developments in the Congo, that it would not take place at all at that time. All he could report to the UN Security Council on 11 October was that he had had another meeting with Louw at UN headquarters in New York, that Louw had issued a new invitation to him to visit South Africa, and that he now planned to undertake such a visit in January 1961.[11] The month before it was due to take place, African leaders meeting outside Johannesburg approved a resolution they then sent to the UN in which they welcomed his visit, but urged him to meet African leaders, and they appealed to the UN to send a commission to Pondoland, where an armed revolt was taking place. The last sentence in the cable they sent to New York read: 'Nationalist government no moral or legal right to rule.'[12]

6 August 1960

UN Secretary-General Dag Hammarskjöld at Idlewild Airport upon his return to New York from the Republic of the Congo. Photo: UN Photo/Yutaka Nagata

The lengthy delay in Hammarskjöld's visit meant that by the time it took place the post-Sharpeville crisis in South Africa had abated, the ruling white minority had recovered its confidence, in part thanks to Verwoerd's 'miraculous' recovery from the attempted assassination, and any talk in government circles of relaxing apartheid had disappeared. Also, the urgency previously expressed by the African and Asian countries at the UN to tackle the South African conflict had faded. On the other hand, during the intervening months many more independent African countries had become members of the UN, and Hammarskjöld knew that their presence would mean the campaign against apartheid at the UN was likely to grow more intense in future years. The question in 1960-61 seemed to many to be whether South Africa would follow other African countries and 'decolonise' in some form, which would presumably mean abandoning apartheid and adopting some form of power-sharing. South Africa's ruling white elite, however, saw their country as quite different from the rest of Africa. For them, there was no question of ending apartheid, which Verwoerd redefined as involving leading African states (the Bantustans) within South Africa to independence as a way to meet the demands for African self-determination.

11 UNSC, Second Interim Report by the Secretary-General, 11 October 1960. This added that 'during the contemplated visit to the Union of South Africa, while consultation throughout would be with the Union Government, no restrictive rules were to be imposed on the Secretary-General'.

12 Thomas Karis and Gwendolen Carter (eds), *From Protest to Challenge*, volume 3, Stanford: Hoover Institution Press 1977, pp. 627-8.

Hammarskjöld's visit, January 1961

As Hammarskjöld's plane approached South Africa, it was instructed to land at the military airfield at Waterkloof and not at the main commercial airport of Johannesburg, Jan Smuts, because a group of demonstrators had gathered there. He was therefore welcomed initially only by some government officials and a few journalists. By the time he reached his hotel in Pretoria, however, there were about 300 'Africans, Indians, half-castes and a few whites' to greet him with the thumbs up sign of the Congress Alliance, formed in the mid-1950s from the main anti-apartheid movements and led by the ANC. They sang the anthem of the ANC, 'Nkosi Sikeleli Africa', and held up placards that read, *inter alia*, 'Welcome to our Police State'; 'Dag: Take the Yokes off our Neck'; 'Dag Baas – where is your pass?';[13] 'Meet Non-white leaders'; 'Don't forget Sharpeville'; 'Dag: visit Pondoland'; and 'We want Human Rights, Higher Wages'. One of the group tried to present him with a letter asking him to meet recognised leaders, others tried to garland him. The demonstrators clearly hoped that this first visit by a UN Secretary-General would be watched by the world, would draw attention to apartheid and would allow at least some space for the anti-apartheid forces to engage with the chief official of the world body.[14]

Concealed in the garland of flowers left for him at his hotel was a memorandum by the ANC and its associated organisations. This argued that 'Whereas the unjust nature of South Africa's form of government was only of academic interest in the past, it is now a source of great concern to many nations throughout the world. This is because South African tension and violence is recognized as a threat to world peace.' The memorandum concluded:

> Above all, we hope that your investigations here will bear out our repeated contention that the South African Government is a monster, imposing its arrogant will on a dissenting people. We hope that you will recognize, as we do, that this Government is holding the vast majority of our people down by sheer force, and that its policies are contrary to world practice. We hope, too, that you will inform the Security Council that the majority of the South African people are looking to that body for substantial assistance in their struggles for the realization of true democracy in our country.[15]

13 This was a clever play on words: 'Dag Baas' was a customary greeting by Africans, meaning 'morning, master' in Afrikaans, and so implied subservience.

14 *Cape Times*, 7 January 1961; *New York Times*, 7 January 1961.

15 Memorandum by the Congress Alliance submitted to Dag Hammarskjöld, 6 January 1961: http://www.anc.org.za/show.php?id=4755&t=United%20Nations

Such hopes were to be dashed. While Hammarskjöld opposed apartheid, he did not believe that open confrontation with the South African government would help to end it. He arrived well-informed, for he had had lengthy briefing papers prepared for him at UN headquarters, and he had read widely, including a solid anti-apartheid study by Leo Marquard entitled *The Peoples and Policies of South Africa*. He was accompanied throughout his visit by his chief African adviser Heinrich Wieschhoff, an American of German origin who had lived in Pretoria before the Second World War. Hammarskjöld relied heavily on Wieschhoff's advice on where to go and what to see in South Africa, but his visit was for the most part carefully controlled by the government, which, of course, knew of the appeals for him to meet opposition leaders and knew that he would be seen in some quarters in South Africa as representing hope for change and an end to apartheid. A heavy security presence followed him, and for the most part he travelled in government cars to meetings arranged for him by the government.

On arrival, he went straight into talks with Prime Minister Verwoerd, after which he flew to Cape Town for a 'day off' on Sunday, 8 January. One of the South African diplomats in the talks in Pretoria, J.F. ('Frikkie') Botha, had got to know Hammarskjöld when he was representing South Africa at the UN and become a close friend of Wieschhoff. Botha suggested that in Cape Town Hammarskjöld should be the guest of Paul Sauer, the government minister who after the Sharpeville massacre had suggested that the apartheid laws relating to urban Africans might have to be reconsidered, and was therefore one

Demonstrators outside the hotel in Pretoria where Dag Hammarskjöld stayed. Photo: © Hulton-Deutsch Collection/CORBIS

of those Afrikaners regarded as 'verligte' (enlightened). Hammarskjöld was taken by car from his hotel to major tourist sites in the city, then to the winelands near Stellenbosch. As they looked out over the vineyards on an estate founded by Europeans in the 17th century, Wieschhoff was reported to have remarked to Sauer, with a smile: 'To think that all this must be ruled by the restless natives of the Witwatersrand.'[16] Hammarskjöld visited no Cape Town townships and the only black area he passed through was the Coloured suburb of Athlone.[17]

In the talks in Pretoria, Verwoerd tried to justify apartheid by reference to the diverse nature of the South African population. Hammarskjöld asked him in particular where those of mixed descent fitted into the apartheid jigsaw. After his 'day off', he visited the parliament buildings in Cape Town (parliament itself was not in session) and nearby government offices, where he met members of the Council for Coloured Affairs, an unrepresentative state-appointed body. He was greeted by people holding placards, some welcoming him but others calling the Council members stooges. That evening, at a dinner held in his honour by the Administrator of Cape Province, I.D. du Plessis, an apartheid apologist who was then secretary for Coloured affairs, tried to persuade him that the Coloured people were a distinct group in South African society.

Hammarskjöld then flew to Umtata, the chief city in the Transkei, the area at the forefront of the implementation of the policy of 'Grand Apartheid'. There he met Botha Sigcau, who would become the first president of the Transkei when that Bantustan was given its nominal 'independence' by the South African government in October 1976, and other state-appointed African chiefs, members of the Transkeian Territorial Authority, which had some powers of local government. That evening, at a dinner hosted in his honour, the commissioner-general for the Transkei attacked the UN, saying South Africa had been given a rough passage there. An annoyed Hammarskjöld spoke in response of the UN as a mirror of the world, where global concerns were reflected. He was also reported to have said: 'I admire the spirit in which you do your utmost to help your friends [the Africans] to achieve the goal which you have set yourselves'. This remark led three leaders of the anti-apartheid Liberal Party to express their 'great concern' that it might be seen as approving apartheid, and especially the Bantustan dream of Verwoerd. 'The hopes of millions of South Africans whose representatives you have not yet met lie in your visit,' Paton told him. Hammarskjöld's staff had to

16 Hammarskjöld commented that the Cape was more like Europe than Africa and the contrast with the Congo must have been very striking. 'S.W.', 'Spel Dag se Dood Onheil vir Ons?' (Will Dag's Death Be Misfortune for us?), *Die Burger*, 23 September 1961; J.F. Botha, interview with author, 12 April 2011.

17 *Cape Times*, 9 January 1961.

issue a statement saying he had been misquoted and his speech taken out of context, for, they said, as Secretary-General he could make no public pronouncements on the South African government's policies.[18]

Hammarskjöld asked to be driven from Umtata into nearby Pondoland, where an uprising the previous year against the imposition of Bantustan policies had left over 20 dead. He drove to Lusikisiki in a car with Kaiser Matanzima, who would become Transkei's first prime minister 25 years later, but was not able to see any signs of the revolt, which had taken place in mountainous country.[19] From Umtata, he did not go to Durban, as originally planned, but flew back to the Witwatersrand. By this time the repeated criticism that he was not meeting any real leaders of the African people could be ignored no longer, but there was no question of his meeting Luthuli, who was restricted to his home town of Groutville near Durban (Robert Kennedy had the use of a helicopter to take him from Durban to see Luthuli in June 1966). When Hammarskjöld told Verwoerd on 10 January that he wanted to meet 'true representatives of natives and coloured', Verwoerd replied 'These people will interpret such interviews as an arbitration by you on UN instructions, as an appeal by them to higher authority,' adding 'We do not…wish you to see [any] representative of illegal organisations or people under ban for political reasons.'[20]

Clearly Hammarskjöld thought he could not insist on meeting such people. Only on his last full day in South Africa did he finally meet three leading Africans who had some association with the ANC but were not banned or restricted: K.T. Masemola, the secretary of the Pretoria Native Advisory Board and a director of companies; William Nkomo, a medical doctor who had been a founder member of the ANC Youth League but was in 1961 distancing himself from his activist past; and Alfred B. Xuma. The latter had, as president-general of the ANC, been part of a successful campaign at the UN in 1946 to block a proposed South African annexation of South West Africa, but had then been ousted as president-general by the Youth League in 1949 and by 1961 was very much a 'has-been'. The three were hardly, then, the representative leaders that so many had called on Hammarskjöld to meet. But in a meeting that lasted 90 minutes, the three Africans told him that leaders like Luthuli should share in the running of the country; that they rejected the division of the country by the creation of Bantustans; and that 'there might be a case for outside intervention if South Africa continued to deny human rights to Africans and other non-whites'.[21]

18 'Hans Abraham Provoked Dag at Umtata Dinner', *Contact*, 28 January 1961; *Cape Times*, 12 January 1961; Brian Urquhart, *Hammarskjold*, London: Bodley Head 1973, p. 499.

19 *New York Times*, 10 January 1961.

20 National Library of Sweden, Hammarskjöld Papers.

21 'Natives Told Dag re "Outside Interference"', *The Star*, 13 January 1961; *New York Times*, 14 January 1961.

After this meeting, Hammarskjöld did visit a number of African townships. In Soweto he asked to meet some of the inhabitants, and visited five homes of people who had been forcibly removed some years previously from Sophiatown. He was ringed by police as he did so, however, and journalists and press photographers were bitter that they could not get near him. When he then visited a gold mine, he chose not to go down the mine shaft but instead to meet two Africans in the mine office, with only Wieschhoff and his personal bodyguard present. The Africans told reporters afterwards that he had asked them if they ever saw political leaders, to which they replied that was not allowed. They also told him that they were well treated, but had to carry passes. Before leaving South Africa, Hammarskjöld visited another township outside Pretoria, where he went into a beerhall and talked to Africans in a butchery, a dry cleaning shop and a general store. He had planned to stay in South Africa another two days, but had to return to New York for another Security Council debate on the Congo.[22]

Hammarskjöld interpreted his mandate from the UN as not merely to talk to the South African government about the situation that had given rise to the shootings at Sharpeville and Langa, but also about apartheid in general. This he approached mostly from a general philosophical angle and hardly at all in terms of what apartheid meant for blacks on a day-to-day basis. In his talks with Louw in May 1960, he had said that he recognised that though 'both total integration and total and equitable separation may not be objectionable policies from the standpoint of human rights, he doubted that, having regard to the economical and demographical situation in the Union, policies of complete separation could be regarded as realistic'. He also pointed out that even in what were called 'European areas' there would always be a 'non-European majority which…would wish to play a full part in Union's affairs'. Hammarskjöld had ended his discussions with Louw by asking three questions:

> [I]n the so-called Bantu homelands would the people constitutionally be kept to traditional lines or be permitted to take up 20th century constitutional forms with a natural share in the responsibility for their country?; How could economic equity be created in view of the exorbitant investments necessary?; and Could it be envisaged that the native group in the white regions could be barred from rights given to the white population?[23]

22 *Cape Times*, 13 January 1961; Urquhart, *Hammarskjold,* p. 499.

23 National Library of Sweden, Hammarskjöld Papers.

Though Hammarskjöld told the Security Council in October 1960 that he intended to 'explore with the Prime Minister the possibility of arrangements which would provide for appropriate safeguards of human rights, with adequate contact with the United Nations',[24] the country's largest newspaper, the *Sunday Times*, pointed out during his visit that Verwoerd had in a sense given his response to Hammarskjöld even before he arrived. In his New Year's broadcast at the beginning of 1961, the prime minister had said that the UN had become 'a platform where problems are created and aggravated' and that he could not believe that any 'world organisation…can make any impression on our South African thinking or action'. In another speech, he had said that, in response to pressure from overseas, South Africa would have to be 'as unyielding as walls of granite'.[25]

The segregated stands of a sports arena in Bloemfontein, South Africa, are a reflection of an entire nation divided by the issue of race.
Photo: UN Photo/H Vassal

When the two men finally met, Verwoerd liked the reserved, quiet manner of Hammarskjöld, so different from what he saw as the pompous and arrogant attitude shown by his visitor of a year earlier, British Prime Minister Harold Macmillan. In a break in the talks, Verwoerd said in Afrikaans to Frikkie Botha and the few other South Africans present, in language similar to that Mrs Thatcher was to use of Gorbachev, that Hammarskjöld was a person he could engage with.[26] He told Hammarskjöld that South Africa was very different from the rest of Africa and that 'the Western Powers should understand what the Union means for the protection of Africa from communism and thus for the safety of Europe'. Integration would mean 'national suicide', while separation was 'a good neighbour policy' and the ultimate goal was 'a commonwealth of South Africa, including white and black states'.

In response, Hammarskjöld pointed out that 'the natives have no saying [*sic*] in the central Government and its preparation for the future'. While most of the UN would support 'speedy integration', he personally was not in favour of that, and he realised that it was politically unrealistic, so the question was whether there was 'a competitive alternative' to integration. In six meetings, Hammarskjöld and Verwoerd explored the practicalities of the 'Bantu homelands', with Hammarskjöld pointing out that they would require major investment and much more land to become viable. He failed to see the likelihood of that. He told Verwoerd that he did not understand South Africa's racial policy outside the 'homelands', and that much of the country's legislation left him 'frankly shocked'. Racial discrimination 'is bound to cast doubt of [*sic*] the so-to-say rational arguments for segregation'. He pointed out that South Africa had not explained its approach to

24 UNSC, Second Interim Report by the Secretary-General, 11 October 1960.

25 Stanley Uys, 'Granite Face of Apartheid', *Sunday Times*, 8 January 1961.

26 J.F. Botha, interview with author, 12 April 2011.

the world 'in terms which convinced public opinion', and that the present slow progress towards the government's self-imposed targets would not work. The African states at the UN would unite on the South African issue. A much bolder approach might 'catch the wind' (did he think here of Macmillan's warning of the 'wind of change'?), but was urgent. It would mean setting aside 'a sufficient and coherent territory to serve as a basis for the national life of a Bantu state', and 'fixed steps at short intervals leading to the establishment of such political institutions as were necessary as a basis for full independence and self-government'. Africans outside the 'homelands' must have their 'human rights' recognised. He suggested that it might be useful for the government to set up an institution to receive complaints and draw attention to deviations from 'the sound way to reach the target', as well as to maintain contact with the UN. In response, Verwoerd said that his government would 'try to increase the pace, but it is very difficult' and 'in the meantime we have to maintain the political control in our own hands. Otherwise the natives, with the help of international force, will overwhelm us.'[27]

At the heart of the discussions, then, was Verwoerd's concept of so-called 'grand apartheid' (to distinguish it from the 'petty apartheid' of racial discrimination similar to that of the United States South earlier in the century) or 'separate development', which, as he had explained to Macmillan a year earlier, was his answer to the African nationalism then sweeping the continent. As we have seen, Hammarskjöld did not reject out of hand the idea of developing the African reserve areas into self-governing and then 'independent' territories, but he explored with Verwoerd what might be done to make this meaningful, and insisted that any such policy should be discussed with those it affected. He knew, of course, that Verwoerd had made clear there would be no change to apartheid *per se*, and he tried to raise issues of human rights, which Verwoerd deflected by discussions of South Africa's historical legacy and its diverse population, which he said required policies of separation.

Though there was no agreement between the two men, Hammarskjöld did not see this as meaning he was up against a brick wall. Both envisaged their exchanges would continue at some future date. Hammarskjöld reported to the Security Council on 23 January 1961 that while 'so far no mutually acceptable arrangement has been found', 'this lack of agreement is not conclusive' and that the

> …exchange of views in general has served a most useful purpose. The Secretary-General does not consider the consultations as having come to an end, and he looks forward to their continuation at an appropriate time with a view to further efforts from his side to find an adequate

27 National Library of Sweden, Hammarskjöld Papers.

> solution…The Prime Minister of the Union of South Africa has indicated that further consideration will be given to questions raised in the course of the talks and has stated that 'the Union Government, having found the talks with the Secretary-General useful and constructive, have decided to invite him at an appropriate time, or times, to visit the Union again in order that the present contact may be continued. [28]

By the time of Hammarskjöld's death in September, no further visit had been arranged.

Conclusion

Hammarskjöld's attempt at dialogue with the South African government was not continued by his successors as Secretary-General, who focused rather on the issue of South West Africa/Namibia, which many saw as being easier to solve than that of apartheid itself. Photo: UN Photo/Yutaka Nagata

For Hammarskjöld, the visit to South Africa, for all its difficulties, must have been a relatively pleasant distraction from the Congo, where he was involved in what he himself called 'the craziest operation in history'.[29] Part of his mind must have been on the Congo throughout his time in South Africa. There were numerous demands on him, some of them absurd: the South African Tennis Board wanted him to investigate colour discrimination in sport, for example.[30] His main task was to talk to a government pursuing policies with which he fundamentally disagreed, but, as we have seen, he made some efforts to speak to others. The delay of over six months in his arrival was, from the point of view of any action being taken against the apartheid regime, unfortunate, though by the time it took place 17 more African countries had become independent and joined the UN and would add their voices to the campaign against apartheid. Hammarskjöld's attempt at dialogue with the South African government was not continued by his successors as Secretary-General, who focused rather on the issue of South West Africa/Namibia, which many saw as being easier to solve than that of apartheid itself. The ANC-led Congress Alliance was critical of Hammarskjöld's visit, blaming Wieschhoff in particular for his not meeting Congress leaders and pointing out that during the visit no disapproval was voiced of the South African government's policies.[31]

Could Hammarskjöld have done more? He was in South Africa as a guest of the South African government and he knew he had to be seen as an impartial. The arrangements for his visit, as the *Cape Times* said, were 'calculated to frustrate those who had planned demonstrations and hoped for meetings to show him another side of the picture'. However, as the newspaper also pointed out, he could have stayed in his hotel room

28 UNSC, 23 January 1961, S/4635, Report by the Secretary-General.

29 James L. Henderson, *Hammarskjöld,* London: Methuen 1969, p. 80.

30 *Cape Times*, 9 January 1961.

31 Dag Hammarskjöld Welcoming Committee, 'Report on the visit of the Secretary-General of the United Nations', n.d., p. 4, quoted in Sellstrom, 'Hammarskjöld and Apartheid South Africa', pp. 53-4.

and chosen not to. The *Cape Times* believed that the government had got bad publicity from the impression that was created that it was protecting him from anti-government influences. It would have been better, the newspaper suggested, had the government made clear to the public at the beginning of his visit that he was free to see anyone he wanted to see. [32]

Had Hammarskjöld lived and made further visits, it seems unlikely that he could either have become a strong voice against apartheid or have persuaded Verwoerd to modify his Bantustan policies. The month after his meetings with Verwoerd, he intervened personally with him to secure the withdrawal of the case against a Swedish novelist arrested in Johannesburg under South Africa's notorious Immorality Act. This meant that the charge against the person with whom she had committed the alleged offence, the national organising secretary of the ANC Youth League, was also withdrawn. As Sellstrom has suggested, this case must have brought home to Hammarskjöld with renewed force the horrors and absurdities of what apartheid could mean.[33]

The South African government expected him to return and wanted to continue the dialogue with him, but in the event his visit led nowhere and the impetus for further action in the Security Council was lost. But Peter Brown, the national chairman of the Liberal Party, though disappointed in the visit, thought that it might have positive results. If Verwoerd was deaf to Hammarskjöld's arguments, wrote Brown, 'the United Nations and the Commonwealth will know that argument is useless and will think more in terms of action…it would be idle to suppose that the rest of the world will sit back and let apartheid flourish [or] that any state can survive in isolation in the Atomic Age'.[34] And Hammarskjöld's failure to achieve anything substantial in his talks with Verwoerd did feed into South Africa's withdrawal from the Commonwealth two months after his visit in the face of opposition from other Commonwealth countries to South Africa's continued membership. After the Commonwealth prime ministers' conference the previous year, Kwame Nkrumah had told a branch of the UN that

> 'If the Secretary-General is unable to agree with the Government of the Union of South Africa on such arrangements as would adequately help in upholding the purposes and principles of the Charter, then the Government of Ghana for one would find it embarrassing to remain in the Commonwealth with a republic whose policy is not based upon the purposes and principles of the United Nations'.[35]

32 *Cape Times*, 12 and 13 January 1961.

33 Sellstrom, 'Hammarskjöld and Apartheid South Africa', pp. 56-8.

34 Peter Brown, 'In Terms of Action', *Contact*, 28 January 1961

35 National Library of Sweden, Hammarskjöld Papers.

Though Hammarskjöld's successors were to take up the South West Africa/Namibia issue, and the UN Security Council was to impose a voluntary arms embargo on South Africa in 1963 and then a mandatory embargo in 1977, the UN was never to impose economic sanctions on the country. On the other hand, the mounting campaign against South Africa at the UN, seen in particular in the General Assembly, from which South Africa was excluded in 1974, was one aspect of the growing international pressure against apartheid that finally helped bring that racial system to an end. So Hammarskjöld's interaction with South Africa was a brief moment in a much longer story of the UN's relationship with the country of apartheid, a story that was to lead eventually to UN participation in the monitoring of the first democratic election in 1994.[36] It is certainly the case that Hammarskjöld achieved nothing significant from his visit, for apartheid intensified and repression and conflict grew worse in subsequent years and decades. There was none of the 'substantial progress' he had hoped for, and his mission was indeed, in Tor Sellstrom's words, 'unaccomplished'. Though anti-apartheid activists were naturally disappointed in this, in the context of the time was it possible for him to have done more?

It is certainly the case that Hammarskjöld achieved nothing significant from his visit, for apartheid intensified and repression and conflict grew worse in subsequent years and decades.

Links between South Africa and Hammarskjöld continued after his death on 18 September 1961. In August 1998, in the final days of the public hearings of the Truth and Reconciliation Commission, Desmond Tutu, chair of the commission, disclosed that documents discovered during the commission's work suggested that South Africans had been involved in sabotage against Hammarskjöld's plane and so were in part responsible for his death. These allegations have not been proved, however, and appear unlikely to be true.[37] The month after Hammarskjöld's death, the Nobel Peace Prize committee announced that he would be awarded the prize for 1961 posthumously, and that the prize for 1960 would be awarded to Albert Luthuli, whom he had failed to meet in South Africa. When Luthuli received the prize in Oslo in December 1961, he paid gracious tribute to Hammarskjöld as 'a fighter for peace' and said that it was 'significant that it was in Africa, my home continent, that he gave his life'. The linked awards to Hammarskjöld and Luthuli helped promote the development of the global anti-apartheid movement.[38]

36 See esp. E.S. Reddy, 'The United Nations and the Struggle for Liberation in South Africa', in South African Democracy Education Trust, *The Road to Democracy in South Africa*, volume 3, Pretoria, Unisa Press 2009, pp. 41-139.

37 More information regarding this may be forthcoming in a book by Susan Williams to be published in September 2011. There are other links. A book on Hammarskjöld was translated into English by Christoph Jensen, living outside Cape Town, and his translation was published in that city: Stephan Mogle-Stadel, *Dag Hammarskjöld. Visionary for the Future of Humanity*, Cape Town: Novalis Press 2002.

38 For Sweden, see esp. T. Sellstrom, *Sweden and National Liberation in Southern Africa*, volume 1, Uppsala, Nordiska Afrikainstitutet 1999.

22 July 1958

Continuing its day and night meetings on the situation in Lebanon, the UN Security Council failed to adopt the resolution presented by Japan because of the negative vote of a permanent member (USSR). The vote on the resolution followed the rejection of Soviet amendments by 8 votes to 1 with 2 abstentions.

Seen here in the delegates lounge between meetings today are (left to right): Mr. C.S.A. Ritchie, Permanent Representative of Canada to the UN; Sir Pierson Dixon, the United Kingdoms' Permanent Representative to the UN; Dr. Sidney E. Smith, Canada's Secretary of State for External Affairs; and UN Secretary-General Dag Hammarskjöld.

Papers and Comments

» International Criminal Justice in the Shadow of Politics

Alex Obote Odora

> The ICTY and the ICTR were established more as acts of political contrition, because of egregious failures to swiftly confront the situations in the former Yugoslavia and Rwanda, than as part of a deliberate policy, promoting international justice.
>
> Ralph Zacklin, UN Assistant Secretary-General for Legal Affairs (Zacklin 2004: 541)

Introduction

Some scholars and legal practitioners have suggested that the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were established more as acts of political contrition than as part of a deliberate policy to promote international criminal justice. These commentators further suggest that the International Criminal Court (ICC), as a judicial institution, intends to serve the political interests of the major powers, particularly the five permanent members of the Security Council (P5). In sum, the argument is that that the ICC targets Africa.

Two preliminary points need to be addressed. First, the ICTY and ICTR were established by the Security Council to address situations unique to the former Yugoslavia and Rwanda. The two *ad hoc* tribunals did not have jurisdictions to investigate or prosecute serious crimes committed elsewhere. To that extent, the ICTY and ICTR target no other country except to implement their respective mandates. The two tribunals investigate and prosecute only persons covered by the ICTY/ICTR statutes. Second, unlike the ICTY and ICTR, which are creatures of the Security Council, the ICC was established by state party, not the Council, and has a broader jurisdiction and mandate to investigate or prosecute any person anywhere in the world, as long as the conditions stipulated in the ICC statute (Rome Treaty) are met. Its objective is not to target any state or continent, for the ICC investigates and prosecutes individuals and not states or organisations.

To that extent, the argument that the ICC is created to serve the political interests of major powers is a caricature. It exaggerates certain features of the international court and underestimates the extent to which the court has made international criminal justice relevant and accessible to victims of serious violations of international humanitarian law (IHL). Significantly, the ICC provides access to the underclass living in states where the judicial systems are unwilling or unable to conduct credible investigations or prosecutions of suspects who are in positions of authority, or are connected to persons in positions of leadership or enjoy the protection of governments or government officials. These vulnerable persons are the beneficiaries of the ICC and have not, so far, complained that the ICC is targeting Africa.

The suggestion that the ICTR was established as a 'diplomatic *mea culpa*, an act of contrition by the world's major powers to make amends for their gross failure to prevent or halt the massacre' is not fully supported by Rwanda's or Africa's history, particularly during the Cold War (Del Ponte 2008: 69). This observation is an exaggeration, particularly in the context of the ICTR's bringing to account of senior political leaders, military commanders and other influential persons who exercised great political and economic control in Rwanda; persons who would never have been called to account for their acts or omissions before a national court in Rwanda.

The creation of the ICC is a positive development for victims of IHL. In practice, such victims, their representatives and victim-friendly NGOs have closely followed the proceedings of the ICC. At the time of writing, there are three categories of cases before the ICC. The first relates to situations referred by individual states to the ICC or 'self-referrals'. These states are the Central Africa Republic (CAR), Democratic Republic of the Congo (DRC) and Uganda. They made these voluntary referrals because each of them recognised they were unable to conduct credible investigations or prosecutions. The fact that all three are from Africa cannot and must not be used to support the argument that the ICC targets Africa. The three states did not refer a country to the ICC, but situations that ultimately lead to investigating the acts or omissions of individuals alleged to have committed international crimes. Self-referral is one of the rights enjoyed by a sovereign state in the exercise of its free will. The decision whether or not to exercise the right of self-referral is not imposed on any state. Significantly, the CAR, DRC and Uganda governments have not thus far argued they were targeted or forced by the ICC to refer the situations to it.

Suggesting that, in situations of self-referral, African states are targeted by the ICC, is devoid of merit. This paper will not therefore discuss self-referrals.

The second category relates to investigations or prosecutions initiated by the prosecutor with the authorisation of a pre-trial chamber. This was the option taken by the ICC prosecutor with respect to the Kenyan situation. Under this category, the contentious issue is the apparent failure by the public to appreciate the criteria used by the ICC prosecutor in initiating investigations. The Kenya case is a good example. The argument that the ICC has not investigated other equally serious situations, as, for example, in Honduras, Sri Lanka, Afghanistan or Iraq, may be a politically useful argument but is not necessarily correct in law. Each situation is different and the ICC prosecutor must prioritise, as s/he cannot investigate all cases at once. What is necessary is for the prosecutor to make public the priority situations s/he proposes to investigate, where this is possible and without compromising the security of witnesses. A regular update on its website would make the general public appreciate the work of the ICC.

ICC critics argue that particularly the US, a P5 member, is not party to the Rome Treaty but is participating in the armed conflict in Libya alongside France, Britain and other NATO members, it ought to have abstained from voting when Resolution 1973 (2011) was adopted.

The third category relates to referrals of situations to the ICC by the Security Council. The circumstances in Sudan and Libya were referred to the ICC by the Council, yet other more serious cases, including Sri Lanka, the Israeli/Palestine conflicts and Syria were not. This is one of the grounds critics of the ICC cite in support of the argument that the court targets Africa. ICC critics neglect to mention that it is the Security Council, and not the ICC, that authorised investigations of Sudan and Libya as provided for in Article 13(b) of the ICC statute.

Additionally, ICC critics argue that particularly the US, a P5 member, is not party to the Rome Treaty but is participating in the armed conflict in Libya alongside France, Britain and other NATO members, it ought to have abstained from voting when Resolution 1973 (2011) was adopted. Further, the role of the UK and France, considering their military actions and economic interests in Libya, tends to undermine the Council even if its decision is taken in good faith (Akhavan 2010: 1046; Kress 2004: 944).

While there may be reasons for criticising the ICC, the challenge of impunity in Africa is also real. Victims in Africa are left unprotected by their respective governments and their cases are not credibly investigated or prosecuted under national legal systems. These legal deficits are only remedied through international criminal investigation or prosecution by the ICC. This is one of the reasons many African states (31 of 53) have signed and ratified the Rome statute. It can be persuasively argued that the ICC has not been robust and aggressive enough in pursuing African leaders alleged to have committed international crimes. Many more need to be investigated. Those dissatisfied with the limited investigations currently being conducted by the ICC wonder when the court will begin to investigate members of the government's armed forces, and not focus only on rebels.

The fact that only African states have referred cases to the ICC, I submit, attests to the weakness of some national criminal justice systems on the continent. The self-referrals also suggest that these African states are aware of these weaknesses. Significantly, self-referrals attest to the commitment of these states to fight impunity through the ICC, which credibly investigates and prosecutes perpetrators. Self-referrals should not therefore be construed negatively and as targeting Africa. Rather, they are positive acts within the overall ambit of complementarity under the ICC statute. The critics of self-referral to the ICC should not turn a blind eye to the plight of victims and vulnerable witnesses in Africa, most of whom receive no justice or protection under national jurisdictions.

On the other hand, the clumsy manner in which the Security Council and the ICC prosecutor have handled the Sudan and Libya referrals has led to allegations of 'double standards' in the treatment of cases from Africa as opposed to other equally serious IHL violations elsewhere in the world. The ICC prosecutor's initiation of an investigation into the Kenyan situation has led many ICC critics to question the criteria used by the prosecutor in targeting another African state, while ignoring similar or more serious violations of IHL on other continents. The perception of 'double standards' in the Security Council's selection of situations for referral to the ICC as well as the ICC prosecutor's criteria in selecting a given state for investigation, albeit with the authorisation of a pre-trial chamber, have reinforced the view that the ICC targets Africa. In my discussion, I focus on three situations in examining whether the Security Council or the prosecutor uses double standards and further whether the ICC prosecutor used a selective criterion with respect to Kenya.

As regards ICTR, I will submit that critics tend to ignore the historical context under which the tribunal was established in arguing that it was established as a diplomatic *mea culpa*. The history of the US, the UK, France and other Western powers in committing serious violations of IHL in Africa, Asia and Latin America over several decades is well documented. Some of the atrocities during the colonial period pale in comparison to abuses and serious violations of IHL in the CAR, DRC or Uganda, situations currently before the ICC (Boahen 1990: 25), or crimes being prosecuted by the ICTR. The Security Council did not establish tribunals to cover-up criminal acts committed by the colonial and imperial powers in Africa, Asia and Latin America since 1945.

The US, UK, France and Russia did, however, create the Nuremberg and Tokyo tribunals to prosecute persons most responsible for the crimes committed by Germany and Japan. In later years, the major powers did not find it necessary to establish similar tribunals to investi-

gate and prosecute perpetrators of serious violations of IHL committed in Vietnam by the US, Chechnya by Russia or Tibet by China. This selective approach to international criminal justice was the practice in the pre-1989 world. After the fall of the Berlin Wall, a consensus began to emerge within the Security Council, particularly among the P5, to address international criminal justice, hence the establishment of the ICTY and ICTR in quick succession. The failure to establish international criminal tribunals between 1945 and 1992 was a function of the Cold War and not situations in Africa.

The relevance of international criminal tribunals may be measured by their proliferation.

Further, critics of the ICTR tend to ignore the care and detailed legal analysis undertaken by the United Nations Office of Legal Affairs (OLA) in the preparation of the draft statute for the ICTR. The drafting exercise demonstrates the seriousness of the work done rather than acts of political contrition. The fact that some states had political interests in the events in the former Yugoslavia and Rwanda does not undermine the credibility of the ICTR statute. Rather, the statute demonstrates that the Security Council, while a political body, can perform its functions like a national parliament by adopting legislation for the good of society. In all situations before the Security Council, politics does influence decision-making. However, the purpose and degree of influence is difficult to independently determine or verify. Therefore, to suggest that the political interests of some Security Council members were the primary reason for establishing the ICTR, or that it is simply a diplomatic *mea culpa,* while perhaps reasonable, is far-fetched.

The relevance of international criminal tribunals may be measured by their proliferation. Between 1993 and 2007, the UN established five international criminal tribunals in response to post-conflict violence in Europe, Africa, Asia and the Middle East.[1] The purpose of each tribunal was to provide remedy for the victims of the armed conflicts or, in the case of Lebanon, of terrorism. International criminal prosecution by these tribunals is intended to counter impunity and promote international criminal justice.

Placing the work of the international criminal tribunals in the context of the UN, Dag Hammarskjöld's philosophy on the essential role of the

1 In Europe, the UN established the ICTY by Security Council Resolution 827 adopted on 25 May 1993; in Africa, the ICTR by Security Council Resolution 955 adopted on 4 November 1994, and the Special Court for Sierra Leone (SCSL) by agreement between the UN and government of Sierra Leone pursuant to Security Council Resolution 1315 adopted on 14 August 2000; in Asia, the Extraordinary Chambers in the Courts of Cambodia (ECCC) by agreement ratified on 19 October 2004 between the UN and royal government of Cambodia concerning the prosecution under Cambodian law of crimes committed in Democratic Kampuchea; in the Middle East, the Special Court for Lebanon (STL) by agreement between the UN and the Lebanese republic pursuant to Security Council Resolution 1664 adopted on 29 March 2006.

UN is helpful in understanding the role of the Security Council in the establishment of the ICTR. In his address to the University of California's convocation on 13 May 1954, Hammarskjöld, the UN Secretary-General, said: 'The United Nations was not created in order to bring us to heaven, but in order to save us from hell.' Cordier and Foote point out that in his address Hammarskjöld summed up the essential role of the UN and his own attitude of mind (Cordier and Foote 1972: 301).

To paraphrase Hammarskjöld, the establishment of the ICTR on 8 November 1994 was, despite its flaws, a modest attempt by the UN to retrieve Rwanda from hell. It was not to take Rwanda to heaven by solving all its political and social problems. The objective of the ICTR was, and still is, limited to the investigation and prosecution of those most responsible for the 1994 genocide. The ICTR mandate is not to investigate or prosecute every *suspect* or *perpetrator* of the 1994 genocide. Rather, the tribunal prosecutes only those most responsible, and the remaining perpetrators are the responsibility of Rwanda and other states willing and able to investigate or prosecute. Thus, in evaluating the political role of the Security Council members in the Rwanda crisis, we should have a correct 'attitude of mind'.[2]

To paraphrase Hammarskjöld, the establishment of the ICTR on 8 November 1994 was, despite its flaws, a modest attempt by the UN to retrieve Rwanda from hell. Photo: UN Photo/Mark Garten

Critics have argued there is a connection between the active participation by some Security Council members in Rwanda and the dismal performance by the UN in protecting the civilian population before and during the 1994 genocide. They argue that the Security Council's sole purpose in creating the tribunal was to cover up that failure and that the process of doing so was political – hence the introduction of a diplomatic *mea culpa* into the ICTR lexicon. They further argue that the Security Council's bureaucracy was responsible for creating conditions that permitted the international community to ignore the unfolding tragedy in Rwanda and focus on celebrating the end of apartheid in South Africa.

Additionally, it is suggested that poor management of communications systems between UN field officers and headquarters staff in New York and Kigali was responsible for General Dallaire's urgent fax to New York being ignored, or at least not acted on promptly. Dallaire had requested New York for a more robust Security Council mandate and further authority to disarm the *Interhamwe* to pre-empt the genocide or at least slow it. The request, when New York eventually responded, was rejected (Dallaire 2003: 307).

2 It may, of course, be argued that the very purpose of limiting the jurisdiction of ICTR was to ensure foreign nationals, particularly military, political and diplomatic 'advisors' most active before and during the 1994 Rwanda genocide, are not investigated or prosecuted.

It is against this background that the question must be evaluated whether the Security Council established the ICTR as an act of political contrition for its failure to confront the egregious situation in Rwanda rather than as part of a deliberate policy promoting international justice. It is argued that the establishment of ICTR was intended to promote international criminal justice, although the process was riddled with bureaucratic incompetence.

In sum, whether political considerations influenced the decisions to refer Sudan and Libya to the ICC is discussed in the next section. Also discussed in this section is the Kenya situation. The ICTR position is discussed in the third section and concluding remarks are provided in the fourth.

Law, Politics and the ICC

An Overview

On 31 March 2005, the Security Council pursuant to Article 13(b) of the Rome Statute[3] adopted Resolution 1593 referring the situation in Darfur, a region of Sudan, to the ICC (UNSC 2005). At the request of the ICC prosecutor, the pre-trial chamber issued arrest warrants or summonses for four Sudanese officials, including Sudan's President, General Omar Al-Bashir.[4] It is important to stress that under Article 13(b), the Security Council refers a situation for investigation and not necessarily an individual, notwithstanding that Al-Bashir was mentioned by name. The prosecutor is at liberty to investigate or prosecute other individuals not specifically mentioned in the resolution.

Sudan objected to the referral and the issuance of the arrest warrant. It argued that the Security Council's resolution on referral violates Sudanese sovereignty. Sudan also objected to the Security Council's decision by stating that the ICC has no jurisdiction because Sudan is

3 Article 13(b) reads: 'The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if...(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.'

4 *The Prosecutor v Omar Al Bashir,* Case No.ICC-02/05-01/09-I, Warrant of arrest issued on 4 March 2009; the second warrant of arrest for Al-Bashir was issued on 12 July 2010. See *The Prosecutor v Omar Al Bashir,* Case No. ICC-02/05-01/09-I. The other three accused are: *The Prosecutor v Ahmad Haruna and Ali Kushayb,* Case No.ICC-02/05/-01/07-2, Warrant of arrest for Ahmad Haruna issued on 27 April 2007; *The Prosecutor v Ahamad Haruna and Ali Kushayb,* Case No.ICC-02/05-01/07-3, Warrant of arrest for Ali Kushayb issued on 27 April 2007; *The Prosecutor v Bahr Idriss Abu Garda,* Case No.ICC-02/05-02/09-15-Annex A, Decision on the Prosecutor's application under Article 58, 29 July 2009.

not a party to the Rome Treaty and has never signed or ratified the treaty.[5] Sudan decided to ignore the warrants of arrest.

Under the Vienna Convention on the Law of Treaties, a state not a party to a treaty does not have rights, duties or obligations arising from that treaty. There are, however, exceptions, for example, when a treaty extends limited rights, duties or obligations to a given non-state party, or when a non-state party accepts some or all the rights, duties and obligations imposed by the treaty without formally becoming a state party. With respect to states not party to the Rome Treaty but party to the UN Charter, their rights, duties and obligations overlap. Thus, Sudan, having withdrawn from the ICC, it is not a state party to the ICC, but as a party to the UN Charter is obliged to comply with the UN Security Council resolution adopted under Chapter VII. As such, in a treaty-based international judicial institution like the ICC, the Sudan is not bound to comply with the ICC requests, but the Security Council resolution on its referral to the ICC is binding. Thus, due to conflicting norms between the UN Charter and the Rome Treaty, the referral is ambiguous in international treaty law and constitutes a coercive measure and apparent violation of the law of treaties (Vienna Convention 1969: 331, art. 31). But the Security Council referral is justifiable from the perspective of the UN Charter if the referral is a measure aimed at the maintenance or restoration of international peace and security under its Article 39 (Jalloh *et al.* 2011: 15).[6]

In May 2010, following a prosecutorial request for a finding of non-cooperation, the pre-trial chamber issued a decision holding that Sudan had failed to comply with its obligations to cooperate with the court and invited the Security Council to take any action it deemed appropriate.[7]

In support of Sudan, the African Union (AU) called on the Security Council to invoke Article 16 of the Rome Statute[8] to suspend the

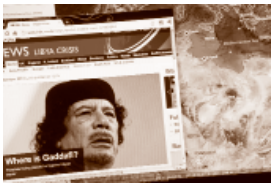
5 Sudan signed the Rome Statute on 8 September 2000, but sent a communication on 26 August 2008 informing the Secretary-General that Sudan no longer intended to be party to the Rome Statute and had no legal obligation arising from the signature

6 Article 39 of the UN Charter provides: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

7 See, *The Prosecutor v Ahmad Harun and Ali Kushayb*, Case No.ICC-02/05-01/02, decision informing the Security Council about the lack of cooperation by the Republic of Sudan, 25 May 2010.

8 Article 16 on Deferral of Investigations or Prosecutions: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations has requested the court to that effect, that request may be renewed by the Council under the same conditions.'

processes initiated by the court against President Al-Bashir.[9] The AU further directed all AU member states to withhold cooperation from the ICC in the arrest and surrender of President Al-Bashir.[10]



On 27 June 2011 Pre-trial Chamber I granted the prosecutor's request for the issuance of warrants of arrest for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi

The second referral is Libya. On 26 February 2011, the Security Council referred the situation in the Libyan Arab Jamahiriya (Libya) to the ICC and on 2 March 2011 the ICC prosecutor notified Judge Sang-Hyun Song, president of the court, accordingly. On 4 March 2011, President Song assigned the situation in Libya to Pre-trial Chamber I. The prosecutor opened investigations into alleged crimes against humanity committed in Libya since 5 February 2011. Within four months, the ICC prosecutor had concluded these investigations and on 27 June 2011 Pre-trial Chamber I granted the prosecutor's request for the issuance of warrants of arrest for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, described as Libyan *de facto* prime minister and Abduall Al-Senussi, Libyan head of security.

The first and the only case initiated by the prosecutor so far relates to Kenya. Responding to the 2007-08 post-election violence in Kenya, on 5 November 2009 the ICC prosecutor, pursuant to Regulation 45 of the regulations of the court, informed Judge Sang-Hyun Song that, on the basis of information on crimes within the jurisdiction of the court, there is a reasonable basis to proceed with an investigation of the situation in Kenya.[11] The following day, 6 November 2009, Judge Song assigned the situation in Kenya to Pre-trial Chamber II with immediate effect.[12] In March 2010, this chamber by a majority authorised the prosecutor to commence an investigation into the situation in Kenya in relation to crimes against humanity within the jurisdiction of the court committed between 1 June 2005 and 26 November 2009. On 15 December 2010, the prosecutor submitted to this chamber two applications under Article 58 of the Rome Statute for the issuance of summons to appear for six suspects.[13] All six suspects were later indicted of various

9 See, Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc.Assembly/AU/13(XIII), Addis Ababa, 1-3 July 2009, 8; Communiqué of the 207th Meeting of the Peace and Security Council at the level of the Heads of State and Government, Doc.PSC/AHG/COMM.I(CCVII), 29 October 2009, p. 5.

10 Press Release, Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC), Commission of the African Union, 14 July 2009.

11 Letter of Prosecutor Luis Moreno-Ocampo to Judge Sang-Hyun Song, President of the ICC Ref: OTP/051109/LMO-rr dated 5 November 2009.

12 Situation in the Republic of Kenya: Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II, No.ICC-01/09, dated 6 November 2009.

13 The six suspects are: William Samoei Ruto, suspended minister of higher education, science and technology; Henry Kiprono Kosgey, MP and chairman of the ODM; Joshua Arap Sang, a journalist with Kass FM; Francis Kirimi Muthaura, head of the public service and secretary to the cabinet; Uhuru Muigai Kenyatta, deputy prime minister and minister for finance; and Mohammed Hussein Ali, CEO of the Kenyan postal corporation.

counts of crimes against humanity. Confirmation of the indictments was scheduled for 1–2 September 2010.

The Kenyan coalition government, parliament and civil society are divided on the ICC investigations. Civil society and the Orange Democratic Movement (ODM), a coalition partner in government with the Party of National Unity (PNU), support the ICC investigation, while the PNU is opposed to any such investigation. With its newly found majority in parliament, the PNU on 22 December 2010 passed a resolution calling for Kenya's withdrawal from the Rome Statute. At the time of writing (July 2011), neither President Mwai Kibaki, leader of PNU, nor Prime Minister Raila Odinga, leader of ODM, have pursuant to Article 127 of the Rome Treaty notified the UN Secretary-General of Kenya's intention to withdraw.

The Security Council and the ICC

From the perspective of many African leaders, ICC involvement in Sudan and Libya through Security Council referrals is an example of abuse of power reflecting the skewed power distribution within the Security Council and the limited space available to Africa in international politics. Because of the Council's legitimacy deficit, many African and other developing countries see its work as 'a cynical exercise of authority by great powers', in particular the P5 (Jalloh *et al.* 2011: 9).

From the perspective of many African leaders, ICC involvement in Sudan and Libya through Security Council referrals is an example of abuse of power reflecting the skewed power distribution within the Security Council and the limited space available to Africa in international politics.

African frustration is best illustrated by the Security Council's allegedly selective use of Article 16 of the Rome Statute to defer investigations or prosecutions with the primary aim of providing immunity from prosecution to the US and its allies for serious international crimes committed by its soldiers and civilian personnel during peacekeeping operations. The first example is the adoption of a resolution before the coming into force of the Rome Statute extending immunity to US personnel operating in the former Yugoslavia under NATO's umbrella. Within two weeks of the adoption of the Rome Statute, but before it came into force, the Security Council in Resolution 1422 (12 July 2002) pre-emptively ensured that US nationals would not be investigated or prosecuted for future crimes they might commit while serving as UN peacekeepers. Resolution 1422 is based on Chapter VII of the UN Charter. Paragraph 1 of the resolution invokes Article 16 of the Rome Statute as follows:

> Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the

> Rome Statute over acts or omissions relating to a United Nations established or authorized operations, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise…

The ICC became operational on 1 July 2002. The impact of the resolution is that US soldiers will not be liable for any international crime committed from that date. The resolution provides for this exemption to be automatically extended through periodic renewal of the resolution. Based on Resolution 1422, the ICC prosecutor will have no legal authority to investigate or prosecute current or former officials or personnel from a contributing state not a party to the Rome Statute for acts or omissions in violation of IHL. Thus, Article 16 through Resolution 1422 grants absolute immunity to soldiers and civilian personnel from contributing states not party to the Rome Treaty, but not for soldiers and civilian personnel of a national state on whose territory war or peacekeeping operations are taking place.

When Resolution 1422 expired on 12 June 2003, the Council automatically renewed it without taking into account new facts on the ground that could impact the language of the resolution. Twelve states, including the three African states on the Council at the time, voted for the resolution. Germany, France and Syria abstained.[14] No member of the Council voted against the resolution. However, many states, including those that abstained, and civil society from developed and developing countries regarded these resolutions as problematic, particularly the provision for automatic and unlimited renewals of resolutions suspending investigation or prosecution of persons suspected of having committed serious international crimes. Some states and civil society organisations construed the resolution as political interference by the Security Council in the work of the ICC.

Objecting to the resolution, Uruguay argued that the resolutions created conditions for discrimination among peacekeepers and deep injustice arising from the unequal application of the law to personnel of contributing states based on whether they are party to the Rome Statute. Uruguay emphasised that all peacekeepers 'must be subject to the same rules and work under the same statute'.[15] Canada, Brazil, New Zealand and South Africa argued that the resolutions effectively sought to modify the terms of the Rome Statute indirectly, without a formal amendment of the treaty.[16]

14 UN Doc.S/PV.4772, 11, 12 June 2003.

15 Ibid.

16 UN Doc.S/2002/754, 12 July 2002.

In opposing the resolutions, Germany explained that Chapter VII of the UN Charter requires 'the existence of a threat to the peace, a breach of peace or an act of aggression – none of which…is present in this case. The Security Council would thus be running the risk of undermining its own authority and credibility [by adopting the resolution].'[17] Syria, on behalf of Arab states, appealed 'to the Security Council to assume its responsibility and not accept these exemptions because that might damage the credibility of the Court before it is born'. Syria further argued that 'the adoption of this resolution [1487] would result in the gradual weakening of the Court's role in prosecuting those who have perpetrated the most heinous crimes that come under its jurisdiction'.[18]

During the Council's debate on Resolution 1487, the Netherlands, citing *travaux preparatories* of the Rome Treaty, argued that the intent of the drafters of Article 16 is 'that this Article allows deferrals – only on a case by case basis – only for a limited period of time' and 'only when a threat to or breach of peace and security has been established by the Council under Chapter VII of the UN Charter…Article 16 does not sanction blanket immunity in relation to unknown future events.'[19] Canada was opposed to any Security Council interference in ICC action, regarding it as inappropriate political interference in a judicial process.[20]

The heads of state and government of over 100 member states of the Non-Aligned Movement expressed their collective view that the Council's actions 'are not consistent with the provision of the Rome Statute and severely damage[d] the Court's credibility and independence'.[21]

The Secretary-General in his statement to the Security Council on the renewal of a resolution regarding the ICC and peacekeeping operations explained: 'In making this decision, you will again rely on Article 16 of the Rome Statute. I believe that that Article was not intended to cover such a sweeping request, but only a more specific request relating to a particular situation…'[22]

17 UN Doc.S/PV.4568, 10 July 2002.

18 UN SCOR, 58th Session, pp.25-66.

19 UN SCOR, 58 Sessions, p.20.

20 See remarks by Ambassador and Permanent Representative of Canada to the UN at the Tenth Session of the Preparatory Commission for the ICC, 3 July 2002, http://www.iccnow.org/documents/CanadaICCPlenary3July02.pdf.

21 XIII Conference of Heads of State and Governments of Non-Aligned Movement, Doc. NAM XIII/Summit/Final Document (REV.I), Kuala Lumpur, 20-25 February 2003.

22 UN Secretary-General's statement to the Security Council delivered on 12 June 2003, See http://www.un.org/apps/sg/sgstats.asp?nid=389 (accessed 6 July 2011).

On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other hand, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees.

The debate in the Council reminds us of the position taken by India in Rome when the treaty was adopted. In a statement explaining a vote by India on the adoption of the Rome Statute issued on the night of the final vote, India said it was hard to understand or accept any power of the Security Council to block prosecution:

> On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other hand, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. The moment this argument is conceded, the Conference accepts the proposition that justice could undermine international peace and security.[23]

India did not ratify the Rome Treaty and is not a party to the ICC.

Overall, there was, and still is, strong opposition to Article 16 in particular, and the Council's continued reliance on it to provide blanket immunity to future perpetrators. It may be argued that reference to Article 16 in Resolutions 1422 and 1487 regarding the mandate of the UN mission in Bosnia and Herzegovina, as well as all other future peacekeeping operations, was the first political interference by the Security Council in the operation of the ICC. Indeed, many UN member states and many legal scholars and political commentators have criticised the two resolutions as unfortunate political interference in the work of the ICC (Stahn 2003: 85; Murphy 2002: 725; Layalle 2003: 195).[24]

The precedent created by the adoption of Resolutions 1422 and 1487 was followed in 2005 by Resolution 1593 when the Security Council referred the Sudan situation to the ICC. The second preambular paragraph of Resolution 1593 reads:

> Recalling Article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a

23 'Explanation of vote by India on the Adoption of the Statute of the International Criminal Court, Rome, 17 July 1998', p. 3.

24 According to Mohammed El Baradei, 'Certain political factions in the United States have often viewed the United Nations as merely a tool, to be used when convenient, as a way to make US-driven actions more palatable to other countries, but to be discarded or circumvented when UN objectives are not in US interests. These individuals of groups tend not to view the United States as UN member among many – nor really as a member of community of nations – but rather as a sort of patron or custodian of the UN, exempt from the rules it helps set for others…' (El Baradei 2011: 52 note 4).

> Security Council requests to that effect. 'Moreover, operative paragraph 6 provides that the Security Council
>
> *Decides* that nationals, current or former officials or personnel from contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union unless such exclusive jurisdiction has been expressly waived by that contributing State. (UNSC 2005)

The US was, as expressed by its ambassador to the UN, satisfied with Resolution 1593: 'This resolution provides clear protection for United States persons. No United States persons supporting the operations in the Sudan will be subjected to investigation or prosecution because of this resolution.'[25] However, it is the same resolution that refers President Al-Bashir and other Sudanese combatants to the ICC, while foreign forces in Sudan who may commit serious crimes will not be investigated or prosecuted by the ICC because they enjoy immunity. As India correctly observed, did the Security Council conclude that investigation or prosecution of US personnel would undermine international peace and security?

By providing immunity to the US and other contributing states not party to the Rome Statute, Resolution 1593 may be construed as creating conditions for the unequal application of the law – a 'double standard' – and an abuse of the authority of the Council by expanding beyond reason the scope of Chapter VII of the UN Charter. First, Article 16 is understood by many states and legal scholars as being limited to deferrals of investigations or prosecutions on a case-by-case basis. By providing for collective blanket immunity, the Council has gone beyond the scope of Article 16. Second, while Article 16 allows the Security Council limited powers of intervention in the workings of the ICC, the provision was not intended to allow the Security Council to decide who may, or may not, be investigated or prosecuted by the prosecutor before the ICC.

Aware that the Security Council had twice used powers under Article 16 to defer future cases, the AU sought that the Council defer investigations or prosecution of Sudanese President Al-Bashir. The Security Council did not meaningfully engage with the AU before the request for a deferral was summarily rejected. The AU, frustrated at being ig-

25 UN Doc.S/PV.5158, 31 March 2005, p. 4.

nored by the Security Council, decided not to cooperate with the ICC in relation to the *Al-Bashir* case. The legal basis for the AU's decision not to cooperate is Article 98 of the Rome Statute.[26] Pursuant to the article, the Court may not request the surrender of a person in a manner that would require a state to act inconsistently with its obligation under international law or international agreements in respect of immunity of that person (see also Akande 2009).

The problem with Article 98 and the AU's decision requesting all 53 African states not to cooperate with the ICC is whether its decision is binding on all African states, including the 31 African states party to the Rome Treaty. The AU appears to recognise this dilemma by requesting AU member states 'to balance, where applicable, their obligations to the AU with their obligations to the ICC'.[27] A careful reading of Security Council Resolution 1593 suggests that AU member states are not necessarily bound to cooperate with the ICC, as the Council only explicitly required the government of Sudan to cooperate. Since cooperation with the ICC is derived from the Rome Treaty itself, the 31 African states who have signed and ratified Rome Treaty must cooperate with the ICC, despite the AU decision on non-cooperation. On the other hand, all 53 members of the AU are also members of the UN. Therefore, any decision taken by the Council under Chapter VII is binding on all the 53 AU members. In adopting the resolution calling for non-cooperation, the AU appears not to have considered the obligation of its members who are also members of the United Nations.

Examining the AU's reaction in context, it appears that the AU heads of state and government were upset with the Security Council for not treating their request for deferral of the *Al-Bashir* case seriously and with reasonable respect. With no veto power in the Council, and with little if any political or economic clout on the global stage, the AU could only threaten non-cooperation. Even at that level, the AU was

26 Article 98 on cooperation with respect to waiver of immunity and consent to surrender provides:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligation under international law with respect to State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

27 African Union July 2010 Kampala Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270 (xiv).

not united: for example, Botswana opted to cooperate with the ICC against the wishes of the AU. A threat that cannot be carried out or is not enforceable is often not taken seriously by those threatened. To that extent, the AU was, and still is, a paper tiger.

The AU's empty threat perhaps explains why the Security Council followed a similar path with the referral of Col. Gaddafi. In Resolution 1970, the preamble recalled 'Article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council requests to that effect' and thereafter, at paragraphs 4 and 5:

> *Decides* that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;
>
> *Decides* that nationals, current and former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in Libyan Arab Jamahiriya established or authorized by the Council, unless exclusive jurisdiction has been expressly waived by the State. (UNSC 2011)

It is unclear whether the US vote in favour of the Libyan referral is a change of policy by the US government in support of the ICC.

The Libyan government promptly rejected the resolution. Similarly, the AU called on member states to disregard the arrest warrant against Col. Gaddafi on the grounds that the ICC move seriously complicated efforts to find a solution to the Libyan crisis.

The US voted for referral of Libya to the ICC. In 2005, however, it had abstained from voting on the Sudan referral, but it was on US insistence that Resolution1422 stipulated that nationals of states that have not ratified the Rome Statute do not fall within the jurisdiction of the ICC, a provision incorporated into Libyan Resolution 1970. It is unclear whether the US vote in favour of the Libyan referral is a change of policy by the US government in support of the ICC.

Overall, the Security Council may appear to support international criminal justice by making referrals to the ICC. But its exemption of UN peacekeepers from prosecution, particularly those from states not

signatory to the Rome Treaty, is problematic. With allegations that UN peacekeepers have committed, and continue to commit serious international crimes (for example, widespread and systematic rape and other sexual violence in the DRC), the current use of Article 16 tends to undermine international peace and security. Second, the Council's failure to provide funding for the investigation or prosecution of cases referred to the ICC tends to suggest the Council is uninterested in giving the court the kind of support it needs to credibly implement referrals. Thus, it may be argued that the referral of Al-Bashir or Gaddafi is a political strategy, a form of warfare calculated to undermine the authority and legitimacy of leaders the US and its allies are at war with, notwithstanding the evidence that serious international crimes have been committed by all sides in the Sudan and Libya. Further, by exempting its nationals from ICC jurisdiction, the US and NATO allies engaged in armed conflicts in Libya appear hypocritical: they demand that their opponents be investigated or prosecuted by the ICC while they enjoy blanket immunity.

As NATO forces continue to bomb, maim or kill civilians, despite occasional denials, some commentators have suggested that the NATO leadership should also be investigated or prosecuted by the ICC alongside the Libyan leadership (Smith 2011). This would ensure that all parties to the armed conflict are held to account. The NATO objective is to protect civilians, not to kill them. Any killing, accidental or intentional, must therefore be credibly investigated. The prosecutor's conclusion of investigations into Libya in only four months, resulting in the issuance of arrest warrants, may not be considered a credible exercise by some international criminal law experts. Investigations into international crimes are complex and problematic. It is even more difficult to conduct criminal investigations in hostile states that do not normally cooperate with the ICC.

Therefore, civilian casualties at the hands of NATO and the failure of the Security Council to seriously engage the AU on Article 16 deferrals are some of the factors in the ICC's lack of legitimacy and credibility among some African leaders. Although 31 of the 53 African states have ratified the Rome Statute, many of them, as well as the AU itself, have opposed the ICC's investigation of Sudan, Kenya and Libya. This may have something to do with self-serving politics or mutual back-scratching among African leaders, many of whom have bad human rights records and are potential candidates for ICC investigation or prosecution. But with its formal investigations targeting three African states (self-referral by states excluded), the ICC has invited allegations that it is an agent serving postcolonial Western interests in Africa.

This is unfortunate as serious crimes are committed, and continue to be committed, in Africa and elsewhere. To address this issue, the ICC prosecutor needs to initiate formal investigations outside Africa, for example in Sri Lanka, Pakistan, Afghanistan, Iraq, Colombia, Palestine/Israel, Georgia and Honduras, places where serious violations of IHL have occurred and continue to take place. In investigating states outside Africa, for example Colombia, the prosecutor has taken many years without showing results. Yet the Libyan investigation was surprisingly concluded within a mere four months. This is unprecedented, particularly when the investigation was conducted during a period of armed conflict without the cooperation of the Libyan government, both circumstances severely limiting free movement by ICC investigators.

The conduct of the Security Council on the Sudan and Libyan referrals, particularly the use or abuse of Article 16 to exclude personnel from contributing states from ICC jurisdiction, is viewed as evidence of political interference in the ICC's workings and of a 'double standard'. Similarly, the Security Council's summary rejection of the deferral requests on the Sudan and Kenya, or the request for amendment of Article 16 by the AU, have frustrated the AU, which continues to view the ICC as an anti-African institution and a tool of the West, despite evidence of serious international crimes committed in Africa.

However, on balance, the decision by the ICC prosecutor to request authorisation by a pre-trial chamber to initiate investigation of the Kenya situation was a good one. The majority of Kenyan people, including many respected international criminal lawyers, support the ICC prosecutor, for they recognise that Kenya is unwilling or unable to investigate or prosecute the perpetrators of the post-election violence in that country.

Law, Politics and the ICTR

Brief background

The ICTR was established at the request of Rwanda[28] following serious violations of IHL in that country, particularly from April to July 1994. The details of the mass murders in Rwanda are documented in many cases before the ICTR.[29] There are also publications that provide useful background on the 1994 Rwanda genocide, three of which – Prunier (1994), Africa Rights (1995) and Des Forges (1999) – are the most authoritative and are frequently relied upon by Office of the Prosecutor (OTP) staff.

28 S/1994/1115.

29 See, http://www.unictr.org/Cases

At the time Resolution 955 was adopted in November 1994, Rwanda held one of the 10 non-permanent Security Council seats. The Rwanda representative on the Council requested the establishment of a tribunal to investigate, prosecute and punish those responsible for the mass murder in Rwanda. In doing so, he explained that the criminal justice system in Rwanda was destroyed during the 1990-94 armed conflict, and that most of the pre-1994 judges, prosecutors and lawyers in private practice or in Rwanda's civil service had been killed or had left the country.

The ICTY, established by the Council one year earlier, served as a precedent. At the request of the Security Council, the Secretary-General directed the OLA to draft the ICTR statute, which was then presented to the Council for consideration. The Rwanda government delegation found some of its provisions unacceptable and informed the Security Council they no longer supported the establishment of a tribunal for Rwanda. Despite Rwanda's objection, the Security Council proceeded with the process. When the resolution was put to the vote, 13 members voted in favour, Rwanda voted against and China abstained.

Rwanda had three objections. First, Rwanda opposed the limited temporal jurisdiction of one calendar year because it did not cover serious crimes committed in Rwanda between 1 October 1990 and 31 December 1993. In this respect, Rwanda noted that under Article 1 of the ICTY statute, the prosecutor could prosecute persons responsible for serious IHL violations committed in the former Yugoslavia *since* 1991. Article 1 of the ICTR, however, limits the jurisdiction of the court to one year: from 1 January 1994 to 31 December 1994. Rwanda preferred that the court's jurisdiction commence in 1990, when armed conflict between the Rwanda Patriotic Front (RPF) and the Rwanda armed forces began. Additionally, Gen. Kagame's government argued that the planning of genocide commenced before 1992, and that that period should fall within the jurisdiction of the tribunal.

Second, the Council resolved to seat the ICTR headquarters in Arusha in Tanzania. However, Rwanda was opposed to Arusha and preferred Kigali. The Security Council believed that no fair trials could be held in the presence of millions of victims and survivors calling for blood. The security of both defence lawyers and judges would have been virtually impossible to maintain, even without taking into consideration the difficult security situation in Rwanda in the aftermath of the civil war and genocide. Rwanda objected, in principle, to holding trials in a foreign country, even a neighbouring state. The crimes were committed in Rwanda, by Rwanda citizens, against fellow Rwandans, argued the RPF government. There was, therefore, no justification for holding trials outside Rwanda.

However, *verbatim* Security Council records suggest the Council carefully considered alternative locations, including Kigali and Nairobi in Kenya, before settling on Arusha. The Council was advised there was a serious shortage of premises in Kigali to accommodate the ICTR and properly meet its needs. The Council also felt that the appearance of justice and fairness, in particular impartiality and objectivity, required that trial proceedings be held in a neutral country. Additionally, the Secretary-General considered there were serious security risks in bringing the leaders of the previous regime into Rwanda.

Nairobi, which already hosted many international organisations, was ideal for the ICTR. However, the Moi government declined to offer Nairobi as the ICTR seat since it was opposed to the tribunal and viewed it as an anti-Hutu institution. When the Council opted for Arusha, the Tanzanian government offered to accommodate the tribunal in the Arusha international conference centre.

Third, Rwanda objected to the non-inclusion of the death penalty in the ICTR statute. In Rwanda, as in many other states, including the US and China, an accused may be sentenced to death or executed for murdering a single person. Rwanda found it unreasonable that low-level criminals prosecuted in Rwanda could be sentenced to death, while masterminds of the genocide prosecuted at the ICTR would only serve a maximum of life imprisonment.

The Security Council and the 1994 Rwanda Genocide

The UN's role before and during the 1994 Rwanda crisis was limited and gradual. The United Nations Assistance Mission to Rwanda (UNAMIR), a UN peacekeeping mission, was given a restricted mandate. The mission was approved by the Security Council and launched in October 1993 as part of Arusha peace accords signed between the RPF and the Habyarimana regime. UNAMIR was small in number given the nature of the conflict and the tensions then building in the country. Following the Arusha peace agreement of 4 August 1993 – designed to end three years of armed conflict in Rwanda – a major role for the UN in implementing the accords was envisaged. A 22-month transitional period was to begin with the formation of a transitional government and a multiparty National Assembly, leading to national elections to be held by the end of 1995. To help monitor the process and maintain security in the transition period, the Security Council on 5 October 1993 adopted Resolution 872 establishing UNAMIR. The UN observation force established earlier in June 1993 to monitor the border between Rwanda and Uganda (UNOMUR) was folded into UNAMIR, although it remained an autonomous body and kept its original name (Laegreid 2000: 231).

The UN's role before and during the 1994 Rwanda crisis was limited and gradual.

UNAMIR's mandate under Resolution 872 was to contribute to the security of Kigali and monitor a weapons-secure area to be established by the Rwandan parties in and around the city. UNMANIR forces were to monitor observance of the ceasefire agreement, including the establishment of cantonment and assembly zones and demarcation of the new demilitarised zone, and to monitor the security situation during the final period of the transitional government's mandate before the elections. UNAMIR also was authorised to investigate non-compliance with the Arusha peace agreement and investigate complaints regarding the *gendarmerie* and police. However, according to the terms of the peace agreement, UNAMIR had no mandate to disarm combatants or to intervene militarily to enforce the Arusha peace accord. This provision effectively undermined Resolution 872.

The challenges that faced UNAMIR started with the differences among Security Council members as to the appropriate size of the new force. The final number was based on political and economic imperatives rather than military requirements. Gen. Romeo Dallaire, the UN force commander in Rwanda, initially considered 4,500 troops as the maximum option and 2,600 the minimum. In response to political pressure from New York, the UN reconnaissance mission to Rwanda in August, which Dallaire headed, presented two lower options in its report. These lower figures already reflected a compromise. The minimum option was now 1,935 troops, while the mission's recommended option was 2,538 (Laegreid 2000: 232).

The force of 1,935 troops approved was inadequate, given the terrain in Rwanda, the lack of local resources and the fragile road network, which necessitated armoured personnel carriers (APCs) and helicopters. In UN peacekeeping operations, however, APCs and helicopters have traditionally been contingent-owned (i.e., provided by troop-contributing nations, which are subsequently reimbursed by the UN). If the contributing nations fail to provide the requested material, the UN has no logistical reserves to draw on. In the Rwanda case, only the Belgian contingent arrived with APCs. The UN Department of Peacekeeping Operations succeeded in borrowing eight additional APCs from UN operations in Mozambique, but they were Russian vehicles with manuals written only in Russian. In any case, there were no spare parts, access to the engines was blocked, and the Bangladeshi contingent in UNAMIR supposed to man the APCs lacked the basic knowledge and experience to operate them. Almost all APCs quickly broke down. When it was clear that no contributing country would provide the helicopter unit authorised by the Security Council, private contractors were hired. However, when the genocide commenced in

April 1994, the contractors were unavailable and had not delivered a single APC or helicopter to Rwanda (Laegreid 2000: 232–3).

With limited troops and a lack of trained personnel, military equipment and finances, UNAMIR found itself in a difficult situation. Gen Dallaire's job was made more difficult because he had no mandate to disarm perpetrators or take pre-emptive action to stop crimes. In many ways, UNAMIR was doomed to failure.

After the killing of 10 Belgian troops by the Rwanda armed forces, the security situation in Rwanda further deteriorated. The Security Council's decision to reduce the numbers of the peacekeepers following the murders of the 10 Belgian soldiers exacerbated the security situation in Rwanda. The Belgian government also shortly afterwards withdrew its contingent from Rwanda. This withdrawal gave the green light to the *Interhamwe* and additional opportunity to Gen. Habyarimana's regime to commit genocide.

The rebel RPF was unhappy with the UN, but also needed that body. Not only did the mass murders affect many victims, they also involved many perpetrators from all walks of life, from the highest office to ordinary persons in remote rural villages. With many judges, prosecutors, defence lawyers and other justice professionals either killed or having fled the country, Rwanda's post-genocide legal system was in no position to bring the perpetrators to justice. Besides, long after the RPF had formed a government of national unity, attacks against Rwanda by the perpetrators of genocide continued from their bases in the DRC. Challenges relating to security and the need to arrest and try perpetrators of genocide persuaded the RPF government to work with, among others, the ICTR, national governments and NGOs, notwithstanding the deficits in the ICTR statute.

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Rwanda's troubled relationship with the UN, or at least with some of its more important Security Council members, arose from the conduct of those states before and during the armed conflict, and their relationship with the genocidal Habyarimana regime. The US, the UK and France, three of the P5, for example, had reason, dictated by their respective national interests, to limit the jurisdiction of the ICTR against the express wishes of Rwanda (Melvern 2000).

According to Andrew Wallis, 'the United States, in the guise of President Clinton and his official advisor to the UN Madeleine Albright, stand accused of monumental arrogance and indifference as they prepared to watch Rwanda and its people burn for political and electoral reasons'

(Wallis 2006: 6). In pursuit of its objectives in the Great Lakes region, the Clinton administration, against the wealth of evidence then publicly available, declined to call the crimes in Rwanda by their proper name, genocide, and thereby trigger the legal response required under Article 1 of the 1948 Genocide Convention to protect victims.

At the peak of the genocide in Rwanda in 1994, US troops were in neighbouring Burundi. They could have been ordered by the political leadership in Washington to stop the genocide in Rwanda. In the Security Council, the US played a significant role in the reduction of UNAMIR troops, particularly after the murders of the Belgians. The result was to expose more Tutsis to grim death as the *Interahamwe* hacked their victims with machetes and the Rwanda armed forces continued to kill Tutsis and moderate Hutus.

The UK 'under Prime Minister John Major, chose to turn its back on the unfolding tragedy, resulting in the killers effectively gaining a "green light" from the international community to continue the slaughter' (Wallis 2006: 6). In violation of Security Council Resolution 918 (1994), the UK, through Uganda, provided arms and political and diplomatic support to the RPF, whose entire leadership was English-speaking. The RPF leadership were descended from Rwandan refugees who had settled in Uganda, a former British protectorate. General Habyarimana's Rwanda, on the other hand, was a former Belgian colony and French-speaking. France considered Rwanda its 'African colony' and therefore deserving of French support. Sadly, the armed conflict in Rwanda soon became a repeat of the old Anglo-French rivalry in Africa without any concern for the safety of the civilian population.

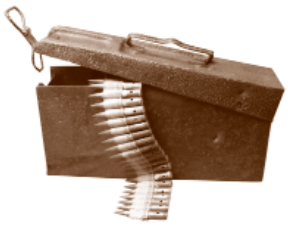
If the UK had supported the commencement of ICTR temporal jurisdiction from 1990, the prosecutor would have been authorised to investigate the activities of Uganda, which would eventually lead to investigating the role of Britain in supplying arms to the RPF at a time when there was a UN embargo on the sale of weapons to Rwanda. In that event, a number of British officials and freelance gun runners would have found themselves the subjects of criminal investigation as possible accomplices in genocide. Others could have been investigated or prosecuted for aiding and abetting genocide. The UK at the time of the adoption of Security Council Resolution 955 was not an impartial member of the Council.

Of all the P5, France was perhaps the most active in Rwanda. In the aftermath of the 1994 genocide, a large portion of the French media and most NGOs vigorously denounced French policy in Rwanda, going

so far as to accuse the government, in particular President Mitterrand, of complicity in genocide (Callamard 2000: 157). Much was then written on the personal connections between President Mitterrand and his Rwandan counterpart, Juvenal Habyarimana, and between their two sons, and on the business deals between Paris and Kigali, including the secret sale of arms by Paris to the Rwandan military involved in the genocide (Callamard 2000: 157).

In response to the allegations, the French government insisted it had supported Arusha peace processes and contributed to the Arusha accord and had not supported the military in committing genocide. French Prime Minister Édouard Balladur dismissed the accusations as scandalous and explained that France supported the regular, legal government of Rwanda. It was revealed afterwards, Balladur argued, that the Habyarimana government was not as regular as it claimed. These claims of innocence, however, did not persuade many observers (Callamard 2000: 157). Before and during the genocide, France, the 'protector' of its former African colonies and the power behind some of the worst dictatorships in Africa, was deeply implicated in the mass murder of civilians throughout Rwanda, and particularly Nyanza and Ntarama.

French support for the Habyarimana regime continued notwithstanding a plea from Boutros-Ghali, the UN Secretary-General, on 30 April 1994 that the arming of protagonists be stopped. 'The Security Council warn[ed] that the situation in Rwanda would be further seriously aggravated if either of the parties were to have access to additional arms. It [the Security Council] appeal [ed] to all States to refrain from providing arms or any military assistance to the parties to the conflict.'[30] The Security Council's appeal was reiterated as part of Resolution 918 of 17 May 1994. Paragraph 13 declared that 'all States shall prevent the sale or supply to Rwanda by their nationals or from their territories or using their flag vessels or aircraft of arms and related *material* [sic] of all types, including weapons and ammunitions, military vehicles and equipment, paramilitary police equipment and spare parts'. However, the political and economic interests of the P5 were too important to permit genocide to undermine them.



A host of dealers in various countries continued to provide weapons to all parties to the Rwanda conflict.

Not only France, but a host of dealers in various countries continued to provide weapons to all parties to the Rwanda conflict. The states that continued to deliver arms included the UK, South Africa, Albania, Belgium, Bulgaria, Egypt, Israel, the Seychelles and Zaire (now DRC).

30 See S/PRST/1994/21. See also Boutros-Ghali (1999), pp. 129-32 and 138-41.

A more robust ICTR statute would have required that those supplying arms to Rwanda in violation of Resolution 918 be investigated or prosecuted. This has not been done even though Resolution 918 called on all states to give information on how the embargo could be effectively implemented and on any violations and recommend 'appropriate measures in response to violations' (Wallis 2006: 115-21). In any event, even if such information were made available, most of the weapons were supplied before 1 January 1994 and therefore fell outside ICTR's temporal jurisdiction as stipulated in Article 1 of the ICTR statute.

China and Russia, while appearing to be disinterested parties with respect to the Rwanda genocide, did not desire a tribunal that would disrupt business and redirect attention to human rights issues in their business relationships with Africa. Such an approach would be a bad precedent for them. For these two P5s, it would be politically incorrect to vote against Resolution 955. Thus China, with no known interests in Rwanda at the time – Rwanda being a country without known vital resources – opted to abstain. Russia was interested in the former Yugoslavia, not Rwanda, and viewed the ICTY as persecuting the Serbs, who deserved Russian protection. If the scope of ICTR jurisdiction could be limited, it might well set a precedent for amending the terms of the ICTY. This opportunity arose in 2003 with the adoption of Security Council Resolution 1503 (reiterated in Resolution 1534 of 2004), which called for the gradual closure of the two tribunals. Later, Security Council Resolution 1966 (2010) stipulated the timeline for closing the two tribunals and established a residual mechanism to manage this closure.

The politics within the Council prompted Daniela Kroslak to characterise the P5's response to mass murder in Rwanda thus: 'British and American blindness towards the atrocities committed by RPF in Rwanda and in the Congo during the genocide and after is just as unacceptable as the French refusal to accept the facts [of its criminal participation in the Rwanda genocide]' (Kroslak 2007: 274).

It was under these circumstances, involving various degrees of compromise by various members of the Security Council, that Resolution 955 (1994) establishing the ICTR was adopted. As noted earlier, the final vote was 13 for the resolution, one against (Rwanda) and one abstention (China). The resolution was adopted on 8 November 1994 and the ICTR statute is annexed to it.

Impact of Security Council's decisions on the ICTR

The Security Council decision that ICTR share a chief prosecutor with the ICTY was not well received in Rwanda. The ICTR and most of its staff were based in Arusha, while the chief prosecutor was based at The Hague in the Netherlands – a continent away. Rwanda soon realised that the ICTR was getting further and further away from Kigali. While the Security Council decision may be considered reasonable, it was insensitive to the feelings of the victims and survivors of the Rwanda genocide. A compromise resulting in the placement of the ICTR in Arusha but with a separate and independent chief prosecutor would have probably been welcomed by Rwanda. It is not surprising that with the appointment of a separate ICTR prosecutor in 2003, the relationship between Rwanda and the ICTR dramatically improved.

The process of appointing senior staff to the ICTY was adopted by the ICTR, and was clumsy at best. It took almost a year to find and appoint the first ICTY prosecutor, Ramon Escovar-Salom, a former attorney-general of Venezuela. However, within a few days of his arrival in The Hague in January 2004 to take up his appointment, he resigned to become his country's minister of the interior. A quick background check would have provided the Security Council with the information necessary to indicate that Escover-Salom was not available. The ICTY had started out on the wrong footing.

The Security Council vetoed eight of the possible replacements put forward by the Secretary-General during the next five months, including Professor Cherif Bassiouni, a respected international criminal law expert. In the meantime, the ICTY was without a chief prosecutor. The tribunal's future and credibility was being seriously jeopardised, especially as recruitment of OTP staff could not be conducted without a chief prosecutor. Finally, the Security Council appointed as chief prosecutor a commercial lawyer who had never prosecuted a criminal case in any court, and who had no expertise in international criminal law or international humanitarian law (Goldstone 2000: 74-5).

Meanwhile, the judges of the tribunal who had been earlier elected by the General Assembly had completed the laborious task of drafting the rules of procedure and evidence for the tribunal and were waiting to begin their work. The judges were increasingly frustrated, because without a chief prosecutor, the investigations could not begin; and, without investigation there would be no indictments and consequently no trials.

The Security Council's political debates in establishing the tribunal and the long delay in the appointment of a chief prosecutor, created the impression that the tribunals were not a high priority. The delay in appointing a chief prosecutor when viewed in the context of some of the P5s' earlier participation in the armed conflicts in Rwanda, meant that to victims the establishment of the tribunal was a political ploy intended to mislead the public into thinking that the Security Council was doing something.

Commenting on the ICTY, Judge Richard Goldstone, its second prosecutor and later the first ICTR prosecutor, noted that international media had effectively written off the ICTY 'as a fig leaf of the international community to hide its shame for inaction in the former Yugoslavia, particularly in Bosnia' (Goldstone 2000: 77). Judge Goldstone concedes that there was nothing he could have done to change the negative attitude of the international press except to promise that investigations into war crimes would begin as soon as possible. The victims of the armed conflicts in the former Yugoslavia did not believe him.

Later, Carla Del Ponte, the third ICTR prosecutor, who took office after Judge Goldstone of South Africa and Judge Louise Arbour of Canada, shared Judge Goldstone's observation with respect to the ICTR. She candidly observed:

> The United Nations Security Council created the International Criminal Tribunal for Rwanda on November 8, 1994. This act was not just an effort to end the culture of impunity that had developed in Rwanda for generations before the genocide. It was a diplomatic *mea culpa*, an act of contrition by the world's major powers to make amends for their gross failure to prevent or halt the massacre. (Del Ponte 2008: 69)

Prosecutor Del Ponte makes a pertinent point. A culture of impunity had indeed grown up in Rwanda and other parts of the world for generations before the 1994 genocide. Since 1959, there have been regular mass murders in Rwanda and in neighbouring Burundi. In 1973, there was genocide in Rwanda and the international community took no action. It became normal practice for Hutus to kill Tutsis at a time and place of their own choosing, and they always got away with it. So what was new about the 1994 genocide and why set up a tribunal to investigate or prosecute perpetrators when earlier genocides were ignored, if not as a diplomatic *mea culpa*?

Looked at holistically, Del Ponte's criticism of the Security Council for belatedly establishing the ICTR ignores historical facts prior to the Soviet Union's formal collapse in 1991. During the 1960s, 1970s and 1980s, when the Cold War was at its height, it was difficult for the Security Council to agree on, let alone adopt, resolutions on controversial matters. With the US waging wars in many countries, including Vietnam (Schmitz 2006; Midilsky 2005; Blum 2003), and the Soviet Union engaged in various wars of liberation in Africa and elsewhere (Shubin 2008), the Security Council was not in a position to establish a tribunal similar to the ICTR to address any of the armed conflicts in Asia, Africa and Latin America. Hence, the establishment of the ICTR in 1994 was not necessarily a diplomatic *mea culpa* for the earlier failure of the international community in Rwanda. The international community had failed elsewhere before and did not establish similar tribunals. The ICTR was established because after 1989 the world had changed and the Security Council could and did establish tribunals. It was not possible for the US and Russia to cooperate during the Cold War, even reluctantly, to address global problems, including some form of international criminal justice.

Ralph Zacklin, an Assistant Secretary-General in the OLA, reinforces the views expressed by Ms Del Ponte, as the epigraph at the head of this chapter reveals (Zacklin 2004: 541). It is conceded the Security Council did fail Rwanda. However, following Zacklin's reasoning, the Security Council ought to have established tribunals in response to other armed conflicts where it had failed to intervene effectively or at all. This would include places as diverse as the DRC, Sri Lanka, Columbia, Honduras and Palestine/Israeli, among others.

Significantly, Zacklin and Del Ponte seek to establish a link between the failure of the international community to protect civilian populations and the establishment of an international criminal tribunal. There is a lack of credible evidence to sustain the argument that where there is a serious violation of IHL, the Council must establish an international criminal tribunal. Each case is different and the most reasonable approach is for the Council to proceed on a case-by-case basis.

Since 1994 serious violations of IHL have taken place in many states, including Afghanistan, Iraq, Sudan, Columbia, Honduras and Somalia, yet the Security Council has not considered establishing tribunals similar to the ICTR.

This in turn requires a consistent approach in order to avoid allegations of 'double standards'. Since 1994 serious violations of IHL have taken place in many states, including Afghanistan, Iraq, Sudan, Columbia, Honduras and Somalia, yet the Security Council has not considered establishing tribunals similar to the ICTR. This warrants explanation. The need to understand the criteria the Council uses in establishing

tribunals becomes even more urgent when viewed in the context of the creation of the Special Tribunal for Lebanon (STL).

On 14 February 2005, former Prime Minister Rafiq Hariri and 22 others were killed by a car bomb in Beirut. On 29 March 2006, the Security Council adopted Resolution 1664 authorising the establishment of a tribunal by agreement between the UN and Lebanon. The STL was instituted to try those responsible for this terrorist crime. As serious as it was, this episode does not compare with events in Rwanda, former Yugoslavia, Sierra Leone or Cambodia. Significantly, however, there is no credible evidence that the Security Council established the STL because of its failure to protect Mr Hariri and the 22 other persons who were killed. In sum, failure by the Security Council to intervene in an armed conflict does not automatically translate into establishing a tribunal as a diplomatic *mea culpa*.

Conclusion

Contemporary practice in the Security Council suggests that international criminal justice is consistently under the shadow of politics. The referral of Sudan and Libya, which are not parties to the Rome Statute, continues to be cited as evidence of abuse of process by the Council, a political body that includes states not covered by the ICC statute. Similarly, the prosecutor's decision to initiate a criminal investigation in respect of Kenya, while supported by the majority in that country, particularly lawyers, has political underpinnings.

On the other hand, critics of the Security Council and the ICC must acknowledge that serious violations of IHL did occur in Sudan, Libya and Kenya. Thus, while the process of referral by the Security Council is problematic, and the prosecutor's criteria for selecting situations for investigation needs improvement, it is submitted that those who violate IHL need to be investigated or prosecuted by the ICC if national jurisdictions are unwilling or unable to do so. Criticism of and by itself is not enough. Recommendations to improve the process are required. One such recommendation is to delete Article 16.

The process of referring Al-Bashir and Gaddafi underscores the need to reform the Security Council to reflect contemporary power relations in the world. The Council's resort to Articles 13(b) and 16 to advance the political interests of major powers is unfortunate. This practice undermines the ICC, as persuasively articulated by the Netherlands and Germany, among other states, during the Council's deliberations.

Serious international crimes are being committed in Africa. If African governments do not create the conditions for judicial institutions to conduct credible investigations and prosecutions, or if national courts are unwilling or unable to investigate or prosecute perpetrators of international crimes, it is only reasonable that the Security Council and the ICC prosecutor do so. This is not to suggest that the international community must condone the Security Council's reliance on Articles 13(b) and 16 or accept the ICC prosecutor's automatic rush to follow the Council's directives without demonstrating independence in the conduct of investigations or prosecutions.

Overall, the challenges related to international criminal investigations or prosecutions have revealed both the flaws in existing international criminal justice and the contours for improving it. The Security Council must redirect its attention to the root causes of conflict rather than only the symptoms of insecurity. Significantly, the Security Council must not participate or be seen to participate as combatants in situations that it refers to the ICC under Article 13(b), on one hand, while, on the other, directing the prosecutor under Article 16 not to investigate or prosecute combatants allied to the P5 in the Council.

The Security Council, dominated as it is by one or a few permanent members, ought to reduce its emphasis on after-the-fact coercive measures as a political tool to punish UN members who are not subservient to some or all the P5. The Council also needs to rebuild its credibility based on consistency and fairness, eliminating double standards linked to geopolitics, political alliances or moral relativism. While legal under the UN Charter, the Security Council may undermine its legitimacy among developing countries if its decisions continue to be seen as embodying 'double standards' and as being against the interests of the Third World.

In conclusion, the ICC is a relevant body that must be supported by the Security Council, Africa and the rest of the international community. It is equally important for the ICC to earn its place in the international community by operating within accepted international standards in the investigation or prosecution of international crimes.

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How to Tackle Impunity - A Comment

Michelo Hansungule[1]

Dr Odora's paper is an excellent exposé of the current state of international criminal justice, particularly as it affects Africa. International criminal justice in the shadow of politics captures the ongoing discourse on international criminal law that was triggered by the establishment of the International Criminal Court (ICC) in the late 1990s and the recent controversial ICC decisions to indict Sudan's President Bashir and his officials and to initiate investigations into certain African individuals with a view to applying the ICC statute.

Simultaneously, European states have been developing their domestic criminal legislation so as to net perpetrators of international crimes under the principle of universal jurisdiction. Here too, individual Africans have easily become the prime suspects under these laws, leading African countries to cry foul in relation to European justice systems. Dr Odora's paper ventures into this controversial territory.

Africa's response to the challenges posed by the latest developments in international criminal justice is deeply divided. On one hand is the 'leadership position', or the position taken by the African Union, which Dr Odora discusses in the paper. According to this position, international criminal justice has no business arresting and trying African leaders in the name of international criminal law. African leaders are incensed that European countries are targeting Africans in the name of universal jurisdiction when the same is not done to non-Africans in other countries. Further, African leaders are angry with the ICC, especially about the way ICC Prosecutor Moreno Ocampo has been trying to hunt down Africans suspected of violating international criminal law, in particular the Rome Statute. The AU accuses Mr Ocampo of being arrogant with regard to African leaders and of not respecting them in discharging his functions. AU leaders are particularly annoyed that Mr Ocampo is determined to get Sudanese President Omar Bashir behind bars and now Kenyan ministers and officials and former Libyan strongman Colonel Muammar Gaddafi. They have complained about how the Security Council is using its powers under the Rome Statute to refer cases only of African leaders

1 These comments are purely personal and in no way represent the views of the organisations the author works for.

to the ICC and refuses to entertain AU requests to defer cases under the statute's Article 16 in respect of African leaders.

On the other hand, African civil society sees nothing wrong in the way European states, the Security Council and the ICC are discharging their functions. African civil society is adamant that perpetrators of human rights violations, especially those breaking international criminal law, should be treated with no less rigour than is required by law. Civil society is not bothered whether this law is European as long as it brings justice to people who otherwise would get none at home. This is the line Dr Odora takes in his wide-ranging paper, namely that international criminal justice serves extremely well the victims of human rights violations, who are totally at the mercy of the state in their home countries.

President Joseph Kabila of the DRC has said he will not refer any more Congolese citizens to the ICC because he did not want to make the ICC a Congolese court. Photo: UN Photo/Marco Castro

One of the reasons for the strong 'African position' is because international criminal law, especially the principle of universal jurisdiction and the ICC, is still very much unknown territory for most of the people. It may be due to ignorance that a state that eagerly ratifies a treaty such as the Rome Statute can turn round and refuse to cooperate when called to do so in line with the treaty provisions. There is much still to be understood about the implications of the Democratic Republic of the Congo's (DRC) or Uganda's referring its nationals to the ICC. If ignorance is not a factor, why cry victim, as Uganda did, when the ICC declines to cancel the referral? President Joseph Kabila of the DRC has also said he will not refer any more Congolese citizens to the ICC because he did not want to make the ICC a Congolese court. Dr Odora's paper helps clarify the meaning of international criminal justice and debunks some of the myths around it.

Methodology

The paper employs a comparative analytical methodology, which enables it to cast the net as wide as possible. Besides describing the issues, the paper discusses them in a comparative perspective. For example, the author presents international criminal justice against the background of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). He analyses the issues using his experience as former prosecutor at the ICTR as well as his academic understanding. The paper refers to some of the major scholarly works on the subject, including works by two Canadians, ICTR/ICTY Prosecutor Arbour and General Dallaire, who served in Rwanda at the height of the genocide. Both have written extremely moving accounts detailing the international criminal justice system as it was unfolding, particularly through the two ad hoc tribunals.

Structure and content of the paper

The paper is quite extensive and is divided into several sections. Among the subjects discussed are law, politics and the ICC; the Security Council and the ICC; law, politics and the ICTR; the Security Council and the 1994 Rwanda genocide; and the impact of the Security Council's decisions on the ICTR.

Although the paper discusses issues including the UN Security Council, the International Criminal Court and the ICTY, the bias is towards international criminal justice in Africa, the main challenge for international criminal justice, especially the ICC, and the author's area of specialisation. However, the paper does not discuss the Special Court of Sierra Leone as a specific subject, whereas it goes into considerable detail about the ICTR. This is due to the fact that the author worked as prosecutor at the ICTR and is best able to examine international criminal justice through the lens of that body, and to an extent of the ICTY.

The paper is highly researched. In the introduction, for example, it raises several issues, including the reasons for the establishment by the Security Council of the ad hoc ICTR and ICTY, which he argues was so that the Security Council could address specific issues posed by breaches of international criminal law in both former Yugoslavia and Rwanda. On the other hand, the ICC, unlike the two tribunals, was established by UN member states under the Rome Statute as a permanent court to ensure lasting international criminal justice. The tribunals also have mandates different from the ICC mandate. The author quickly picks up on the argument of commentators that 'the ICC was intended to serve political interests of the major powers, particularly the five permanent members of the Security Council'. He shares this view, but qualifies it by affirming that the ICC provides access to justice to the underclass in states where judicial systems are unwilling or unable to conduct credible investigations or prosecute suspects in positions of authority, or connected to leaders or enjoying the protection of governments or officials. Based on this, he swiftly rejects the widespread suggestion, for example, that the ICTR was established as a 'diplomatic mea culpa, an act of contrition by the world's major powers to make amends for their failure to prevent or halt the massacre' of mostly minority Tutsis in Rwanda. Rather, he argues that the creation of the ICC is a positive development for victims of infractions of international humanitarian law.

Dr Odora then gives an outline of how cases can be brought before the ICC, starting with member state referrals, as in the referrals by the DRC, Central African Republic (CAR) and Uganda. Secondly, he refers to investigations by the prosecutor's own motion sanctioned by

the court and cites the case of Kenya. Finally, he refers to Security Council referrals, citing those of Sudan and more recently Libya. Given the controversies about ICC jurisdiction in states not yet party to the Rome Statute, Dr Odora clarifies the relationship between being a party to the Rome Statute and, therefore, subject of the jurisdiction of the ICC and being a party to the UN Charter and subject to the UN's Chapter VI jurisdiction. In other words, while both Sudan and Libya have not ratified the Rome Statute, it would apply to them based on UN Chapter VI jurisdiction to which both the two states are subject.

Under the section on law, politics and the ICC, the author highlights the politics of the Security Council in administering the Rome Statute. He shows how the Security Council decided to refer Sudan and President Bashir and his officials to the ICC for international crimes in Darfur, a move strongly opposed by Sudan on the grounds of infringement of sovereignty. He explains how, following the unsealing of the indictments against Bashir and his ministers, the AU approached the UN Security Council to defer the indictments based on Article 16 of the Rome Statute so as to give peace a chance. This was refused and the indictments stand. The author then refers to the referral on 26 February 2011 of then President Muammar Gaddafi, his son and officials to the ICC, and the controversy this caused among African leaders.

While using Sudan and Libya to demonstrate the African argument that Africa was being targeted, the paper does not mention that the Security Council did not refer the cases of Tunisia and Egypt to the ICC. This is particularly important, because the two countries' internal criminal processes against their former leaders, following the overthrow of their

The Security Council decided to refer Sudan and President Bashir and his officials to the ICC for international crimes in Darfur, a move strongly opposed by Sudan on the grounds of infringement of sovereignty. Photo: UN Photo/Isaac Billy

regimes, shows that in some cases the ICC and the Security Council can allow relatively positive complementarity. The post-revolution regimes in both countries have not followed the DRC, CAR and Uganda in referring former leaders to the ICC, and the ICC is seemingly not concerned that the trials are taking place in those countries. Kenya, on the other hand, is seeking to determine the validity of the prosecutor's assessment that international crimes had been committed there and owing to the *sub judice* rule, not much can be said about it at this stage. However, it appears that the dissenting judge in the case held there was a basis to argue that while crimes were committed, this would have been a perfect case for deferring to local jurisdiction in line with the complementarity principle.

Political contamination of global and regional institutions

The author next deals with the related subject of the Security Council and the ICC. It is in this section that he describes the AU position, namely that, based on the Sudanese and Libyan referrals, the Security Council is biased against Africa and makes selective use of its ICC mandate to target Africans. In particular, the author observes that because of its frustration with the ICC, especially its prosecutor, and the Security Council, the AU decided not to cooperate with the court. The author raises an important question about the meaning of the decision not to cooperate: does it apply to all AU states or only to those signatories of the Rome Statute. This point deserves clarification. Technically, only states party to the Rome Statute can make such a declaration and even in their cases the declaration will be valid on an individual basis only, according to the treaty's provisions. Because endorsement of the Rome Statute is by individual states, the AU cannot make a sweeping collective declaration that 'AU states party to the Rome Statute shall not cooperate with the ICC'. The AU can make only a political statement, not one legally binding on states party to the Rome Statute.

The paper's title could not have better articulated the subject. It is true that international criminal justice is under the shadow of politics. Contrary to the well-established principle of law that justice shall be independent and independently exercised, unfortunately the reality is that politics – big-time politics at that – affects international criminal justice. Two examples will illustrate this argument. First, the Security Council is not a court of law. Even though some of the diplomats may be lawyers or even jurists, they are there as diplomats, with briefs from their respective foreign ministers or heads of states or government, who are definitely politicians. Decisions of the Security Council are political. There is an International Court of Justice (ICJ), an organ of the UN under the UN Charter, but this is for settling disputes between and among willing states

and most certainly not for making UN policy. Rather, it is politicians in the various world capitals, especially of the permanent members of the Security Council, who make decisions, including referrals under the ICC Statute to the ICC. Similarly, it is diplomats under the shadow of politics who refused appeals from the African group to defer the indictment of President Bashir for the one-year period provided in the ICC Statute. Because the Security Council is a political body established under the United Nations Charter to oversee peace and security, it follows that the basis of these decisions is politics.

The same can be said of the AU's decisions concerning the ICC and universal jurisdiction with respect to certain African individuals. The AU is also not a court of law. In addition to having ambassadors representing its states, the AU operates through the council of foreign ministers and, above them, heads of state and government. Like the UN, the AU has courts, including an African Court of Justice and an African Court on Human and Peoples' Rights, located in Arusha, Tanzania, and operational since 2004. The African Charter on Human and Peoples' Rights mandates this court to play the double role of promoting and protecting human and African peoples' rights. The point, however, is that the AU's political organs, including the Assembly of Heads of State and Government, make policy decisions, including those that bear on the ICC and on universal jurisdiction. Again, these decisions are based on political rather than judicial interests.

As indicated above, the AU Assembly has repeatedly made policy pronouncements on the ICC, especially ICC Prosecutor Ocampo, and on Europe's application of its universal jurisdiction principle. Factors that

An African Union-UN Hybrid Force Patrols West Darfur
Photo: UN Photo/Albert Gonzalez Farran

clearly show these decisions are based on political interests include the fact that after President Bashir's indictment, the AU spoke out and said it would not cooperate with the ICC. This was a reference to the fact that under the ICC Statute member states are obliged to cooperate with the ICC, including in effecting the arrest warrants issued against accused persons by the court. Thirty-one African states have ratified the ICC Statute – the largest single group to do so – which means that in theory Africa is no haven for ICC-indicted persons because so many states in Africa are under an obligation to arrest and handover wanted persons. However, the AU, including ICC state parties in the AU, instead decided they would not follow the law. Rather, politics held sway and it was decided no AU member state would arrest President Bashir or his ministers on the basis of the ICC warrants because of political interests. Similarly, political arguments were made at the Security Council by African states to defer the arrests of Bashir and his ministers for one year on political grounds, namely 'to give peace in Darfur a chance'. More or less the same political argument is being put forward by the AU in the case of Kenyan ministers and officials who are going through motions at the ICC to determine whether there is a case to indict them for their participation in the crimes against humanity committed during the political conflict in in 2007-08.

Purely political interests are again evident in the AU's constant accusations that the ICC and its prosecutor are targeting African leaders in implementing the ICC Statute, while ignoring the fact that among their audience are some of the heads of state responsible for referring three of the six cases before the ICC. The DRC, the CAR and Uganda all voluntarily referred cases within their territories to the ICC, but in the AU discussions this point is never raised. Regarding universal jurisdiction, the AU, while condemning European states' targeting of certain prominent Africans, refrains from mentioning that not all such Africans are targeted. Indeed, only a few are and usually on the basis of complaints filed in European countries by African victims of human rights violations. Therefore, generalising is a form of playing politics, making it sound as though no Africans can go to Europe any more for fear they might be arrested under universal jurisdiction. To pick up where Dr Odora left the argument, it is important to look more closely at the interplay of African politics lately vis-à-vis international criminal justice.

The shadow of politics in the African Union

The AU has repeatedly complained and cried foul about the way international criminal justice is being used against Africans

Above: Secretary-General Ban Ki-moon addresses the opening session of the 11th African Union Commission Summit. Photo: UN Photo/ Eskinder Debebe

Since the 11th session of the summit of the AU Assembly, held at Sharm-el Sheikh, Egypt,[2] the AU has repeatedly complained and cried foul about the way international criminal justice is being used against Africans. This followed a complaint from Rwanda about the selective implementation of the principle of universal jurisdiction by certain European countries, whom it accused of targeting Africans. In an unprecedented response, the AU Assembly instituted a commission on the abuse of universal jurisdiction comprising ministers of justice and attorney-generals from all AU member states. The commission submitted its report in April 2008. Based on that report, the AU Assembly noted that universal jurisdiction is a principle of international law intended to ensure that individuals who commit grave offences, such as war crimes and crimes against humanity, do not do so with impunity and are brought to justice, which is in line with Article 4(h) of the constitutive act of the African Union. The Assembly then made the following statements:[3]

(i) The abuse of the principle of universal jurisdiction is a development that could endanger international law, order and security.

(ii) The political nature and abuse of the principle of universal jurisdiction by judges from some non-African states against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these states.

(iii) The abuse and misuse of indictments against African leaders have a destabilising effect that will negatively impact on the political, social and economic development of states and their ability to conduct international relations.

(iv) Those warrants shall not be executed in African Union member states.

(v) There is need for establishment of an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of the principle of universal jurisdiction by individual states.

Consequently, after calling on UN member states, in particular EU states, to impose a moratorium on the execution of those warrants until all the legal and political issues had been exhaustively discussed among the AU, EU and UN, it requested the AU chairperson to table

2 Sharm-el Sheikh, 1 July 2008, Assembly of the African Union Eleventh Ordinary Session 30 June – 1 July 2008, Assembly/AU/Dec. pp.193-207

3 Assembly/AU/ Dec. 199(XI), p.1, 'Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction', Doc. Assembly/AU/14 (XI).

the matter of abuse of the principle of universal jurisdiction before the Security Council and General Assembly for consideration. This was done, and the Europeans, in particular, were canvassed. However, there was no positive outcome.

Based on the recommendations of the second meeting of states party to the Rome Statute, which followed the summit meeting held in Sirte, Libya, the Assembly discussed and made decisions on various proposals and issues including:[4]

(i) a proposal for amendment to Article 16 of the Rome Statute;

(ii) a proposal for retention of Article 13 as is;

(iii) procedural issues: guidelines for the exercise of prosecutorial discretion by the ICC prosecutor;

(iv) immunities of officials whose states are not parties to the Rome Statute: the relationship between articles 27 and 98; and

(v) proposals regarding the crime of aggression.

This more or less coincided with the Security Council decision to refer the case of President Bashir and his officials to the ICC to investigate possible breaches of international criminal law in Darfur. It is a moot point now that, following these investigations, the ICC prosecutor applied to the court for indictments against President Bashir and his ministers, which were granted, and a sitting head of state was indicted for serious breaches of international criminal law while in office. In reaction, the AU Assembly took a two-pronged approach. It condemned impunity as well as gross violations of human rights in Darfur and even called on perpetrators to be brought to justice, and expressed commitment to democracy, rule of law and good governance throughout the continent. Nevertheless[5] it expressed deep concern 'at the indictment made by the prosecutor of the ICC against the President of the Republic of The Sudan, H. E. Mr Omar Hassan Ahmed El Bashir'. It went on to caution that, 'in view of the delicate nature of the peace processes underway in The Sudan, approval of this application would

4 Adopted by the 14th Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010.

5 It strongly supported the decision by the PSC to establish a High-Level Panel of Eminent Personalities under the chairmanship of former President of the Republic of South Africa, H. E. Mr Thabo Mbeki, to examine the situation in depth, and to submit recommendations on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed.

seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur'.[6]

When this did not deter the court from granting indictments, the AU Peace and Security Council in July 2008 focused on Article 16 of the ICC Statute, in terms of which it argued for the deferment of the ICC process against Bashir and his officials to give peace in Darfur a chance. Against this background, the Assembly decided to lobby the UN Security Council to this end and simultaneously to convene 'a meeting of the African countries that are parties to the Rome Statute on the establishment of the International Criminal Court (ICC) to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements'.

In an effort to appear objective, especially in the eyes of the international community, and in a bid to get Security Council deferment for Bashir, the Assembly called upon 'all parties to scrupulously respect the values and principles of human rights'. Reference to 'all parties' and not just to Sudan was intended to avoid embarrassing the Sudanese government, which, of course, was present in the room when the resolution was made. But in what seemed to be a 'coup' by progressives in the summit, the same resolution called on 'the Government of The Sudan to take immediate and concrete steps to investigate and bring the perpetrators to justice, and to take advantage of the availability of qualified lawyers to be seconded by the AU and the League of Arab States'. Had it stood by itself, this single line would demonstrate that Africa was running out of patience with the Khartoum authorities and President Bashir in particular. However, it was not this but the next line that summed up Africa's real position on Bashir, particularly that whatever the international community said, African leaders were not about to dump their colleague. The Assembly noted 'the steps taken by the Republic of The Sudan to address human rights violations in Darfur'. More than anything else, this left no doubt where Africa truly stood on the matter.

But this particular route was not successful. The Security Council would not put the Bashir process on ice. In frustration, the Assembly expressed its strong regret, stating that it:

6 Assembly/AU/Dec. 221(XII) p.1, 'Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan'.

> Deeply regrets that the request by the…AU…to the United Nations Security Council to defer the proceedings initiated against President Bashir of The Sudan, in accordance with Article 16 of the Rome Statute of ICC…has not been acted upon, and in this regard,
>
> Reiterates its request to the UN Security Council; and
>
> Requests the African members of the UN Security Council to place the matter on its agenda of the Council. [7]

All this time, President Bashir remained in defiant mood, going about his 'normal' business as head of state and even responding to invitations from fellow African and Arab heads of state to visit their countries – though these became fewer and fewer. His visits to Kenya and other countries evoked the ire of the ICC in particular and Western countries in general, who expected state parties to the Rome Statute to arrest and hand him over to the court for trial. Consequently, the ICC pre-trial chamber complained to the Security Council about the way Bashir and some state parties were fragrantly disregarding the court. This provoked a swift response from the AU Assembly, which stated that it:

> Also deeply regrets the Decisions no.: ICC-02/05-01 of the Pre-trial Chamber I of the ICC dated 27 August 2010 informing the UN Security Council and the Assembly of the States Parties to the Rome Statute (ASP) about the visit of President Omar El-Bashir of the Sudan to the Republic of Chad and the Republic of Kenya on 21st July and 27th August 2010 respectively…
>
> Decides that by receiving President Bashir, the Republic of Chad and the Republic of Kenya were implementing various AU Assembly Decisions on the warrant of arrest issued by ICC against President Bashir as well as acting in pursuit of peace and stability in their respective regions.

Besides strongly supporting President Bashir, the AU Assembly saw politics at play in the case of the Kenyan ministers and the deputy prime minister, Uhuru Kenyatta, and colleagues – the so-called 'Ocampo six' – after ICC Prosecutor Ocampo initiated charges against them. With Bashir's case in mind, it was only natural the AU Assembly would extend similar support to the Kenyans by trying to get Ocampo's decision to bring them before the ICC suspended. Relying on Article 16 of the Rome Statute, the Assembly decided that it:

7 Assembly/AU/ Dec. 334(XVI).

> Supports and Endorses Kenya's request for a deferral of the ICC investigations and prosecutions in relation to the 2008 post election violence under Article 16 of the Rome Statute to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity, and in this regard
>
> Requests the UN Security Council to accede to this request in support of the ongoing peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence; and
>
> Requests the African members of the UN Security Council to place the matter on the agenda of the Council.

What is interesting is that when the violence broke out in Kenya, the government had floated the idea of establishing a national mechanism to punish the perpetrators, but legislators would have none of it. Even though prosecution was going to be difficult for the government, which had harboured alleged perpetrators, it is important that the issue of internal measures against them was at least considered by some in government.

As with the ICC's concerns about Africa, the African phobia about universal jurisdiction – with African leaders seeing politics everywhere – has continued right up to the Kampala ICC review conference. Following this conference, the Assembly, after taking note of Resolution A/RES/65/33 on the Scope and Application of the Principle of Universal Jurisdiction adopted on 6 December 2010 by the 65th United Nations General Assembly, invited all member states to submit to the UN Secretary-General, before 30 April 2011, information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant international treaties, their domestic legal rules and judicial practice.

Further, it invited AU member states affected by the abuse of the principle of universal jurisdiction by non-African states to respond to the AU chairperson's request to communicate to the AU Commission the list and details of cases pending in non-African states against Africans.

In particular, states have been asked to compile cases with names of their citizens to whom European countries have applied the principle of universal jurisdiction so that this can be discussed at the UN. In other words, Africa is still pursuing the principle of universal jurisdiction because the leadership is totally convinced that the way it is being applied smacks of politics alone.

Lastly, the AU has, of course, recently pronounced in Resolution 1970 (2011) of the Security Council on former strongman Muammar Gaddafi. Here again, the AU strongly believes politics has affected the way in which Western countries, especially the US and its allies, have handled the Libyan situation and the referral of Gaddafi and his close aides to the ICC.[8] The Assembly noted that 'the warrant of arrest issued by the Pre-Trial Chamber concerning Colonel Gaddafi, seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya, which will also address, in a mutually-reinforcing way, issues relating to impunity and reconciliation'. In this regard, the Assembly stated that, 'Member States shall not cooperate in the execution of the arrest warrant, and request the UN Security Council to activate the provisions of Article 16 of the Rome Statute with a view to deferring the ICC process on Libya, in the interest of Justice as well as peace in the country'.[9]

The AU strongly believes politics has affected the way in which Western countries, especially the US and its allies, have handled the Libyan situation and the referral of Gaddafi and his close aides to the ICC. Photo: UN Photo/ Mark Garten

However, this position, which seemed to have been taken when Gaddafi was in charge, has clearly changed in a number of these countries since the fall of the strongman. Even before the AU announced an about-turn on Libya, a number of countries, including Botswana, Nigeria and Ethiopia, recognised the National Transitional Council (NTC), which, with strong support from its Western allies, took over the capital Tripoli. Again, politics divided African states, with some drifting away from the official AU position not to recognise the NTC until given the AU had given the nod.

The case for politicisation of international criminal justice

It is quite consistent and fair to see reasons for the widely held perception, particularly among African leaders, that international criminal law and justice do operate under the shadow of politics. Why is there a perception that European universal jurisdiction steers clear of crimes by American and NATO forces? And despite committing crimes against innocent Palestinians, Israeli state and military officials, for instance, are not afraid of European universal jurisdiction, are they? In other words, how universal is universal jurisdiction? While it is important to net Africans who commit heinous crimes against their innocent people such as mass rapes, torture and extrajudicial killings, using power and privilege and then running to Europe to hide when the stakes change and to escape accountability, it is equally so to do the same with all

8 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court', Doc. EX.CL/670(XIX).

9 Assembly/AU/Dec. 366(XVII).

criminals who come on to European soil. There should be no double standards in the exercise of the jurisdiction. Some of the African leaders in the AU who protest about tough European universal jurisdiction in relation to them and their colleagues are not doing so innocently. African people suffer plenty of crimes at the hands of their so-called leaders and someone out there should call them to account. Since such leaders are so powerful at home, where they define and dominate the state itself, it would be futile to expect weak poor citizens to take them on on their own turf. This is where institutions like universal jurisdiction become very important. But European countries should not apply such jurisdiction to prominent Africans only, while giving a haven to Americans or Europeans who commit similar crimes.

The way the ICC operates is clearly not equitable. At present, it is nothing but 'an African Criminal Court' in the eyes of the accused. It is no accident that a world court set up to try world crimes has since it began operation nearly 10 years ago managed only to net Africans. Where are the American soldiers breaching international law in Afghanistan, Iraq and other places? What about the well-documented cases of those NATO soldiers who have committed egregious crimes not against Europeans but, like American forces, against innocent civilians in Afghanistan, Iraq, Libya and elsewhere? While some ICC cases have come from African states themselves, signed off by President Joseph Kabila of the DRC, President Yoweri Museveni of Uganda or President Patassé of the CAR, mostly through poor advice or total ignorance – which is why after signing they go to the AU to condemn the ICC – the most controversial have come from the UN Security Council. The Security Council, it is fair to say, can never refer Americans or Europeans, only Africans. This is a council comprising states like the US which has yet to ratify the Rome Statute it uses to 'order' the ICC to cage those African leaders it has fallen out with. Referrals from African states have political overtones too, because none of them relate to serving generals, colonels and fighters on the side of government. The African leaders making these referrals refer only to their opponents. Are atrocities against civilian populations committed only by rebel forces, never by government forces?

All these things give credibility to accusations that the ICC operates under the shadow of politics. Justice should be justice. There is a need for the ICC prosecutor to be convincing in discharging his function by, for instance, being more questioning of Security Council referrals as well as referrals by states. There is a perception now that Prosecutor Ocampo did not really seriously consider the submissions from Kenya in the light of the minimum threshold for invoking ICC jurisdiction.

The motions are being heard as we write but there is a feeling that the Kenyan case is one where the parties should have opted for positive complementarity. The involvement of former UN Secretary-General Kofi Annan, which led to the ICC prosecutor's jurisdiction, is what opponents of the ICC call the shadow of politics. The ICC prosecutor should be a professional office. The ICC trial chambers should act professionally and be guided only by their professional instincts in discharging their functions. There should be no invisible hands trying to influence the prosecutor and the chambers. Instead of operating under the shadow of politics, international criminal law should operate only according to justice as plainly defined.

There is a notion among ICC's African judges and staff members that merely because they are African, they cannot target Africans in their work. This is simplistic because targeting or not targeting does not flow simply from one's ethnicity. It is a much more complex issue. Besides, evidence abounds that Africans have targeted fellow Africans, for instance, in xenophobic attacks and in genocide and war crimes in, for example, apartheid South Africa, Rwanda and Sierra Leone. Second, the notion oversimplifies complex international power politics where big forces can use groups or individuals to achieve their agendas. Often big powers find or even create decoys to hide behind and use for the purpose. While this may not always be so, the possibility of it happening cannot be excluded either.

Conclusion

Dr Odora's paper discusses an important subject prominent in contemporary discourse. He raises several of the issues currently being discussed in key regional and global institutions, like the AU and Security Council. International criminal justice, especially through the principle of universal jurisdiction and the ICC, has raised challenges that have divided states and groups one from the other. At issue, however, is how to tackle impunity, which for many years has dogged weak sections of society all over the world. Recent developments in international criminal justice are meant to address this weakness, which exposed innocent civilians to systematic exploitation. Dr Odora's contribution takes the debate forward in a more enlightening direction.

» Solidarity Triumphs Over Democracy – The Dissolution of the SADC Tribunal

Laurie Nathan

In 2011, the heads of state of the countries comprising the Southern African Development Community (SADC) decided to dissolve the SADC Tribunal, a regional court modelled on the European Court of Justice. Four years earlier, the tribunal had ruled that the Zimbabwe government's expropriations of land owned by white farmers violated the SADC Treaty principles on the rule of law and non-discrimination. The tribunal ordered the government to refrain from interfering with the farmers' occupation and ownership of their properties. The government ignored the court's decisions and embarked on a campaign to smash the tribunal and nullify its rulings. The SADC Summit was thus confronted with the choice of backing either the Zimbabwe government or the tribunal. By abandoning the court in favour of Harare, it elevated the norms of solidarity and regime protection above the democratic and legal principles espoused in the treaty. The head of the tribunal, Judge Ariranga Pillay, denounced the summit's decision as 'worthy of potentates and kings who can do no wrong and who are not accountable for their actions' (Christie 2011a). This article first outlines the relevant provisions of the treaty and the protocol governing the tribunal and then discusses the scrapping of the regional court.

A Treaty and Protocols Championing Democracy

SADC's legal instruments champion democracy. The 1992 treaty provides that the organisation's objectives include the evolution of common political values, systems and institutions, and that the regional body and its members must act in accordance with the principles of sovereign equality of member states, solidarity, peace and security, and human rights, democracy and the rule of law. The member states pledge to adopt adequate measures to promote the attainment of SADC's objectives and to refrain from taking measures likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the treaty. They commit themselves to taking all steps necessary to accord the treaty the force of national law (SADC 1992).

In 2001, the summit revised the treaty and reinforced the emphasis on democracy. The objective relating to common values was reformulated so as to 'promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective' (SADC 2001a). The amended treaty added a further objective, namely to 'consolidate, defend and maintain democracy, peace, security and stability'.

SADC's legal instruments posit a close linkage between democracy and peace and security. The protocol on regional security stipulates that one of the objectives of the SADC Organ on Politics, Defence and Security Co-operation is 'to promote the development of democratic institutions and practices within the territories of the State Parties and encourage the observance of universal human rights as provided for in the charters and conventions of the UN and the OAU' (SADC 2001b). According to the Regional Indicative Strategic Development Plan of 2003, the underlying logic is that economic growth and development 'will not be realised in conditions of political intolerance, the absence of the rule of law, corruption, civil strife and war' (SADC 2003: 5).

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Secretary-General Ban Ki-moon (right) meets with Joaquim Chissano, Southern African Development Community (SADC) Mediator for Madagascar and former President of Mozambique. Photo: UN Photo/Evan Schneider

As far as the tribunal is concerned, the treaty provides that the regional court is an institution of the SADC that will adjudicate disputes between states and ensure adherence to the provisions of the treaty (SADC 1992). In 2000, the summit approved the protocol for the tribunal and in 2005 the body was inaugurated, with the seat of the court being Windhoek. According to the tribunal registry, the tribunal is an international court like the European Court of Justice and the East African Court of Justice: it bases its judgements on international law and SADC law, the latter comprising the treaty, the protocols and any other legal instruments that are in force; and can rule that a member state's conduct or legislation is in violation of SADC law or international law (SADC Tribunal Registry undated).

The tribunal protocol provides that the regional court comprises jurists who are citizens of SADC states and qualified to be appointed to the highest judicial office in their country (SADC 2000). They are selected by the summit on the basis of nominations submitted by member states. The tribunal's jurisdiction covers disputes between states and between natural or legal persons and states over the interpretation and application of the treaty, the interpretation, application and validity of the organisation's protocols and the validity of acts undertaken by SADC institutions. No person may bring an action against a member state unless he or she has exhausted all available domestic remedies or is unable to proceed under the relevant domestic jurisdiction. Where a dispute

is referred to the tribunal by any party, the consent of the other parties to the dispute is not required. The decisions and rulings of the judicial body are final and binding.

The protocol's provisions on the enforcement and execution of the tribunal's decisions suggest, on paper at least, that member states are willing to subordinate their sovereignty to the regional court. The states must enforce the tribunal's judgements in accordance with their laws on the registration and enforcement of foreign judgements and they 'shall take forthwith all measures necessary to ensure execution of the decisions of the Tribunal' (SADC 2000). The decisions shall be binding upon the parties to the dispute and enforceable within the territories of the member states concerned. According to the protocol, if a member state fails to comply with a ruling of the tribunal, the tribunal shall report that failure to the summit for appropriate action. The treaty empowers the summit to impose sanctions on a member state that persistently fails, without good reason, to fulfil its treaty obligations or implements policies that undermine SADC's principles and objectives.

While the tribunal does not have enforcement powers, it will be evident from the above that the SADC states are expected to abide by and give effect to the court's rulings and that failure to do so must be addressed by the summit. Between 2007 and 2010, the enforceability of the tribunal's decisions was put to the test in a series of cases challenging the Zimbabwe government's harassment of white farmers and seizure of their farms and land. As discussed below, the summit failed the test dismally, turning its back on the tribunal and the treaty.

The Tribunal versus Zimbabwe

In 2000, Zimbabwean war veterans who had fought in the liberation struggle, and whose socioeconomic plight had since been neglected by the government, began a violent campaign of invading and occupying white-owned land and farms. The land question had long been a smouldering political and economic problem. In the late 1990s, acute racial inequities in land ownership – arising from colonial conquest and white minority rule and then entrenched by Zimbabwe's negotiated settlement in 1979 – were still in place. The government backed the land invasions and launched a programme of compulsory land expropriations. The programme was characterised by disregard of judicial rulings, the emasculation of the judiciary, violence perpetrated by state-sponsored militia, the accumulation of farms by the ruling elite and the impoverishment of farm workers (International Crisis Group 2001).

In 2007, a group of white Zimbabwean farmers petitioned the SADC Tribunal for relief over the government's confiscation of their farms (hereafter 'the Campbell case'). The confiscations had taken place in terms of a constitutional amendment dealing with the state's expropriation of agricultural land for resettlement and other purposes (hereafter 'Amendment 17'). Amendment 17 excludes from the jurisdiction of the Zimbabwe courts any plea contesting such expropriation. When the tribunal heard the Campbell case, it noted that the Zimbabwe Supreme Court had recently denied Campbell and the other applicants the right to institute domestic proceedings relating to the seizure of their land: the supreme court had accepted that its jurisdiction to hear the matter had been ousted by Amendment 17. Consequently, the tribunal held that the applicants did not have domestic legal remedies available to them and were entitled to lodge their complaint with the regional court (SADC Tribunal 2007).

The tribunal observed that article 4(c) of the SADC Treaty requires member states to act in accordance with the principles of human rights, democracy and the rule of law. The tribunal concluded that it therefore had jurisdiction in respect of any dispute pertaining to these principles. It found that the Zimbabwe government was in breach of article 4(c) because the ouster clause in Amendment 17 violated two essential elements of the rule of law, namely the right of access to the courts and the right to a fair hearing before being deprived of a right, interest or legitimate expectation (SADC Tribunal 2007).

The tribunal also found that Amendment 17 targeted white farmers alone and did so regardless of other factors, such as their citizenship, length of residence in Zimbabwe or proper use of their lands. The constitutional amendment thus amounted to indirect racial discrimination, which was contrary to Article 6(2) of the treaty and numerous international conventions, including the African Charter on Human and Peoples' Rights (SADC Tribunal 2007).[1] The tribunal added that it would have reached a different conclusion if the state's criteria for confiscating land were reasonable and objective rather than arbitrary, if fair compensation were paid for expropriated lands and if these lands were indeed distributed to poor, landless and other disadvantaged and marginalised individuals or groups (SADC Tribunal 2007: 53-4). The tribunal ruled that the state should pay the farmers fair compensation for the expropriated land. It ordered the Zimbabwe government to take all necessary measures to protect the pos-

1 Article 6(2) of the SADC Treaty provides that 'SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit'.

session, occupation and ownership of the applicants' other land and to ensure that no action was taken to evict the farmers or interfere with their peaceful residence of their properties.

The government ignored the tribunal's judgement, which President Robert Mugabe dismissed as an 'exercise in futility' (Newzimbabwe.com 2008). When some of the applicants in the Campbell case were beaten up and tortured in 2008, they submitted an urgent application to the tribunal, asking it to find that the government was in breach and contempt of the 2007 order.[2] The regional court held in favour of the farmers, rejecting the government's defence that there was a state of lawlessness in Zimbabwe and that the authorities were experiencing difficulty in tackling acts of intimidation and violence (SADC Tribunal 2008). In 2009, the farmers turned to the tribunal for a further declaration that the government was in breach and contempt of the tribunal's order. This time, the government declined to participate in the proceedings. The court noted that Mugabe had described its earlier decisions as 'nonsense' and 'of no consequence' and that these utterances had been followed by the intimidation and prosecution of the farmers and the invasion of their land (SADC Tribunal 2009). Once more the regional body found in favour of the farmers.

Patrick Antony Chinamasa, Minister of Justice of the Republic of Zimbabwe. Photo: UN Photo/Jean-Marc Ferré

Harare was now set to mount a frontal attack on the tribunal. In September 2009, the Zimbabwe minister of justice, Patrick Chinamasa, announced that his government had withdrawn from the tribunal's jurisdiction. He argued that the tribunal was not legally constituted because its protocol had not been ratified by two-thirds of the member states, a requirement that he said was stipulated in the protocol (Sasa 2009). Chinamasa did not explain why, if this were a fatal impediment to the functioning of the tribunal, his government had accepted the regional court's jurisdiction in the Campbell case in 2007 and in several other cases heard by the court. Nor did he explain why, nine years after Mugabe had signed the protocol in his capacity as head of state, Zimbabwe was yet to ratify the document. Chinamasa's argument implied that the president's signature on an international agreement had no legal relevance and that the government could legitimately evade the tribunal's jurisdiction because of the government's own failure to ensure the ratification of the protocol.

Most strangely, Chinamasa relied on an outdated version of the protocol. When the summit revised the treaty in 2001, it scrapped the requirement that the tribunal protocol would only come into force after

2 In April 2011, Mike Campbell, the leading applicant in the Campbell case, died as a result of the brain injuries he sustained during the 2008 assault (Dugger 2011).

ratification by two-thirds of member states. Instead, the protocol would be incorporated into the treaty and would enter into force on the date on which the Agreement Amending the Treaty of the Southern African Development Community entered into force by virtue of its adoption by three-quarters of the members (SADC 2001c). On 14 August 2001, the amending agreement was duly adopted and signed by 13 heads of state, including Mugabe. The tribunal protocol thus came into force on that date. The summit subsequently amended the protocol so as to reflect this substantial change and other modifications to the regional court. The preamble to the 2002 Agreement Amending the Protocol on Tribunal, signed by Zimbabwe and 12 other countries, notes that 'the Protocol entered into force upon the adoption of the Agreement Amending the Treaty of the Southern African Development Community at Blantyre on 14 August 2001' (SADC 2002).

In response to Chinamasa, the lawyers acting for the Zimbabwe farmers cited international case law and the law of treaties to show that a state may not act contrary to a treaty it has consented to but not formally ratified and may not invoke its constitution and other domestic law as an excuse to dishonour a treaty obligation (Gauntlett and Pelser 2009). The lawyers added that it is a well known principle of international law and domestic legal systems, including that of Zimbabwe, that once jurisdiction is established in a given matter it cannot be lost, least of all on the basis of a unilateral and belated disavowal of jurisdiction by one of the parties. Moreover, the Zimbabwe government had nominated a judge to serve on the tribunal and had relied extensively on the provisions of the protocol during many of the tribunal's hearings. This exposed Chinamasa's subsequent disavowal of the protocol's validity as 'humbug and a contrivance' (Gauntlett and Pelser 2009).

In 2010, the farmers returned to the tribunal, exhorting it to report to the summit the Zimbabwe government's failure to comply with the regional court's rulings. The court stated that it had already reported the failure to the summit and that the government had persisted in flouting the tribunal's decisions and endangering the lives, liberty and property of the applicants (SADC Tribunal 2010). In addition, the government had informed the tribunal that it would no longer appear before the regional court and that any decisions the tribunal might have made or might make in the future against Zimbabwe were null and void (SADC Tribunal 2010).

The Campbell applicants petitioned the Zimbabwe High Court to enforce the tribunal's order, but the court dismissed the petition on the following grounds:

> Having regard to…the overwhelmingly negative impact of the Tribunal's decision on domestic law and agrarian reform in Zimbabwe, and notwithstanding the international obligations of the Government, I am amply satisfied that the registration and consequent enforcement of the judgement would be fundamentally contrary to the public policy of this country. (quoted in SADC Tribunal 2010:3)

The critical issue, however, was not whether the tribunal's judgements were consistent or at odds with public policy, but whether the Zimbabwe courts were *legally obliged* to enforce the judgement in accordance with the tribunal protocol and the treaty. As the tribunal asserted in reaction to the high court's position, the protocol states unambiguously that a decision taken by the tribunal is binding on the parties to a dispute and enforceable in the territories of the member countries effected by the decision (SADC Tribunal 2010).

In another court case in Zimbabwe, the judge had offered legal rather than policy reasons for refusing to recognise the tribunal's authority and endorse its order in the Campbell case. Judge Gowora presented the argument thus:

> The supreme law in this jurisdiction is our Constitution and it has not made provision for [Zimbabwe] courts to be subject to the tribunal. This court is a court of superior jurisdiction and has an inherent jurisdiction over all people and all matters in the country, and its jurisdiction can only be ousted by a statutory provision to that effect…I do not have placed before me any statute to that effect and the [Tribunal] protocol certainly does not do that. (quoted in Chimora 2009)

Do the SADC countries consider themselves legally bound by the treaty and protocols they have signed?

Whatever the merits of Judge Gowora's argument in terms of constitutional and international law, it highlights the fact that the underlying and most basic questions surrounding the tribunal are political and relate to sovereignty: Do the SADC countries consider themselves legally bound by the treaty and protocols they have signed? And are they willing to submit themselves to the judicial authority of the tribunal and comply with its rulings, just as the European Union countries comply with the rulings of the European Court of Justice? If the answers to these questions were 'yes', then the SADC states would take care of the jurisdictional implications by amending their constitutions or other laws as required. Zimbabwe's answer has been emphatically 'no'. What of the other states? On three occasions the tribunal referred Zimbabwe's failure to obey its rulings to the summit for appropriate action and on each occasion the summit, despite the urgency and importance of the matter, declined to act. But the worst was still to come.

In 2009 and 2010, Chinamasa travelled to the regional capitals, furiously lobbying his counterparts to support Zimbabwe's position. On 17 August 2010, after the annual summit meeting, he announced that the heads of state had resolved to suspend the tribunal for six months pending the outcome of a review by the region's justice ministers and attorneys-general (Zvayi 2010). He deplored the tribunal's attempts to rewrite Zimbabwe's constitution and reverse the decisions of its courts. He maintained that while the tribunal was a necessary instrument for regional integration, it should only deal with matters referred to it by member states. It had to be reconstituted in order to put it 'on a sound footing which recognises negotiations between member countries over those issues member countries want to refer to the tribunal' (quoted in Zvayi 2010: 2–3). In this scheme of things, the citizens of Southern African states would no longer have recourse to the regional court and democratic norms would probably be excluded from the tribunal's ambit.

On 18 August, the executive secretary of SADC, Tomaz Salamao, refuted Chinamasa's remarks, claiming that the summit had not suspended the tribunal (ZimEye 2010a). The correct position, he said, was that the body would not entertain new cases but it could proceed with those cases that were already before it. The summit communiqué was typically bland and insufficiently informative, stating simply that the 'Summit decided that a review of the role, functions and terms of reference of the SADC Tribunal should be undertaken and concluded within six months' (SADC 2010). Nevertheless, on 23 August Mugabe triumphantly proclaimed that the regional court had been suspended:

> We [the heads of state] are the creators of this monster and we said we thought we had created an animal which was proper, but no, we had created a monster. We understand that there was interference or interventions by some countries (such as Britain) that the tribunal would be in place and the farmers would come to it. [But] now the house has collapsed and all those decisions which it made on Zimbabwe will become invalid. (ZimEye 2010b)

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The vitriolic and conspiratorial tone of Mugabe's remarks was echoed by Simbi Mubako, a retired Zimbabwean judge and former minister (*The Herald* 2011a). Referring to the tribunal as an 'illegitimate monster', he called for an enquiry into its creation 'in order to establish its real motives'. 'The prime suspects', he suggested, 'must be the officials of the SADC secretariat who planned and orchestrated the judicial charade.' Also culpable were the tribunal judges, 'who seemed to lobby for upholding of their judgements even when it was plain that they were improperly constituted'. Mubako added that 'the spectacle of a

panel of learned dignitaries in judicial regalia presiding over a kangaroo court would be a hilarious comedy if the matter was not so serious'.

Given the diatribes by Mubako and Mugabe, anyone unfamiliar with the tribunal's legal history would be astonished to learn that Zimbabwe had signed the 1992 treaty, which establishes the regional court; the 2001 amendment to the treaty, which provides for the tribunal protocol's entry into force (SADC 2001c); and the 2002 amendment to the protocol, which incorporates this provision on entry into force (SADC 2002). None of these documents was sprung on the summit without adequate notice and extensive regional consultation. All the legal instruments go through numerous iterations, being discussed and amended by committees of state officials before being considered by the SADC council of ministers and thereafter by the summit.

After the 2010 summit meeting, the SADC secretariat commissioned an independent review of the tribunal. Undertaken by University of Cambridge Professor Lorend Bartels and completed in April 2011, the review affirmed the jurisdiction of the tribunal and vindicated its decisions (*The Zimbabwean* 2011). The main conclusions were as follows: the tribunal has the legal authority to deal with individual human rights petitions; SADC law should be supreme in relation to domestic laws and constitutions; decisions of the tribunal should be binding and enforceable within the territories of member states; the tribunal was lawfully established in terms of the tribunal protocol; the SADC countries waived the requirement to ratify the protocol, which became part of the treaty by agreement and binding on all member states; the Zimbabwe government's participation in the tribunal's proceedings and nomination of a judge to serve on the court preclude it from arguing that the tribunal was not legally constituted; and a state may not rely on its constitution and national laws as a defence against a violation of an international obligation.

Notwithstanding these conclusions, Zimbabwe had triumphed by the time the summit met in May 2011. The heads of state announced that they would maintain the moratorium on the regional court hearing any extant, pending or new case until the tribunal protocol had been reviewed and approved (SADC 2011). They mandated the region's ministers of justice and attorneys-general to initiate a process of amending the relevant SADC legal instruments and to submit a progress report in August 2011 and a final report in August 2012. The summit decided further that it would not reappoint the tribunal judges whose term of office had ended in August 2010, nor replace the judges whose term of office was due to expire in October 2011.

The four judges whose appointments would not be renewed wrote an angry letter to the executive secretary of SADC, pointing out that the summit's decision amounted to dissolving and not merely suspending the court (Pillay *et al.* 2011). They slammed the decision as illegal, *ultra vires* and taken in bad faith. The judges argued that the summit was at liberty to amend the treaty and the tribunal protocol according to the prescribed procedures, but prior to making such amendments it could not legitimately limit the tribunal's jurisdiction, to which the summit itself was subject, and it could not legitimately stop the tribunal from hearing the cases before it. This was a breach of the treaty and the principle of access to justice. The bottom line was inescapable: 'The highest authorities of SADC at best only pay lip service to the principles of human rights, democracy and the rule of law and do not scrupulously adhere to them' (Pillay *et al.* 2011). Judge Pillay scoffed at the summit's approach of ignoring the independent review conducted by an international legal scholar and then requesting a second review to be undertaken by politicians (Christie 2011a).

Whatever the outcome of the process for amending the protocol and reconstituting the tribunal, at some stage the heads of state will have to pronounce on the court's rulings against the Zimbabwe government. If the summit nullifies the rulings, as demanded by Zimbabwe and as appears likely, it will effectively condone the violations of the rule of law and make a complete mockery of the treaty and its institutions. The net effect, as a former Zimbabwe magistrate has argued, is that Zanu-PF has exported its distaste for the rule of law to the Southern African region as a whole (Kuveya 2011). According to Lloyd Kuveya, the ruling party ensured the subservient posture of domestic courts in Zimbabwe by intimidating independent-minded judges and hounding them out of office, packing the superior courts with compliant judicial officers and giving gifts of expropriated land to certain judges. None of these tactics was possible in the case of the tribunal and Harare was thus bent on securing the summit's agreement to scrap the regional court and invalidate its decisions.

Explaining the Gap between the Rhetoric and the Practice

The tribunal saga underscores the fact that the treaty and the SADC protocols on politics are rhetorical rather than substantive and legally binding instruments. On the one hand, the states that engage in undemocratic practices pay no heed to these instruments and, on the other, the states that adhere to democratic norms do so because of their constitutions and political histories rather than because of SADC's declarations. Most importantly, as a general rule the summit does not

criticise or sanction member states that breach the organisation's principles on human rights and the rule of law. The summit's failure to back the tribunal's rulings against Zimbabwe reflects the depth of this problem and the marginal relevance of the treaty. Indeed, the summit was so determined to avoid a confrontation with Zimbabwe that it was prepared to disband the tribunal at the very time that the regional court was seeking to uphold the treaty.

Given the mixture of political systems in the region, it is not surprising that the treaty and protocols are rhetorical rather than substantive and legally binding. The 2004 Freedom House survey of political rights and civil liberties classified Angola, the Democratic Republic of Congo, Swaziland and Zimbabwe as 'not free'; Botswana, Lesotho, Mauritius, Namibia, Seychelles and South Africa as 'free'; and Malawi, Mozambique, Tanzania and Zambia as 'partly free' (Piano and Puddington 2004). Most of these ratings remained the same in the Freedom House survey for 2009 (Freedom House 2010). The exceptions were Lesotho and Seychelles, which moved from 'free' to 'partly free'. Madagascar, a new member of SADC, was classified as 'partly free'. In these circumstances, it is not possible for the SADC states to be bound – either in the sense of being united or in the sense of being constrained – by democratic principles.

Why then do SADC's legal instruments champion democracy if its members span the political spectrum and are not collectively committed to democratic norms? The answer probably lies in a combination of three factors: the hegemony of the democratic paradigm in international forums and discourse; the adoption of this paradigm in the declaratory texts of the African Union (e.g., African Union 2000, 2007); and the weakness of SADC countries, whose national and regional projects are dependent on development aid from Western countries and international lending bodies that promote and, indeed, insist on observance of democracy. In this context, it would make no sense for SADC's treaty and protocols to adopt an anti-democratic or less-than-democratic stance.

According to Judge Pillay following his effective dismissal as the head of the tribunal, the formation of the regional court was simply a sop to Western donors:

> For SADC's leaders, [the establishment of the Tribunal] had been a gambit to get funds from the European Union and others. It gave off all the right buzz words, you know, 'democracy, rule of law, human rights'. And then [the SADC leaders] got the shock of their lives when we said these principles are not only aspirational but also justiciable and enforceable. (Christie 2011a)

A similar perspective was voiced by Norman Tjombe, a Namibian human rights lawyer. He points out that the summit had never been enthusiastic about the tribunal, taking 15 years from the signing of the 1992 treaty until it appointed the tribunal judges in 2007. The regional court was never a priority: 'All along it was actually just international powers pushing for it. Now that the geopolitics are shifting, with Southern Africa looking east, whatever interest was there is dead and to be frank the Swedes and Finns and Germans driving this thing are getting fatigued too' (Christie 2011b).

The formation of the tribunal reflected a tendency by states in Southern Africa and elsewhere on the continent to reproduce European institutions. Broadly speaking, the AU was modelled on the EU; the AU Commission on the European Commission; the African Standby Force on the Nordic Stand-by High Readiness Brigade; the Southern African Development Coordination Conference, SADC's predecessor set up in 1980, on the European Economic Community; SADC on the European Community; the SADC Tribunal on the European Court of Justice; the early versions of the SADC Mutual Defence Pact on the NATO Treaty; and the Conference on Security Stability, Development and Co-operation in Africa, which is now part of the AU, on the Conference on Security and Co-operation in Europe (Nathan 2012, forthcoming). This tendency stems both from an African desire to emulate successful organisations and from the proclivity of the EU and its member states to promote and fund the replication of their models in other parts of the world.

Because of its dependence on foreign funding, SADC is especially susceptible to donor influence. In 2011, its annual budget was US$ 83 million, of which US$ 31 million came from member countries and US$ 52 million from donors (*The Herald* 2011b). As the government newspaper in Zimbabwe, *The Herald*, put it, 'If the old adage holds true that he who pays the piper calls the tune, then SADC is not in control of its affairs at all.' The editorial linked this problem directly to the tribunal:

> A typical example of the challenges SADC is having charting its course is the SADC Tribunal. When we thought the Tribunal was dead and buried, the donors attempted to resurrect it at the Angola Summit [in August 2011]. It is reported the judges of the Tribunal fighting to keep it alive are being funded by a foreign donor and some of the countries were beginning to waver from the position they took just recently. Why would any country be keen to subordinate its own judicial system to a foreign-funded Tribunal, unless it is being arm-twisted through threat of losing funding for its budget at

> home? Since the Tribunal is a Western project its existence is being tied to the funding of other SADC programmes. (*The Herald* 2011b)

In like vein, Chinamasa claimed that the tribunal did not bear the 'DNA imprint' of the SADC countries and was somehow the product of a conspiracy hatched by the SADC secretariat and the organisation's Western donors (Zvayi 2011). He was scornful of the secretariat's concerns that Zimbabwe's determination to reconstitute the tribunal would antagonise the international community and tarnish the reputation of SADC:

> [A regional] organisation must be rules based, not one run on the whims of the SADC Secretariat or the dictates of foreign interests. We shouldn't be influenced on the path that we have to follow by our desire for development assistance. That should not be allowed to dictate the pace of the evolution of the organisation. (Zvayi 2011)

In July 2011, the Namibian minister of justice, Pendukeni Iivula-Ithana, made no bones about the fact that state interests and solidarity prevail over treaty principles and international law (Ekongo 2011). She explained that the tribunal was under review so that it better served the interests of member states. The members were entitled to 'fine tune' regional bodies. 'What is cast in stone', she said, 'is our commitment to work together as a regional body, SADC. How we do so is not cast in stone and should suit our collective interest. The instruments serve us, they are for us, and this is not a reversible position' (Ekongo 2011). Absent from this perspective was any sense of the interests of citizens (as distinct from the interests of states), any notion of the SADC states being constrained by democratic norms and any awareness that states are obliged in international law to adhere to the treaties they have signed.

The significance of the Namibian minister's position is highlighted by the radically different approach of the EU, which regards the common values of member states, rather than their interests, as non-negotiable:

> So, the policies and actions we develop are negotiated and mediated by the democratic process. It is the common values, which underlie them, that are not negotiable…Our common policies are, of course, negotiable because they do not constitute universal values.[3]

The common values of the EU member states are enshrined in the 1992 treaty on European Union, which declares that 'the Union is

3 EU Commissioner Anna Diamantopoulou, quoted in Cremona (2001: 196).

founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. In the case of SADC, by contrast, member states are bound by a common commitment to state solidarity and regime protection.

Conclusion

In general, SADC has been adept at managing the contradiction between its official embrace of democracy and the undemocratic behaviour of some of its members. The tribunal's rulings against the government of Zimbabwe, however, posed a major political crisis. Unlike criticism of Harare from Western countries and local politicians and activists, which the summit has felt free to ignore or trivialise, the tribunal's rulings emanated from a judicial body that was established by the treaty and comprised Southern African judges who had been appointed by the summit. By scrapping the tribunal as a result of its efforts to uphold the rule of law, the heads of state deepened the crisis and did enormous harm to the integrity and reputation of the organisation.

After the tribunal was disbanded, the judges complained that the summit believed it was all-powerful and unaccountable, whereas in fact its actions were constrained by the treaty and the tribunal protocol (Pillay *et al*. 2011). The judges' perspective might be normatively appealing, but it is plainly wrong on the facts. The summit demonstrated that it is not constrained by the treaty and the protocols. With this brazen show of *realpolitik*, the heads of state made a farce of SADC's legal instruments and formal commitment to democratic principles.

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The SADC Tribunal – Regional Organisations, Human Security, Human Rights and International Law

Jan Axel Nordlander

Regional mechanisms for upholding human rights have multiplied during the past years; after the Council of Europe and the European Court of Human rights came the Human Rights Charter, Commission and Court of the Organisation of American States. In 1981 the Organisation of African Unity established corresponding mechanisms while its court is a recent addition and currently seems to be inoperative with no pending cases because of a planned merger to become the Court of Justice and Human Rights. The Association of Southeast Asian Nations (ASEAN) established a Human Rights Commission a couple of years ago, but large parts of Asia remain without such a mechanism.

In addition to the regional commissions, sub-regional mechanisms have risen within primarily economic organisations, which also include human rights mandates: unsurprising since economic, social and cultural rights are as important as political and civil rights and often prioritised by developing countries. This is true for the SADC and also for the Economic Community of West African States.

Thirty-two of the now 55 African states have established national human rights commissions, of which 14 belong to Category A and thus have full independence from the executive power as well as a far-reaching mandates, including monitoring. All these institutions are essential both for their capacity to adjudicate and thus for fighting impunity, but at least as much for their creation of customary law through praxis and interpretation of the extant legislation.

In a way, the regional mechanisms have a problematic existence since they are both subsidiary to national human rights systems and 'subordinate' to international human rights standards. Since the gap between international standards and national praxis is frequently wide, steering a straight course can be tricky. By the way, the title of the African Commission on Human and *Peoples* Rights in itself points to a source of dispute since *Peoples* stands for collective rights, a concept which is contested – as a legitimate part of human rights – by many orthodox jurists and diplomats. Some bodies have built-in limitations. The

ASEAN Human Rights Commission cannot act in cases of human rights abuse by a member state and has no monitoring mandate. The Arab League has adopted a human rights charter that is criticised since it deviates from international standards, for example with regard to the Rights of the Child.

The principles of rule of law and good governance are based upon checks and balances, and the judicial system is an instrumental antidote to the executive power.

The panoply of judicial instances would not be complete without mentioning the special international courts or tribunals, such as the International Criminal Tribunal for Rwanda and the International Criminal Court. They represent very important developments but I will not delve into them here.

It may fall outside my task and competence to judge the actions of governments, but I feel that it is my duty to defend the rule of law. From that point of view it is serious that SADC member states have suppressed their own creation, the SADC Tribunal, presumably because some verdicts are seen as inconvenient. Inconvenient in this case means, I am afraid, 'too independent'. But the principles of rule of law and good governance are based upon checks and balances, and the judicial system is an instrumental antidote to the executive power. So are, of course, parliaments, civil society and the media.

Non-enforcement of verdicts is widespread under frail or undemocratic regimes. Non-enforcement demonstrates not only lack respect for justice but also destruction of the rule of law – and this to the detriment of the rights of ordinary citizens. A state that de-recognises one international treaty that it has signed or ratified shoots down the trust in its willingness to keep other treaty obligations. That Zimbabwe has withdrawn from the SADC Tribunal protocol, ignored and failed to implement the verdicts of this SADC court and in addition has tortured some of the applicants, is therefore unacceptable, self-destructive and in grave contravention of the Covenant on Civil and Political Rights.

Individual access to regional or international courts or the right of individuals to complain to UN treaty bodies on human rights is contentious. While desirable for the sake of access to justice – a vital means of upholding the rule of law – experience shows that individual access risks attracting a great many unfounded or capricious complaints that bog down a commission or court in work and create enormous numbers of cases that in turn put justice at risk for those who have presented genuinely important complaints. The European Human Rights Court is an example of where this has happened. However, complaints can be filtered in such a way that access to justice for everyone is assured while limiting the burden on institutions. An example of such filters is the

SADC rule that all domestic instances of justice should be exhausted before a case can be brought to the tribunal. Another way is to permit only organisations, such as NGOs, to apply or complain. The position of two SADC member states on the issue of individual access is as a consequence inimical to the rule of law.

Professor Laurie Nathan has come up with an interesting concept: regime protection and regime solidarity (at the expense of norms). This is a contagious disease not limited to SADC. He has written about a 'selective and hypocritical approach to human rights' by Western powers. Maybe so, but I would like to add: we should remember the cynical approach to human rights of Security Council members China and Russia. However, the human rights crimes recently committed by Western powers in Guantanamo and Abu Ghraib, or restricting freedom of expression and tolerating unlawful detentions in the aftermath of the attack on the Twin Towers in New York, have for years damaged and set back international human rights work. In a similar way, the solidarity all over the world within regimes and between regimes for their own preservation and protection is one of the greatest obstacles to advancing human rights and the rule of law. Many state objections to strengthening human rights are nothing but screens to hide human rights abuses and democracy deficits back home. But we are at the beginning of a new era, where human rights have become customary law and do not necessarily depend on ratification, where the responsibility to protect is being carved out and refined, and where dictators can no longer count on impunity for their crimes against humanity.

» West African Regional Security Architecture with Special Reference to the Côte d'Ivoire Crisis

Cyril Obi

Introduction

The capture of erstwhile Ivorian President Laurent Gbagbo in a bunker in the presidential palace in Abidjan on 11 April 2011 by 'forces loyal to Alassane Ouatarra' backed by UN peacekeepers and French special forces brought an inglorious end to the episode of the 'two presidents, one country' (Obi 2011: 16) in Côte d'Ivoire. This incident had major significance for West Africa's regional security, in some respects calling into question the efficacy of ECOWAS's 'advanced peace and security mechanisms' (Obi 2009: 119), its working relationship with the African Union and its cooperation with the United Nations. It also brought to the fore the issue of the role of external powers, ostensibly operating under the rubric of international peacekeeping and humanitarian intervention, in the affairs of their former colonies in Africa. At the core of events in Côte d'Ivoire and, even more recently, Libya, lies the sensitive issue of the effectiveness of African institutions in responding to the regional peace and security challenges facing the continent in an emerging post-Cold War order, and their (in)capacity in doing so to act as equal partners with the UN, particularly the five permanent members of the Security Council (P5), the US, France, Britain, Russia and China.

The events of 11 April in Côte d'Ivoire have reignited debate on the continent about the nature of Africa's relationship with the United Nations (Murithi 2007: 2; Mbeki 2011; Adebajo 2011b). This debate is between those who see the roles of ECOWAS, AU and UN (and the P5 member states, particularly France) in the Ivorian crisis and post-election conflict as consistent with the promotion of regional peace and security in West Africa and those who criticise it as part of the 'perverse and poisonous proceedings' (Mbeki 2011: 38) that have characterised the rather unequal relationship between Africa and the UN, particularly in terms of the ways certain P5 member states use the UN framework to intervene in and influence Africa's responses to conflicts, and manipulate such intervention to pursue and legitimise their hegemonic and strategic interests on the continent. Also related to Mbeki's critique is the question of the UN's neutrality in African conflicts, a point echoed in the accusation by the Russian president that the UN had taken sides in the Ivorian conflict, in his view a 'very dangerous tendency' (quoted in Anishchuk 2011).

The latter position sees 'the politics' of UN-legitimised international intervention in Côte d'Ivoire as reinforcing the case for democratising the global governance system. Exponents of this view argue that the activities of multilateral organisations and global powers in Côte d'Ivoire 'have exposed the reality of the balance and abuse of power in the post-Cold War era, and put paid to the fiction that the major powers respect the rule of law in the conduct of international relations, even as defined by the UN Charter' (Mbeki 2011: 38).

It is important to reflect on the immediate background to the Ivorian post-election conflict. Côte d'Ivoire, once regarded as a 'haven of peace in a turbulent West Africa' (Obi 2009: 128), descended into civil war in 2002 after a failed coup against President Gbagbo. The war was underpinned by deep tensions within Ivorian society and a structural crisis of citizenship and nation-building (Bah 2010). It pitched Gbagbo's government against the rebel Forces Nouvelles (New Forces, FN), effectively dividing the country into the FN-controlled north and government-controlled south. After many unsuccessful peace negotiations involving ECOWAS, AU, UN and France, efforts at peace culminated in the March 2007 Ouagadougou agreement facilitated by President Blaise Compaoré of neighbouring Burkina Faso. This provided for a transitional government based on a power-sharing agreement between President Gbagbo and the head of the New Forces, Guillaume Soro, who became Gbagbo's prime minister. The agreement provided for the merging of FN with the national army, a disarmament, demobilisation and reintegration (DDR) programme and the holding of credible presidential elections (ICG 2007; Obi 2007: 5).

31 October 2010

Laurent Gbagbo, President of Côte d'Ivoire and incumbent candidate in his country's long-awaited presidential elections, casts his ballot at a polling station in the Cocody neighbourhood of Abidjan. Photo: UN Photo/Basile Zoma

The other issues in the agreement became points of contestation between both sides in the rather complicated mediation process (interview with Ambassador Osei, 2011), which stretched over three years after the signing of the agreement. The elections in particular were postponed at least five times as the parties sought to leverage their interests at the negotiation table. President Gbagbo was widely seen by a weary international community to be prolonging the mediation process, and non-agreement on electoral reform and DDR or non-implementation of key decisions, to remain in power beyond his constitutionally-defined first term in office, and to be seeking delay until he was confident the conditions were most favourable for his re-election. On FN's part, the protracted peace process also gave the movement time to consolidate its control of the north, particularly its economy, and raise revenue to strengthen its power base and, perhaps, rearm.

The determination by the international community and ECOWAS to use elections as an 'exit option' and to bring closure to the protracted conflict and intractable mediation process meant that the fundamental issues in the Ivorian crisis were not fully addressed. It was in this state of flux that the presidential elections, which were followed by run-off elections, were held on 28 November 2010. Election results announced by the Ivorian independent electoral commission (CEI) proclaimed Ouatarra winner and president-elect, with 54.1 per cent of the votes cast, as against Gbagbo's 45.1 per cent. Gbagbo rejected these results outright on the grounds that the elections in the north were not free and fair. These results were endorsed by the special representative of the UN Secretary-General in Côte d'Ivoire, Young-jin Choi, and upheld by ECOWAS, AU, UN, EU and France.

However, in response to Gbagbo's protest, the Ivorian constitutional court (CC) cancelled some election results from the north as being flawed, and then declared Gbagbo the winner by 51.5 per cent of the votes cast, as against 45.9 per cent for his opponent. Based on this decision, Gbagbo refused to hand over to Ouatarra. Ouatarra in turn rejected the new results, insisting that the original results announced by the CEI (and endorsed by ECOWAS, AU, EU, US and UN) declaring him winner were legitimate. Backed by ECOWAS and the international community, pressures were brought to bear on Gbagbo to accept the results declared by the CEI and step down. But Gbagbo refused, first insisting on the legitimacy of the CC-endorsed results, and later calling for a vote recount by an independent international commission. His request was turned down by ECOWAS and the international community, which noted that the infractions cited were too minimal to alter the results and pointed to observer reports that the elections had been fair. Citing

the intransigence of Gbagbo in rejecting the internationally endorsed results declaring Quatarra president-elect and the deteriorating security situation due to fighting between pro-Gbagbo and pro-Ouatarra forces in March and April 2011, UNOCI peacekeepers backed by French forces and pro-Ouatarra Republican Forces (formerly FN) used force to implement an Security Council Resolution 1975 (Security Council 2011) urging Gbagbo to 'step aside' and 'respect the will of the people and the election of Alassane Dramane Ouatarra as President'.

Current members of ECOWAS

Benin
Burkina Faso
Cape Verde
Côte d'Ivoire—reinstated after being suspended because of the 2010 elections
Gambia
Ghana
Guinea
Guinea-Bissau
Liberia
Mali
Niger
Nigeria
Senegal
Sierra Leone
Togo

This paper raises certain fundamental questions: how well did the ECOWAS peace and security architecture serve the organisation in resolving the Ivorian crisis; to what extent did ECOWAS-AU cooperation with the UN reflect an 'asymmetrical relationship'; on what basis should conclusions be drawn as to whether Africa-UN relations reflect a 'hybrid partnership or a hybrid paternalism' (Murithi 2007: 7); and what challenges emerge from the 'hybridisation' of the UN-Africa partnership and how can these be addressed? In addressing these issues, the rest of the paper is divided into three sections. The first provides an analysis of the peace and security architecture of ECOWAS and the Africa-UN connection. The second section zeros in on the Ivorian crisis and analyses the ECOWAS partnership with the AU, UN and France in resolving it, including the Ivorian post-election conflict. In the concluding section, the implications of the Africa-UN partnership for the regional peace and security efforts of ECOWAS are critically examined and recommendations made to address these issues.

ECOWAS's Peace and Security Architecture

ECOWAS has a highly regarded peace and security architecture. This is the product of ECOWAS's experience in regional peacekeeping through the activities of the ECOWAS ceasefire monitoring group (ECOMOG) in the 1990s, which contributed to the return of peace in Liberia, Sierra Leone, Guinea-Bissau and Côte d'Ivoire. It is also the result of the organisation's ability to adapt to changing national, regional and global contexts by linking regional integration and development to an evolving peace and security framework. Finally, it stems from ECOWAS's ability to cooperate with other regional and multilateral organisations such as the AU and the UN in promoting peace and security in West Africa (Obi 2009: 119-20). In addition, ECOWAS has also set up mechanisms for engaging with extra-African regional organisations such as the European Union and established and emerging global powers.

Regarding ECOWAS's response to the changing threats to regional stability, the president of the ECOWAS Commission notes that the organisation responded by enacting new statutes to reflect the new realities (Gbeho 2010: 5, 2011). These statutes give ECOWAS the legitimate right, based on consensus among member states, to intervene diplomatically and/or militarily in any member state embroiled in major conflict. As its peace and security mechanisms evolved, ECOWAS sought regional-global partnerships to legitimise and support its efforts.

This journey towards the new ECOWAS peace and security statutes was not altogether smooth. Founded in 1975, ECOWAS 'began as a collective quest for self reliance, economic cooperation and development' (Obi 2009: 120). This was based on early recognition of a link between regional peace and national development, stability and security. Such recognition, along with several border skirmishes in the region, led to two protocols on defence and security: the Protocol on Non-Aggression (PNA 1978) and the Protocol on Mutual Assistance on Defence (PMAD 1981). Their provisions included an emergency 'Allied Armed Forces of the Community (AAFC),' but stopped short of 'a permanent ECOWAS standing army' (Aning 1999: 26-7).

However, as Aning (1999: 27) notes, 'by 1990, none of the procedural or integral decision-making aspects of the PMAD had been implemented'. This delay underlined the doubts among Francophone states about Nigeria's real intentions in proposing the initiative, as well as the limited capacity of the ECOWAS secretariat at the time. Due to the political and intra-regional rivalries between two language-blocs in ECOWAS, the seven Francophone states (except Guinea) signed a separate non-aggression defence pact in 1977, which also provided for a regional standby force. It was on the basis of PMAD that ECOWAS, acting on an

appeal from Liberia's President Samuel Doe in the face of an invasion of his country by the rebel National Patriotic Front of Liberia, decided to mediate in the conflict. In doing so, it had the support of the Nigerian head of state, but faced opposition from some Francophone member states. A standing mediation committee was established, which called for a ceasefire and decided to institute ECOMOG. The challenges ECOWAS/ECOMOG has faced in mediating and intervening in conflicts in Liberia and later Sierra Leone, Guinea-Bissau and Côte d'Ivoire are well known and will not be recounted here (Obi 2009: 119-35; Adebajo 2000, 2002a, 2008; Aning 2000, 2007). What is important is that ECOWAS drew on the lessons from its mediation and peacekeeping involvement in these countries to enhance its peace and security architecture.

Some of these lessons influenced the 1993 revised ECOWAS treaty, which broadened the supranationality of the organisation. The 1999 protocol relating to the mechanism for conflict prevention, management and peacekeeping and security and the 2001 supplementary protocol on democracy and good governance, and the convention on small arms and light weapons also built upon the new spirit of the revised treaty. Aning *et al.* (2010: 9-10) note that the 1999 protocol sought in part 'to overcome controversies relating to the establishment of the establishment of the Standing Mediation Committee during the Liberian conflict' by setting up three key institutions: the Authority of Heads of State and Governments; Mediation and Security Council and the Executive Secretariat to provide organisational support, improve decision-making and build wider support for ECOWAS mediation and peacekeeping. The 1999 protocol and 2001 supplementary protocol were put to good use in dealing with crises related to ECOWAS's zero-tolerance for unconstitutional changes of government. These protocols also featured prominently in ECOWAS's suspension of Guinea and Niger following military coups in 2008 and 2009, and of Côte d'Ivoire after Gbagbo refused to hand over power to the recognised winner of the November 2010 run-off presidential elections. In all these cases, ECOWAS acted in partnership with the AU and UN to ensure that constitutional rule was restored in member states in the pursuit of peace and security in West Africa.

To address emerging challenges and consistent with the evolution of ECOWAS's peace and security architecture, the Mediation and Security Council on 1 January 2008 enacted the ECOWAS Conflict Prevention Framework (ECPF). This contains 14 components relating to conflict prevention, human security and aspects of peace-building, of which the ECOWAS Standby Force (ESF) is an important element (ECOWAS 2008: 14-16). The ECPF is not yet fully operational and was not in place to deal with the Ivorian post-election conflict, but it does suggest that ECOWAS is creating a sophisticated framework for promoting peace and security.

However, one of the main challenges facing ECOWAS is the gap between its peace and security architecture and its limited ability to deliver fully in practical terms. Its record so far is somewhat mixed, reflecting its strengths and weaknesses, but not foreclosing its immense potential. While its most ardent supporters point to its modest successes as a home-grown regional peacekeeping initiative, most also note the rather disturbing evidence of institutional weakness; poor internal coordination; competing interests of member states; inadequate financial, material and logistical resources; and weak political will and capacities. All of these conspire to limit the effectiveness of the organisation in facing emerging and complex challenges to peace and security. The gap between rhetoric and reality underpins some of the contradictions that mark ECOWAS multilateralism and its partnerships with the AU and the UN, which have wider implications for the credibility and capacity of ECOWAS. The complex challenges confronting ECOWAS and other similar organisations in Africa are linked to the difficulties in reaching pan-regional consensus on critical issues and the inability to equip frameworks for regional peace and security to engage advantageously with the complex configurations of global power in post-Cold War international *realpolitik*.

AFRICA-UN Relations - Emerging architecture of a 'hybrid partnership'?

A critical challenge facing Africa in the post-Cold War order relates to the capacity of the continent to act as a co-equal partner of the international community. It is in this context that Murithi (2007: 2) has made a case for interrogating the relationship between Africa and the UN, or what Adebajo has characterised as 'global apartheid' (2009). The history of Africa-UN relations has already been studied in some detail. What is important to note is that Africa is a relatively recent entrant into the business of peace and security and has been marginalised in the power politics of the Security Council. This assumes greater significance when it is recalled that most African states were not foundation members of the UN and they are not well represented at the highest level of UN decision-making, the Security Council, and are not among the P5, which have the power of veto. This in part explains why in Murithi's view, 'the early decades of the UN were defined by an asymmetrical partnership between the UN and Africa'.

The UN's engagement with the continent in terms of promoting peace, though not new, has increased post-Cold War following a spate of intra-state conflicts on the continent. According to Adebajo (2009: 20), 'about 60 per cent of the UNSC's deliberations focused on Africa, while by 2008 about 80 per cent of UN peacekeepers were deployed in Africa.'

With regard to peacekeeping in West Africa, 'the UN Observer Mission in Liberia (UNOMIL) was the first UN peacekeeping mission undertaken in cooperation with a peacekeeping operation already established by a regional organisation' (Ero 2009: 285). In 1999, 'for the first time ECOWAS troops were transferred (or "rehatted", to use the UN term) into the UN Mission in Sierra Leone (UNAMSIL) 1999; into the UN Mission in Liberia (UNMIL) in 2003; and into the UN Operation in Côte d'Ivoire (UNOCI) in 2004' (Ero 2009: 286). The 'period between 1993 and 1997 was strategic in UN-ECOWAS-Africa relations as it laid the foundation and framework for future partnership models between the world body and the continent'. Ero further notes that the collaboration between the UN and ECOWAS with regard to UNOMIL was based on 'the agreement that the sub-region would take the lead politically in resolving conflict; and that ECOWAS would continue to be the principal peacekeeper in Liberia, with the UN playing a supportive role'. Even then the relationship between ECOMOG and UN peacekeepers was not entirely unproblematic (Ero 2009: 287-8; Obi 2009: 131).

United Nations peacekeepers (UNOCI) from Senegal at San Pedro, Côte d'Ivoire in 2004. Photo: UN Photo/Eskinder Debebe

Several developments within the UN in the post-Cold War period had implications for its relations with Africa. Following a UN General Assembly declaration of December 1994 on promoting cooperation between the world body and regional arrangements or agencies (A.RES/49/57), the UN adopted Resolution 1631 on 17 October 2005 (UN Security Council 2005). This was aimed at, *inter alia*, promoting 'the further development of cooperation between the United Nations and regional and sub-regional organisations in maintaining international peace and security, consistent with chapter VIII of the United Nations Charter'. Taking the process further, the UN and AU dialogue resulted in the agreement titled Enhancing the UN/AU Cooperation: Framework for the Ten Year Capacity-Building Programme (Vogt 2009: 266; Ajayi 2008: 4)

In a related prior development, the report of the Secretary-General to the General Assembly of 28 July 2005 identified opportunities for 'a more effective partnership operating in close cooperation with the Security Council, based on a clear division of labour that reflects the comparative advantage of each organization' (UN General Assembly 2006). This partly echoed the views of former UN Secretary-General Boutros Ghali, whose Agenda for Peace, 'acknowledged the capacities of regional organizations in the key areas of preventive diplomacy, peacekeeping, peacemaking and post conflict peacebuilding' (Ajayi 2008: 2). This thinking also underpinned 'the Report of the High Level Panel on Threats, Challenges, and Change, titled *A More Secure World: Our Shared Responsibility* (2004)' and Kofi Annan's report to the General Assembly in 2005, *Larger Freedom: Towards Development, Security and Human Rights for All*.

The foregoing underscore the UN's recognition that its pursuit of its Chapter VIII mandate is best achieved in partnership with regional organisations that have 'a comparative advantage' in addressing peace and security issues in their neighbourhoods. At the same time, some of these regional organisations, such as ECOWAS and AU, have demonstrated initiative, some effectiveness and comparative regional advantage in developing home-grown mechanisms and processes to address regional peace and security challenges.

The UN-Africa partnership opens up opportunities to build on comparative advantages on both sides. Thus, Vogt (2009: 266) notes that 'the new framework of the UN's relations with the AU is based on the premise that the two organizations need to cooperate to promote international peace and security, especially on the African continent, taking Africa's special needs into consideration.' However, there is no doubt that an effective and equitable architecture of UN relations with Africa and its regional economic communities, particularly ECOWAS, remains a work in progress. While Africa may claim ownership of regional initiatives, mechanisms and processes, their effectiveness in ensuring peace and security on the continent and in its sub-regions will to a considerable extent depend on logistics and resources from the international community. Can collaboration based on such dependence guarantee effective autonomy of action and insulate Africa from the contradictions, competing interests and inequalities that characterise international politics? What kind of negotiations, bargaining and consensus will define the emerging dialogue between Africa and the UN along lines of a transformatory hybrid partnership? In the next section, some of the challenges as shown by the case of post-election conflict in Côte d'Ivoire will be further explored.

The Côte d'Ivoire Crisis - ECOWAS, Africa-UN Partnership

As noted earlier, the immediate trigger for the civil war in Côte d'Ivoire was a mutiny that later developed into a coup attempt against the government of President Laurent Gbagbo (Almås 2007: 10). Some accounts state that the September 2002 mutiny was led by northern officers to be demobilised by President Gbagbo. Such accounts gained credibility when, following the failure of the coup in Abidjan, the rebels withdrew and quickly took control of the northern part of the country.

However, the background to the conflict lay in the country's history, including the crises of succession within the political elite after the death of the country's patriarch and long-term ruler Houphouët-Boigny in December 1993; the 1999 military coup; the exclusion of some electoral contestants, particularly of Alassane Ouatarra, through

the non-eligibility laws and policies that related to personal origin (immigrants, mixed parentage, immigrant parentage) and non-citizenship; and the deterioration of economic conditions in the country following the collapse of world cocoa prices and an IFI-induced structural adjustment programme (Almås 2007: 19-27). The exclusion from elections in 1995 and 2000 of Ouatarra, who had served as Boigny's prime minister between 1990 and 1993 but was branded a foreigner by his political opponents, who alleged that he had immigrant parentage (Burkinabé), was emblematic of the crisis of citizenship that emerged in the country in the post-Boigny era, where those considering themselves 'true Ivorians' in terms the policy of '*ivoirité*' sought to exclude those they considered outsiders (from the north and neighbouring countries) from political power and the distribution of economic resources.

The rebellion of September 2002 was in part a reaction by 'excluded' Ivorians seeking to end what they considered discrimination in terms of their national identity and renegotiate their marginalised position within the Ivorian nation-state (Obi 2007; Bah 2010: 598). The rebels, initially called the Mouvement Patriotic de Côte d'Ivoire (MPCI) but later known as the FN, set up headquarters in Bouaké in the north and remobilised for an attack on the south, which was halted when French troops intervened. The FN rebellion was strengthened by the emergence of two other rebel groups, Mouvement Populaire Ivorien du Grand Ouest and the Movement for Justice and Peace in the western part of the country. It was believed FN was supported by Côte d'Ivoire's northern neighbour, Burkina Faso, while the western rebel groups were said to be backed by Charles Taylor in retaliation for Gbagbo's alleged support of rebels in Liberia.

The outbreak of war in Côte d'Ivoire against the background of ECOWAS intervention in the protracted conflicts in the Liberia and Sierra Leone, Nigeria's decision to pay more attention to its domestic priorities, and French direct intervention and interests in its former colony made mediation by ECOWAS rather challenging. However ECOWAS's response to the conflict was swift: an emergency summit was called on 29 September 2002 and a contact group comprising Ghana, Guinea-Bissau, Mali, Niger, Nigeria, Togo and the AU was set up to mediate between the government and rebels. The mediation process yielded an initial ceasefire and peace talks in Lomé, Abidjan and Dakar, but later became stalemated when the government and NF refused to cooperate with the mediators. By December, ECOWAS noted that the situation was complicated by divisions among ECOWAS member states, including support for FN by some states, particularly Burkina-Faso (with French backing), and called on the AU and UN to reinforce the process. It further advised that the matter be brought before the Security Council.

The impasse contributed to the French-coordinated Linas-Marcoussis Peace Accord (LMA) of January 2003. The agreement was the outcome of a roundtable (15-23 January) that brought together the Ivorian stakeholders and facilitators from ECOWAS, AU and the UN. The LMA, endorsed by all parties to the conflict, provided for a ceasefire and a transitional government of national reconciliation (including FN members) to plan and implement a DDR and election timetable. It was expected that the government of national reconciliation would take steps towards healing the country and bridging the divides created by the politics of identity and citizenship. The LMA was endorsed by Gbagbo on 26 January 2003 at a summit of heads of state in Paris (the 'Kleber Summit'), where he reportedly asked for French support for the ECOWAS peacekeepers that would monitor the ECOWAS-brokered ceasefire. Ero (2009), however, points out that, 'the peace accords were largely regarded as a legitimation of the rebellion, with many Gbagbo supporters affirming that this was evidence that France had masterminded the rebellion to protect French economic interests in the country.'

Security and Defense Forces secure the weapons collected from the rebel militias, under the supervision of the United Nations Operations in Côte d'Ivoire (UNOCI) in July 2004. Photo: UN Photo/ Eskinder Debebe

ECOWAS followed up on its mediation efforts in Côte d'Ivoire by sending its fourth ceasefire monitoring mission, ECOWAS Forces in Côte d'Ivoire (ECOMICI). This was made up of forces from mainly Francophone West African countries (Senegal, Ghana, Niger, Togo and Benin) operating alongside French Licorne forces and endorsed by Security Council Resolution 1464 (2003). France's role gave it ample opportunity to intervene in the Ivorian peace process, even though it was increasingly clear that it might not be a neutral party to the conflict. However, the politics within ECOWAS and lack of consensus on how to deal with the crisis gave France considerable room for manoeuvre. In May, with France playing a key diplomatic role within the Security Council, ECOWAS got some support through UN Security Council Resolution 1479, which established the UN Mission in Côte d'Ivoire (MINUCI). In terms of this resolution, 76 military liaison officers were sent to support ECOWAS and French peacekeepers (Adebajo 2004: 300).

As in Guinea-Bissau, the ECOWAS peace mission to Côte d'Ivoire was largely underwritten by French (ex-colonial master) and international support. In November 2003, following reports of improved operational coordination among MINUCI, UNMIL and UNAMSIL and a report from the UN Secretary-General, the Security Council adopted Resolution 1528 (2004), which established the United Nations Operations in Côte d'Ivoire (UNOCI) and mandated the transfer of MINUCI and ECOMICI to UNOCI on 4 April 2004. It has been noted that UNOCI was 'part of an emerging trend in UN peacekeeping in which the UN force is actually a hybrid of two or three peace operations',

with three important keywords: 'transformation (of ECOWAS forces) absorption (of MINUCI) and co-habitation (with the French Forces)' (Gberie and Addo 2004). These authors have noted that UNOCI forces 'have been well-prepared for their mission,' but 'still faced some difficulties at the operational level'.

As part of its support to regional organisations, the UN backed ECOWAS mediation efforts in Côte d'Ivoire. These included the Accra II and Accra III agreements of March 2003 and July 2004, and the AU mediation (also at ECOWAS's request) that culminated in the signing of the AU-brokered Pretoria agreement in June 2005 and the Yamoussoukro agreement of July 2005 to implement the DDR process and renew the mandate of the transitional government. Continued ECOWAS engagement with the support of regional organisations and the UN was directed at building mutual trust and removing political obstacles to peace in Côte d'Ivoire. However, ECOWAS mediation was flexible enough to accommodate informal and formal efforts by individual member states such as Togo, Ghana and Burkina Faso and the AU. In this regard, South Africa's Thabo Mbeki, acting at the behest of the AU, took over the mediation process and successfully facilitated the Pretoria accord in 2005. However, Mbeki's mediation efforts later collapsed, in September 2006, after the FN questioned his neutrality and ECOWAS proposed to the AU that he be replaced by the heads of both organisations. Shortly afterwards, Mbeki stepped down as mediator. With his departure, the Ivorian stakeholders intensified their efforts at dialogue among themselves.

In March 2007, President Gbagbo and Guillaume Soro of the rebel NF signed the Ouagadougou agreement brokered by President Compaoré of Burkina Faso, creating a new transitional government, signalling the formal end of war and the transition to national unity, reconciliation and post-war elections (Obi 2007: 5-6). The Ouagadougou agreement and the supplementary agreements that followed were endorsed by ECOWAS, the AU and UN as well as the international community. On this basis, UNOCI's mandate was extended by UN Resolution 1795 (2008), along with continued monitoring of and support for the transition process by ECOWAS and the UN through the special representative to Côte d'Ivoire of the UN Secretary-General and the UN regional office in West Africa (UNOWA), located in Dakar, Senegal. The resolution also provided that the UN's special representative would certify the elections to ensure they complied with international standards.

16 april 2007

President Laurent Gbagbo (right) and Prime Minister, Guillaume Soro (left), preside over the ceremony marking the beginning of the dismantling of the Zone of Confidence in Tiebissou, Côte d'Ivoire. Photo: UN Photo/Ky Chung

Several developments, however, led to the postponement of the elections fixed for 2009. These included questions about the neutrality of appointed electoral officials, controversies over voter registration and

arguments on the DDR process. The facilitator of the Ouagadougou agreement, backed by ECOWAS AU, and UN agreed to the postponement of elections and the Security Council extended UNOCI's and the French peacekeepers' mandate to July 2009. In January 2010, President Gbagbo dissolved the CEI because of his concerns about its neutrality, prompting immediate protests from opposition parties and their supporters. The situation calmed down after Bakayoko from the opposition Democratic Party of Côte d'Ivoire (PDCI) was appointed the new head of CEI. However, the tensions over the electoral list between the government and opposition and the non-conclusion of the DDR process persisted right up to the elections in October 2010 and the run-off elections in November. In short, the underlying causes of the conflict were unaddressed by an international community, which perhaps felt the problems would go away with elections.

Thus, the elections took place amid growing tensions between the government and opposition, as did the special representative's endorsement, consistent with Security Council Resolution 1795, of the electoral process and the results proclaiming Ouatarra the president-elect. Gbagbo, as he had done throughout the peace process when he felt his interests were threatened, sought refuge in the nationalist position. He rejected the results announced by CEI and dismissed the special representative's endorsement. In response, ECOWAS called an extraordinary session of heads of state and government in Abuja, a meeting also attended by Young-Jin Choi, the UN special representative to Côte d'Ivoire, and Mahama Ouedraogo, the AU president's representative. In a communiqué released on 7 December 2010, ECOWAS condemned Gbagbo's refusal to accept the results announced by CEI and urged him to 'yield power without delay' (ECOWAS 2010a). It recognised Ouatarra as president-elect and, on the basis of its protocol on democracy and good governance, suspended Côte d'Ivoire from the organisation. ECOWAS was to issue another statement on 20 December condemning Gbagbo's ultimatum to the UNOCI and French forces to leave Côte d'Ivoire and calling on him to 'reconsider his confrontational stance towards the international community' (ECOWAS 2010b).

On 24 December, at another extraordinary ECOWAS heads of state and government summit in Abuja, it was decided to draw on the 1999 ECOWAS protocol and pronounce that 'in the event that Gbagbo fails to heed [the] immutable demand of the ECOWAS [to hand over power] the Community would be left with no alternative but to take other measures, including the use of legitimate force, to achieve the goals of the Ivorian people' (ECOWAS 2010b; Aning and Atuobi 2011: 2). On the basis of Article 22 of the 1999 protocol, the summit 'after reviewing

the situation in Côte d'Ivoire directed the ECOWAS Committee of Chiefs of Defence Staff (CCDS) to commence planning for a possible military intervention to oust Mr Gbagbo should all other means fail' (interview, anonymous ESF general, 2011).

The UN endorsed the ECOWAS position through Security Council Resolution 1967 of January 2011, and further strengthened UNOCI with additional troops from UNMIL, while condemning Gbagbo's anti-UN rhetoric and asking him to respect ECOWAS's demands that he hand power to Ouatarra. In addition, UNOCI's mandate was extended to June 2011. ECOWAS, given its limited success in mediating between the opposing sides in the Ivorian crisis and the inability of Mbeki to make head way in the settlement of the conflict and his subsequent withdrawal, made new efforts to involve the international community in the discussions. For its part, the AU appointed Raila Odinga to mediate in the conflict. However, he later withdrew following accusations of bias by Gbagbo's side and disagreement between him and the AU Commission after he addressed a press conference before briefing the summit.

On 25 March, in the wake of Gbagbo's refusal to budge, another ECOWAS summit in Abuja called on the Security Council to 'authorise the immediate implementation of the Authority decisions of December 2010 [on the use of ECOWAS legitimate force to oust Gbagbo]'. It also asked the Security Council to strengthen UNOCI's mandate and directed the ECOWAS president to support Ouatarra's government. Also, it invited the AU Commission to implement the decision of the AU Peace and Security Council of 10 March 2011 to dispatch a high-level panel of five presidents (representing each of Africa's sub-regions), assisted by a joint AU-ECOWAS facilitation team, to mediate the Côte d'Ivoire crisis (ECOWAS 2011).

Choi Young-Jin (centre), Special Representative of the Secretary-General for Côte d'Ivoire, meets with Ramtane Lamamra (left), AU Commissioner for Peace and Security and Head of the team of experts supporting the AU *High-Level Panel on the Resolution of Crisis in Côte d'Ivoire*, in Abidjan, Côte d'Ivoire on 22 February 2011. Photo: UN Photo/Basile Zoma

By the end of March, it was obvious that high level panel of five's (later of four, after Compaoré withdrew) mission had also collapsed after Gbagbo outright rejected its peace proposals. Gbagbo increasingly turned to national sovereignty and the Ivorian constitution to defend his refusal to give up power in defiance of the ECOWAS-AU peace proposals. He also defied targeted international sanctions against himself and his inner circle, and stepped up anti-UN and anti-French rhetoric. The security situation degenerated further when clashes broke out between Gbagbo's and Ouatarra's supporters, while the latter remained holed up in a hotel protected by UNOCI and French peacekeepers. Some UN peacekeepers were attacked by pro-Gbagbo forces as tensions rose in Abidjan. It was in this context of deteriorating security, attacks on civilians and a humanitarian

crisis marked by arbitrary killings, displacement and refugees streaming into neighbouring countries, that UNOCI, French peacekeepers and Republican forces routed Gbagbo's forces and captured him, paving the way for Ouatarra's ascendancy to the presidency.

Although both ECOWAS and the AU presented a united front in the Ivorian crisis, there were divisions under the surface that limited their effectiveness at the regional level. In ECOWAS, it was believed that Nigeria, Burkina Faso, Senegal and Sierra Leone supported Ouatarra during the crisis, with Nigeria pushing for UN legitimation of the use of force, but that Ghana, Togo and Benin showed 'ambiguous neutrality' (ICG 2011: 17-18; Martin 2011: 2). Within the AU, Angola and South Africa were reportedly pro-Gbagbo, a suspicion fuelled by their support for a power-sharing solution to the post-election conflict (ICG 2011: 17).

This situation was serious enough to prompt the president of ECOWAS to make a rather undiplomatic accusation at the presentation of the EU observation report on the Côte d'Ivoire elections in February 2011 in Abuja that 'certain countries have taken sides', noting that 'the concern that we [ECOWAS] have is that apart from some geo-political interests by some countries, there are others encouraging Gbagbo not to leave'. He then went on to accuse South African of sending a warship off the coast of Abidjan to support Gbagbo, adding that 'one is surprised that a distinguished country like South Africa would decide to send such… support at a time like this' (quoted in Udo 2011). However, South Africa was quick to deny the accusation, noting that the 'SAS Drakensberg was a supply ship undertaking a routine training operation in West Africa' (IRIN 2011). The issue, however, was that at some point competing national and strategic interests and inter-regional politics, pitching West against Southern Africa, became factors adversely affecting regional intervention in Côte d'Ivoire, and also Africa-UN relations.

The other point relates to the appropriateness of ECOWAS's threat to use 'legitimate force' in getting Gbagbo to step down, and the organisation's inability to follow through on this threat, leaving the task to UNOCI and French peacekeepers. While it is clear that the ECOWAS threat was well within the ambit of its peace and security mechanisms, in the haste to announce it, differences of opinion among member states were disregarded, as were the wider ramifications for its relations with the AU and its member states. ECOWAS perhaps underestimated the institutional, logistical and capacity challenges that such an operation would pose (interview with Osei 2011), which only became apparent much later, and contributed to the intervention by UNOCI and French peacekeepers using 'legitimate force'. It is too early to grapple with the full ramifica-

tions of this development, although it clearly showed that ECOWAS-AU relations need to be better defined and coordinated, and that governing elites need to devise ways of building consensus by creatively subordinating their personal and national interests to overarching regional interests.

The UN role in Côte d'Ivoire has been criticised by some on the basis of the body's lack of neutrality (Mbeki 2011: 38), specifically manipulation of the Security Council by France. Ero (2009: 300) earlier alluded to this by arguing that 'the role of the UN in Côte d'Ivoire could not live up to its full potential because of France's partisan agenda'. There is no doubt that over time France's real intentions in Côte d'Ivoire had been a source of concern to many, including Laurent Gbagbo and his supporters, who saw French intervention as a neo-imperialist plot to continue domination of the country. There also appeared to be a silent consensus among Western powers to leave the Ivorian matter to France, as the country's former coloniser. France, for its part, was keen to protect its nationals in the country as well as its economic and strategic interests against the perceived hostility of Gbagbo and his Young Patriot supporters. France certainly had considerable leverage in terms of the divisions within the Ivorian political class, its membership of the Security Council and the politics within and capacity deficits of ECOWAS and AU. It exploited this leverage to maximum advantage, perhaps at the expense of Africa-UN relations.

In the end, ECOWAS, AU and the UN ended up on the same side – supporting the CEI-endorsed winner of the November 2010 elections, held under 'imperfect conditions' and involving two longstanding political opponents representing the divides in the contested Ivorian nation-state and citizenship questions, who saw the elections as another episode in a zero-sum contest for power. The lesson from Côte d'Ivoire is perhaps that 'elections are not enough' (Obi 2011: 14-16), if the underlying causes of conflict and social tension in the country are not comprehensively addressed primarily by the citizens of the country and its political leaders, and also the international community. President Ouatarra has the major task of holding out the olive branch to the Ivorian Popular Front (FPI) and getting it to reciprocate and building meaningful national reconciliation and a countrywide consensus on new inclusive and equitable participatory institutions. Such an initiative, which requires the highest statecraft and a new social bargain underpinned by economic reconstruction and redistribution, will have to be supported by regional organisations that have developed capacities and resources to act decisively in unison, matching rhetoric with positive action.

What Prospects for ECOWAS and the Africa-UN Partnership?

Within the space of 60 years, the United Nations has moved from a position of marginality to becoming a partner of African regional organisations in addressing the peace and security challenges facing the continent. There is no doubt that the world and Africa have changed a great deal in half a century. Part of this change has been the significant increase in the number of African states that have become members of the UN and the changing nature of the complex conflicts on the continent. It is also clear that the ideals upon which the UN was founded face much greater challenges in an interlinked and rapidly changing world, where emerging powers from the South are redefining the nature of international relations.

Africa, buffeted from all sides and from within by pressures for change, partly in response to the forces and processes of globalisation and growing demands for democracy from below, also seeks to survive, adapt and develop in a highly complex and competitive post-Cold War world. In this struggle, Africa is somewhat caught between the Western configuration of global power, with its attendant historical legacies and economic, sociocultural, political and strategic ties, and the emerging powers that represent enchanting new possibilities but provide no clarity yet as to whether the emerging configuration of power represents a viable alternative for the continent's empowerment.

Several lessons can be drawn from the Ivorian post-election conflict in the context of Africa-UN relations. In spite of its track record, ECOWAS faced serious challenges in seeking to mediate the Ivorian crisis. Apart from the intractability of the conflict, competing national interests, institutional weaknesses and resource-deficits and the gap between agreeing to and abiding by collective decisions have been major problems. However, on the positive side, the crisis showed that the Anglophone-Francophone divide that had weakened ECOWAS's early regional peacekeeping efforts had become a thing of the past. It also showed the deftness of ECOWAS in thinking on its feet and using both formal and informal methods of conflict resolution and mediation to some effect. However, the crisis also suggests that more work is needed on ECOWAS peace and security architecture in terms of effective leadership, institutional capacity, and coordination with other sub-regional institutions and mechanisms, particularly the AU. African organisations need to note the importance of avoiding inter- regional rivalries to the extent that they impede attainment of collective goals and interests.

It is difficult to fit the Ivorian case into a 'hybrid partnership-hybrid paternalism' binary. While there is evidence that both the ECOWAS and AU are to some extent locked into asymmetrical relations with the UN and some P5 member countries, nonetheless both organisations have had sufficient leverage to act within the continent and sub-region. The problem seemingly was the limited autonomy and capacity of African regional institutions when faced with competing national and personal interests. The open criticism of South Africa by the president of the ECOWAS Commission was one example of the problems in ECOWAS-AU relations. It is not clear when and how that incident was resolved, but it did send the wrong signals about the state of ECOWAS-Africa relations.

The evidence suggests that the Africa-UN partnership was partly successful, but it is not clear if this partnership was and is on Africa's terms. The decision by the ECOWAS summit to approach the Security Council to authorise implementation of the ECOWAS decision to use legitimate force to oust Gbagbo occurred when the ESF was not operationally ready to carry out the task, and when the UN and French already had a hybrid peacekeeping force on the ground operating on the basis of an ECOWAS and AU-backed UN mandate. While in some respects ECOWAS appeared to be trying to 'outsource' the legitimising of decisions that could divide opinion in the sub-region to the AU and UN, in others, its weaknesses and slow(er) response to the fast-paced developments on the ground reduced the legitimacy of ECOWAS in the very country whose conflict it wanted to resolve, and gave the international community (UN and French peacekeepers) the opportunity to take the required action while ECOWAS seemingly cheered from the sidelines.

The foregoing point relates to the rather difficult situation ECOWAS found itself in late in the Ivorian crisis, when its scope for intervention had been largely circumscribed by the internal challenges facing some pivotal states, reducing their capacity to lead an intervention process, and when there was a UN peacekeeping mission on the ground, leaving ECOWAS with little scope to provide leadership or take over the intervention. It is also instructive, as a top ESF official noted, that the 'ESF was not given a mandate to intervene either by ECOWAS, AU or the UN' (interview 2011), which was hardly surprising given the presence of UNOCI and the capacity and operational challenges facing ECOWAS and the AU.

Many observers have made the point about the neo-imperialist plot by France to continue to dominate Côte d'Ivoire (the crown in its former West African colonial jewel). It has been argued that France took advantage of its permanent membership of the Security Council to intervene in the country, and ensure that an outcome was achieved that served its national interests. It is in this regard that the UN was criticised in some

quarters for compromising its neutrality in the conflict in Côte d'Ivoire. By granting legitimacy to French Licorne forces and collaborating with pro-Ouatarra Republican forces, the UN and UNOCI became directly involved in the war on the side of Ouatarra against Gbagbo. In their defence, the French and UN point to the mandate granted them by the Security Council resolutions (supported by ECOWAS and AU), namely to defend themselves from attacks by pro-Gbagbo forces, and to protect civilians who were being targeted by both sides, resulting in a humanitarian emergency. At a certain point, what became visible in the Ivorian case was the role of UN and French peacekeeping forces, unlike the earlier cases in Liberia and Sierra Leone, where ECOWAS peacekeepers made a strong showing.

In conclusion, it is clear that the UN cannot solve all the world's problems, nor can it transform the world. But it can and should open itself up by democratising its decision-making apex to take on board the interests and welfare of the majority of humankind. In another 40 years, it is hoped that the UN will have become more representative and effective in decision-making for collective security and peace. Principles of equitable participation, equality and justice should underpin its partnerships with regional organisations. On the part of African regional institutions and ruling elites, democratisation and development are central to actualising 'African solutions to African conflicts'.

The democratic project in West Africa needs to go beyond the symbolic holding of elections and address underlying structural political problems regarding inclusive and equitable participation, citizenship rights and social justice. Democratisation at national and regional levels has to be taken seriously and reflect the current mood for political change on the continent and also connect to an agenda for the democratisation of global governance. The point is that without representation among the permanent membership of the Security Council, Africa will continue to lose out in terms of decisions taken by this body. It is also important that Africa explores new ways of building consensus at the regional level and building strategic alliances at the (multipolar) global level in pursuit of its collective interests.

Africa needs to connect its political and economic integration project to transformations in production, governance and economic redistribution in ways that address the widening gaps between rich and poor, and a whole range of social problems that will defy old solutions in a rapidly changing world. The prospects for sustainable peace and security in Africa ultimately lie in the capacity of African elites and people to democratically transform their national and regional institutions in a way that connects with and reinforces the long overdue reform of the UN, so that it can better address the challenges of the 21st century.

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27 April 1953

At a brief ceremony at City Hall, the City of New York paid a special farewell to Mr. Trygve Lie, the first Secretary-General of the United Nations, and, at the same time, officially welcomed Mr. Dag Hammarskjöld, Mr. Lie's successor. Photo: UN Photo

Concluding Reflections

The United Nations – Values, Practices and Reform

Jan Pronk

Let me take you back to the first half of the last century.

That half-century was marked by two World Wars, the first global wars in history. In between those wars people suffered from a severe economic crisis of global proportions. Those were the years of the rise of fascism, Nazism and communism, not only as ideologies, but as cruel dictatorships, with millions and millions of victims. It was the period of the Holocaust, the gravest genocide ever. It was also the century of global imperialism and widespread colonisation, wider than ever before, the heyday for the colonisers, and downright oppression for the colonised. And the disasters culminated in the dropping of the first nuclear bomb.

In short, the first half of that century was a catastrophe. A world-wide crisis seemed to take on permanent features of instability and insecurity, ever-increasing violence and brutal violations of human rights. During the 19th century people had had to endure major catastrophes as well, but in the 20th century the evil took on worldwide proportions.

What happened then? Around 1945 our grandparents built a new structure, with common values, joint institutions, agreed policy rules and shared policy instruments. World leaders negotiated a common framework, in order to meet common objectives on the basis of mutually shared values. For the first time in world history such values and rules were accepted, embraced and institutionalised globally, on the basis of a world consensus.

Maybe humankind could only change the course of world history after suffering from the ordeals of the years before. Awareness grew that these ordeals, if permitted to continue, could destroy civilisation. So, in the end, after the Second World War, the last catastrophe of the first half of the 20th century, a global consensus was reached: 'This must never happen again!' This conviction became the more vigorous when people became aware of potential global nuclear annihilation. It was a close call but, anyway, a clear decision was made to head in a different direction.

President Harry S. Truman being greeted at the airport to attend The San Francisco Conference (25 April - 26 June 1945), the international meeting that established the United Nations. Photo: UN Photo/R

Perhaps this was only possible because of the new power relations in the world. A multiple power structure would probably have resulted in indecision and further deterioration. But – again – anyway, the United States of America, at that time the strongest world power (economically, technologically, politically and militarily) was willing to use its power surplus to back up a new world order, rather than pursuing its own short-term interest only. This was unprecedented in world history.

The decisions taken ushered in a new phase in globalisation: globalisation not only of economic and technological opportunities, but also of values and institutions, in order to serve common global objectives. Six objectives stood out. First, peace: avoiding new World Wars and major conflict escalations. Second, security: addressing international and domestic conflicts that would endanger world security. Third, stability: preventing and mitigating world economic, financial, trade and food security instabilities. Fourth, development: enabling progress, in order to improve the welfare of nations and the life conditions of their people: more food, more employment, higher income and more equal participation, it being understood that unequal access to welfare could result in conflict, violence and insecurity. Fifth, freedom, of both nations (decolonisation) and citizens, by fostering processes of emancipation and democratisation. And, finally, sixth: protection of human rights, initially mainly civil and political rights, for instance of minorities and people living under dictatorship, and later on also economic and social human rights.

There were more objectives, but these six were essential. They could not be accomplished separately. Right from the beginning it was understood that they were interconnected. They had to sustain each other. Violation of each individual objective would also endanger the others.

That is the reason why the new order was constructed as an integrated system. The new institutions had to belong to one and the same family: the system of the United Nations.

Establishing a world government was politically impossible, because notwithstanding their common objectives, nation states still had different interests. However, the institutions were given powers to address violations of common objectives. They had explicit mandates together with rules and procedures for decision-making. They acquired operational capacities and instruments to implement decisions. A modus operandi for review, appraisal and appeal was established in order to ensure compliance. All proceedings were based on the newly agreed principles and values of the system. All agreements (charters, treaties, covenants and resolutions), reached after long negotiations, formed together a system of world governance, a body of true international law. International law became the embodiment of the global values. Looking back, it would be fair to say that consensus-based international law was a breakthrough in international civilisation.

United Nations and united peoples

No country would have the right to intervene in other countries, invade them, impose its will on them and oppress their people.

The new world consensus was based on two main principles. First: sovereignty of the nation state. No country would have the right to intervene in other countries, invade them, impose its will on them and oppress their people. All countries were entitled to full autonomy, provided that they did not use this autonomy to violate the autonomy of other nations. Second: equal human rights for all. Within sovereign nation states all human beings, without any discrimination, would enjoy the same civil, political, social and economic rights. Individual nations, as well as the international community as a whole, would have the responsibility to uphold and protect these rights.

So, the sovereignty of the nation state was not an aim in itself. It should enable the state, in cooperation with other nations, to preserve the human rights of the citizens and improve their living conditions and welfare. This two-pillar system was meant to enable the peoples of the world to address root causes of conflict, insecurity, violence and war, and, thus, to work and live together in peace.

The new system had a number of built-in flaws, due to the specific way it had been established, right after the Second World War. All countries would be sovereign, but the Security Council was constructed in such a way as to allocate more powers to some of them. However, at the time it was the best system attainable. And it was a sea change, unprecedented in world history. A world consensus concerning crucial values was agreed upon, power was shared, and the common interests of humankind were recognised. That is why, I repeat, it is legitimate to call this a breakthrough in civilisation.

Moreover, the new order and its institutions scored successes. A third World War was averted. Economic reconstruction after the Second World War, together with agreed new rules in international finance and trade, made sure that the economic depression of the 1930s gave way to stability and growth. Human rights were better respected after 1945. There were still many violations, but there was progress. Unmistakably, the sovereignty of new nation states was achieved through decolonisation. In no more than about three decades most former colonies became independent nations. This was a great achievement on the part of the UN, though incomplete. Formal legal independence has to be complemented by political autonomy and economic self-reliance, promoting social development and people's welfare. This took much longer. However, the gradual emancipation of nations in the new world system went hand in hand with the growing self-esteem of their citizens. As Ryszard Kapucsinski pointed out recently, people living in a world that Westerners had looked upon as not only different but also of lesser value, with an inferior culture and backward traditions, worthy of conquest, enslavement, conversion and suppression, or, at most, benevolent uplifting from outside, those 'other' people were gradually getting a sense of their own dignity.[1] That process became irreversible.

Look at China and the Chinese, 60 years ago and today. Look at the development of India, Vietnam, Chile, Brazil and South Africa. Look at the quest for autonomy by indigenous people all around the world. Look at Africa in 1950 and at present. Look at the position of Islam, then and now.

The growth of self-esteem is steadfast. The voices are becoming louder and louder. Listen to the people of Southern Sudan, Syria, Tunisia and Egypt, this very year.

Innovation

Where is the world today, 65 years after the birth of the new order in the mid-1940s? In the life of people and their institutions 65 years is a long time. Maturity has been reached, experience accumulated, wisdom collected, retirement is drawing near. Without renewal of ideas and innovation of structures, increased rigidity looms.

Innovation is a must. Six decades represents two working generations, or, perhaps, three cultural generations. This, together with ever-faster changes in technology, in particular information technology, which alter people's perceptions of society with every new decade, implies a challenge to review and renew. Half a century ago the challenges and priorities were different

1 Ryszard Kapuscinski, *The Other*, London: Verso 2008.

from today. The technological and economic means were different. The context was different, witness for instance intensified globalisation. And, last but not least, people's perceptions have changed. What at that time most people considered desirable or necessary is no longer self-evident. Regular reassessments of the aims, character and functions of institutions is essential, if we want them to live up to expectations. Otherwise changes in their technological, economic, social and political environment will render them obsolete, and beyond the capacity of renewing themselves. This also applies to the system that was established to address the causes of the catastrophes of the first half of the 20th century.

Ever-faster changes in technology, in particular information technology, which alter people's perceptions of society with every new decade, implies a challenge to review and renew.

During the second half of that century running globalisation has blurred the distinction between developed and developing countries, between North and South. There is no distinct Third World any more in terms of economic development. Many developing countries achieved the status of emerging economies. Some of them, including the large economies of India and China, have accomplished annual rates of economic growth, which could only be dreamt of 60 years ago. The economic future of Brazil has brightened as well, and quite a number of countries in Africa and South East Asia have been able to sustain higher growth rates than during the first two decades after decolonisation.

During this period, too, the ideological conflict between East and West was overcome. The Cold War came to an end. The arms race was arrested. The fear of a third World War between nations subsided. The Group of Non-Aligned Countries, which had come into existence at the Bandung conference in 1956, has also ceased to exist, because there is no longer any reason to declare alignment or non-alignment in political terms. Countries can choose their own path towards political and economic self-reliance, without risking political intervention by powers fearing that their sphere of influence will be affected. Spheres of influence are no longer territorially based or geographically determined.

The same globalisation that grew to maturity after the fading of frontiers between North and South and between East and West, has for the first time in world history resulted in a real world market, facilitated by unprecedented breakthroughs in communication and information technology, dwarfing costs of transportation of goods, services, persons, knowledge and ideas, enabling people to disregard differences in time and place. After 1989 the sky became the limit, economically and technologically, and the rest would follow. So, in 1992, at the United Nations Conference on Environment and Development in Rio de Janeiro, a new spirit of optimism prevailed. World leaders pledged to allocate the world's resources for investment in the reduction of poverty and the preservation of the

environment. A new Agenda was adopted: Agenda 21. The 21st century would be the century of sustainable development. Profit-oriented market forces would work together with public authorities in order to demonstrate a common responsibility for the planet and its people.

Challenges ahead

However, despite unprecedented world economic growth since 1990, world poverty has hardly decreased. Moreover, our carbon-based global economic growth has resulted in faster climate change than before and has become less sustainable than 20 years ago.

At the beginning of this century world leaders endorsed the so-called Millennium Development Goals, with the aim to cut world poverty by half, in no more than 15 years. These goals will not be met. About 2 billion people still live below or just above a decent level of subsistence. Globalisation has resulted in a sharp increase in social and economic inequality within all countries. This has created a different North-South divide, between people with adequate access to markets and technology, and people who are not only exploited or forgotten, but left out on purpose, excluded from the market, without sufficient purchasing power or resources to invest, in order to increase their productivity. They lack access to modernity or to the means of living a decent life, beyond mere survival. One-third of the world's population is deprived of adequate access to one or more of the essentials: fertile land; clean and safe water; food and nutrition; non-depletable sources of energy; primary health care, to reduce maternal death after childbirth and prevent children from dying of easily curable diseases; essential medicines, to enhance life expectancy; basic education, to secure oneself a place in a rapidly changing society; and a healthy habitat. Within all countries societies have become structurally dualistic. This has resulted in a dualistic world economy. The

Despite unprecedented world economic growth since 1990, world poverty has hardly decreased.

North-South divide between nations, which prevailed until the turn of the century, has changed into a worldwide divide between classes, within all countries, in India and Africa as well as in Europe and the United States. Globally, about two-thirds of the world's population belongs to the upper and middle classes, or can at least reasonably expect further economic and social emancipation. One-third is living in circumstances that can only be characterised as stagnation or decline.

In all countries those people who are better-off, and wish to cultivate their comfort, lay a heavy claim on the scarce resources of our world. Water and non-renewable energy and a number of minerals, raw materials and other resources, which are essential for material economic growth, are becoming ever scarcer. This scarcity is due not only to physical limits or astronomically high costs of exploration, but also to demographic change, increased demand in general, chosen production techniques and revealed consumption preferences. All these patterns are structural. They will result in further climate change, global warming and irreversible losses of biodiversity. These scarcities and trends, together with more dense population settlements – in megacities and in ecologically vulnerable rural areas – and greater technological vulnerability, will make countries more prone to disasters. This is bound to result in more casualties. We may expect that in many parts of the world, including those where natural disasters have been rather exceptional, these catastrophes will become more frequent and have a greater impact.

This is an alarming scenario. It is further complicated by its consequences. Scarcities and inequalities will result in more conflicts and escalating violence. In many parts of the world people will have to compete for survival. Economic and social conflicts will affect tribal, ethnic, religious and other cultural disputes, and result in violent clashes. The quest of people for greater respect, larger freedom and more welfare will not halt. Polarisation is on the rise. People who have been excluded and suppressed are no longer voiceless. They have found new possibilities to communicate and make themselves heard. Globalisation will boost the pursuit of emancipation. It will also enhance the capacity for sophisticated hard-line coercion. In short: the conflict potential is mounting.

At the same time many nation states plagued by frequent conflicts are themselves becoming weaker. In Southern Asia, the Middle East, Africa and South and Central Latin America, more and more nation states find themselves in a situation of 'half war, half peace'. In these states regimes cannot cope with the conflicts. Due to globalisation, and to an unholy alliance between the trade in drugs, arms and people, mostly women, international crime is spreading and increasing. Often the regimes in these

countries feed the conflicts, either through corruption or bad governance, or because they are themselves an offspring of the conflict and take sides.

Globalisation is also facilitating the spread of conflicts to other parts of the world. Conflicts cannot easily be contained any more within a specific region. Migration, refugee movements, diasporas, together with easy access to information, unimpeded money transfers, unchecked trade in sophisticated and small arms, lead to quick and easy escalations of conflicts, including the spread of international terrorism. Moreover, proliferation of nuclear weapons and other weapons of mass destruction can no longer be prevented. Not only regimes that seek international confrontation, but also power groups in disintegrating nation states or insurgents and rebel movements, will get access to such weapons.

These contests within and between nations can be expected to result in new divides at the world level, following the North-South divide and the East-West divide in the previous century. New confrontations between major world powers, both traditional powers and newly emerging powers, are likely. A scramble for scarce resources seems unavoidable. The competition for resources that took place during the 19th and early 20th century stimulated technological breakthroughs, which resulted in the development of new production methods and the use of substitutes for traditional raw materials. However, emerging physical scarcities and a steeply rising consumer demand will make the scramble ahead of us uncompromising. Parallel to this contest we are witnessing a new confrontation between the West and the rest, in particular the Arab world and the world of Islam. This confrontation is partly cultural and religious, but no less a threat to peace and security than the scramble for resources. Cultural and religious conflicts are more difficult to contain than economic conflicts.

On top of all this we are in the midst of a world financial and debt crisis of alarming proportions. This too is due to the character of globalisation, which has resulted in the rise of uncontrolled supranational financial powers, propagating values squarely opposed to the principles which were agreed to half a century ago. Those principles of responsible economic behaviour, meant to ensure balanced international development, were undermined by unchecked market forces. They became liable to erosion when public responsibilities were replaced by private, capitalist greed. Not only are international banks and financial speculators to be blamed. International oil and mineral companies, chemical and pharmaceutical enterprises, and large plantations, tobacco companies, seed producers and food chains are also culpable. Most of these firms are heedlessly putting aside the people-planet-profit commitment of Agenda 21. The spirit has left the bottle and nobody seems to know how the resulting forces can be pushed back.

A diminishing capacity to address the challenges

All the threats and challenges I have touched upon are structural. They are larger than before. They last longer, not only because they are interconnected and reinforce each other, but also because they are not being addressed coherently. This is alarming. However, what should worry us most is not the dangers themselves, but the fact that we have dismantled our capacity to deal with them.

The two-pillar system that we created in the middle of the last century – a global values consensus and law-based international institutions putting those values into force – gave the international community the means to avert further man-made catastrophes. The system was perhaps no more than a clever self-help capacity in case of global threats, but as such it provided some form of common protection. The system functioned as a cover, a tent. Presently both poles are staggering. The values have been eroded and the institutions crippled.

Global common security and protection of human rights without discrimination have become subordinate to arbitrary perceptions of national security.

Principles of international law are being easily disregarded nowadays. Security Council resolutions are but pieces of paper. UN agencies are sidelined. Their position has been taken over by the Group of Twenty and by so-called coalitions of good will, by no means representative of all people who have sought cover in the tent. Agencies that were established to provide some form of protection against instabilities and backsliding have been wilfully weakened. International institutions with a mandate to deal with finance, capital, money, investment, food and agriculture, trade, environment, development, human rights, relief and refugees, have been played off against each other. Global common public institutions give way to transnational private market powers. Global common security and protection of human rights without discrimination have become subordinate to arbitrary perceptions of national security.

National security is regarded as a political precondition for attaining other objectives, including human rights. Security increasingly seems to be understood as an absolute and superior value, in no way dependent on other values, such as justice or equality. Absolute security is security getting out of proportion. It does not allow for nuances. It is biased towards end-of-pipe solutions, such as military means to impose security, rather than political and socio-economic means to address root causes of insecurity. National security, rather than being understood as an integral element of world security for all, has become a concept that excludes people: 'My security is endangered by you, or might be endangered by you. I don't trust you. This entitles me to exclude you. I may even deliver a pre-emptive strike.' So, attack before possibly being attacked.

The pre-emptive strike is back again in the international system. Once again, war has been given a chance.

Security, instead of being perceived as a common public good, has become a private commodity that can be bought and sold on the market. There is no guarantee whatsoever that commercial enterprises selling security will live up to principles such as respect for human rights and sustainability or that they have an interest in peace. The killing of bystanders in the name of national security – for instance with the help of drones – whether these people are innocent or not, is accepted as collateral damage. Collateral damage, when applied to people, is dehumanising. The priority of national security breeds a new culture, a culture of fear: other human beings are taken for possible enemies and looked upon as second-rate people.

Beautiful new concepts have been introduced, such as human security, human development, precaution, sustainability, the responsibility to protect, and other ideas. However, in practice they do not mean much. The political and market mechanisms of today have resulted in less precaution, less security, less sustainability and less protection. The new concepts are fashionable, but the gap between theory and practice has widened. Hypocrisy has crept into the propagated values. The same rights, liberties and responsibilities are believed to have a different meaning for other people than for they do for ourselves. Striving for security by violating the security of others has become legitimate again. The new world order that our grandparents carefully built after 1945, in order to put a halt to this, has become paralysed.

Grasping the opportunities

In order to reverse this trend we need a radical turn on two fronts: values and institutions. This is the challenge today: drastic reassessment of values and fundamental innovation of institutions, not because of the 60-year life cycle behind us, but because of impending world insecurities in the 60 years ahead, which threaten the sustainability of the earth and the social fabric of humankind.

We do not have to start from scratch. Innovation and renewal, preventing decay, include restoration and reform. Reform of institutions, strengthening of values and shoring up the world's social fabric.

Elsewhere I have written about values, their two-tongued interpretation, the disregard for international law, and the ambiguity of the

so-called common objectives.[2] In the second part of this article I will present some suggestions concerning the need to reform and strengthen international institutions in order to uphold global values.

The mandates of the Bretton Woods organisations, World Trade Organisation and also the UN Specialised Agencies have been defined in such a way that many crucial issues are not being approached in an integrated fashion.

The present UN system is no longer able to address the main challenges for humankind. UN bodies no longer represent global economic and political power relations. Decision-making procedures are inefficient and cumbersome. There are too many bodies within the system with overlapping responsibilities. The system has been plagued by turf fights and delaying tactics. The mandates of the Bretton Woods organisations, World Trade Organisation and also the UN Specialised Agencies have been defined in such a way that many crucial issues are not being approached in an integrated fashion.

The UN General Assembly, which has a comprehensive mandate, has been paralysed. It is a forum for deliberation, not intended to result in implementable decisions. The UN Security Council does take decisions, but its composition has deprived this body of credibility. The Secretary-General has no power, either to set the agenda, or to ensure implementation in those cases where decisions have been made. The UN system as a whole lacks the necessary resources to act.

The failures of the system have been documented extensively. Authors such as Erskine Childers have tirelessly pointed to the gap between Charter and practice.[3] Many studies have documented the intellectual merits of the system and its capacity to bring new ideas to the public.[4] The same studies have also exposed the failures of the system to live up to principles and expectations. Important proposals have been made to reform the system, but to no avail.[5] Already since the early 1970s within the system the need for reform has been discussed. However, these debates have not resulted in anything meaningful, so far. Too often the blame has been put on the UN secretariat, which has to operate within the boundary conditions set by nation states, rather than on the – intentionally (?) – ineffective consultative machinery of the countries themselves.

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2 See, for instance, 'Globalization, Poverty and Security', in Felix Dodds and Tim Pippard (eds), *Human and Environmental Security. An Agenda for Change*, London: Earthscan 2005, pp. 71-91; and 'Sustainable Development and Peace', in Erwin Bulte and Ruerd Ruben (eds), *Development Economics Between Markets and Institutions*, Wageningen: Wageningen Academic Publishers 2007, pp. 87-102.

3 See, for instance, Marjolijn Snippe, Vijay Mehta and Henning Melber (eds), *Erskine Barton Childers. For a Democratic United Nations and the Rule of Law, Development Dialogue* No. 56, June 2011.

4 See, for instance, Thomas G. Weiss and Ramesh Thakur, *Global Governance and the UN: An Unfinished Journey*, Bloomington: Indiana University Press 2010.

5 See, for instance, *Our Global Neighbourhood: The Report of the Commission on Global Governance*, Oxford: Oxford University Press 1995.

UN reform

In my view the following reforms would be essential:

First: Security Council reform. This is a well-known issue, much desired, much debated, but, so far, a dead end. In my view Security Council reform is a must, but it would be a mistake to believe that on its own it would be sufficient. Without complementary reforms of the UN system as a whole, some of which I will indicate below, it would not result in structures that can effectively address future global challenges.

Many proposals for Security Council reform have been made. I will refrain from detail. In my opinion an ideal system does not exist. Given the political reality that members of the Security Council can veto any proposal for reform of the Council, negotiations to this end should be guided by a combination of wisdom, pragmatism and enlightened self-interest. I would like to recall the proposal by the Commission on Global Governance, put forward in its report 'Our Global Neighbourhood': a somewhat larger Security Council, rendering this body more representative of the majority of the world population, with the major emerging economies such as India, Brazil and South Africa, as new permanent members without a veto, while the present permanent members, while keeping the right to veto, agree to use this under well-defined, very special conditions only, with a view to abolition of the veto in a decade or two. A proposal like this, though presented already more than 15 years ago, still reflects that much required combination of political pragmatism and forethought.

Second: The virtue of the Security Council is that, in principle, this body can deal with threats to international security effectively, which means (1) in a relatively small group of countries, (2) with a mandate given by all other countries together, (3) working on the basis of a body of consensus-based international law: the Charter, (4) being able to take enforceable decisions, (5) with sanctions in case of non-compliance. However, because the Security Council is essentially dealing with threats to international security of a political character, other security threats are not being dealt with as effectively: economic and environmental security threats in particular. Such threats are dealt with by other bodies, in a rather technocratic fashion, not comprehensively, and without a clear mandate to enforce the outcome of the deliberations. So, a second reform proposal would be to establish an Economic Security Council, dealing with security risks other than basically political ones. These could include threats to international security resulting from climate change, deterioration of natural conditions, environmental pollution, energy, food and water scarcities, financial speculation, amongst others. The same combination of

wise foresight and pragmatism could imply that such a council would be established as a separate chamber of the Security Council itself: with the same composition in terms of countries, similar procedures, meeting not at the level of ministers of foreign affairs or their proxies, but at the level of ministers of finance, agriculture, environment or otherwise, according to the character of the security threat concerned. A comprehensive approach would further be guaranteed by meetings of the Council at the level of prime minister or head of state. Such Charter-based summits would be the best way to get rid of the self-elected G20 meetings of today, which have no legitimacy in consensus-based international law.

Generally the Security Council deals with domestic instabilities and conflicts only if and when these are considered a risk to international security. Photo: UN Photo/JC McIlwaine

Third: generally the Security Council deals with domestic instabilities and conflicts only if and when these are considered a risk to international security. Members may decide themselves whether this is the case. In practice this means that national conflicts will be put on the international agenda at a rather late stage only. Such conflicts have then often escalated into violence or even wars. In such situations the Security Council will no longer be in the position to try a variety of political instruments in order to address the conflict. The Council will soon have to discuss whether or not to use a UN Peace Force, which is basically a military tool.

In order to deal with national conflicts in a timely way, applying a variety of diplomatic and political instruments a Pre-Chamber of the Security Council could be established. This Chamber would have to be given a general mandate by the Security Council itself. It could have a different composition. It could be requested by the Council to consider a specific situation, but it should also have the mandate to take the initiative itself, on the basis of a majority vote, not restricted by veto rights. Such a Chamber should, for instance, have the mandate to listen to appeals made by minority groups within a country, directed to the UN outside official diplomatic channels. The Chamber should have the duty to respond to such appeals. It should have the right to send missions, including fact-finding, review and appraisal missions The Chamber should have a mandate to advise parties in a country, and to mediate between them. The Chamber should have the mandate to carry out such tasks without advance consent from the Council. The Chamber should report to the Security Council and make recommendations to the Council if it wishes to do so. The Security Council, could, of course, decide at a certain point to put the issue on its own agenda.

In my view a new instrument of this kind would enhance the capacity of the UN to deal with conflicts at an early stage, without risking being carried towards a choice between intervention and not acting at all. This

is so often the situation today, leaving room for individual countries to intervene themselves, thereby enlarging the international security risk involved. Such a Pre-Chamber or 'porch' could be seen as a mirror of the Peace Building Committee, which was established some years ago to deal with so-called post-conflict peacebuilding and which functions more or less as a 'Post-Chamber'. Moreover, because of a rather thin line between pre- and post-conflict situations, the UN security system could benefit from cooperation between the two chambers.

However, UN peacebuilding is still falling short. This is not only a matter of time and experience. It is also a matter of resources. Peacebuilding in post-conflict situations requires a holistic approach: demobilisation and disarmament of soldiers, demining, security sector reform, capacity building for new administrations, physical reconstruction of infrastructure (roads, houses, power stations, sanitation and water supply systems) damaged by the war, return and resettlement of internally displaced people, start-up of primary health care facilities and schools, state- and nation-building. All this can be considered reconstruction, rebuilding or recovery of physical and social structures that have been destroyed or severely damaged. Such reconstruction should precede development and requires a different timescale and approach. Development is a gradual process, home-grown and bottom-up. Sustainable development of a society presupposes a basic endogenous capacity which can guide the process. When that capacity has broken down it has to be rebuilt before development can take its course. Reconstruction should be fast, and requires, much more than subsequent development, action from outside and top-down. If reconstruction after violence does not start quickly, people become disappointed and frustrated: former soldiers, farmers, urban dwellers, war victims, widows and orphans, youth in general. When people no longer expect that peace will really make a difference, violence can easily return: looting, crime and insurgency. Development means that people take their own destiny in their own hands, but to be able to do so, they will need some elementary tools and some basic structure. When such things have been taken away they have to be restored. Restoration can start off being given by a strong hand from outside and should gradually, but surely, pass into the hands of the people within.

If reconstruction after violence does not start quickly, people become disappointed and frustrated: former soldiers, farmers, urban dwellers, war victims, widows and orphans, youth in general.

There is no well-functioning international structure with a mandate and resources to assist reconstruction. The World Bank, which initially, after the Second World War, was established as the Bank for International Reconstruction and Development, after its first 10 years of existence renounced its reconstruction mandate. UN agencies have focused on either relief or development, sector by sector, but not on reconstruction.

The UN organisation, which is supposed to act as an umbrella, which should ensure cohesion, has become utterly weak. So, strengthening and reform of the United Nations would require also the establishment of a UN agency with a mandate to assist reconstruction of countries in post-war situations. This agency should be given adequate resources and should be able to act quickly. It should not be constrained by procedures that are essential for endogenous development policymaking – local ownership, people's participation, and tendering of transactions – but which impede timely reconstruction. The UN Peace Building Committee could be transformed into an agency with adequate powers and resources. This is my *fourth* proposal for reform.

Fifth: In addition to this the UN needs to reconsider its mandate in the field of relief and humanitarian assistance. We may expect more violent conflicts within individual nation states. Due to their complex character (environmental, economic, political and cultural at the same time) they may be lengthy and will make result in large numbers of victims over long periods of time. More nations will lose their capacity to address such conflicts. More states will fail. It is also reasonable to assume that the world will be plagued by more natural disasters than in the past. This is partly due to climate change or other natural processes, such as earthquakes, drought, desertification, storms and floods. Partly these natural disasters are manmade: overgrazing, deforestation followed by erosion and landslides, pollution, and nuclear disasters. Together, such disasters will claim more victims, due to patterns of demographic change and human settlement. So, there will be an increased and lasting need for delivery of relief and humanitarian assistance. In most cases this cannot be left to individual countries alone. Within the United Nations, agencies such as the World Food Program, OCHA and UNHCR do have a mandate to provide humanitarian and refugee and food assistance, but they lack resources. Moreover, increasingly they have become accustomed to acting in this field as brokers: they collect finance and channel this to non-governmental agencies, which carry out the relief work in the field. These agencies do a terrific job, but together they are not able to cover the terrain. They lack equipment, for instance transportation equipment and engineering facilities, which have to be collected from elsewhere, sometimes commercially, as the case of road trucks, sometimes from the military, and always come too late or without proper coordination. There is an urgent need to build up a relief capacity that is well coordinated, directly available for use, adequate in terms of size and financial resources, which can be spent directly, instead of having to wait for responses from donors to a new appeal. Most victims fall in the first days of a disaster and this requires direct action, more so than in the field of development or reconstruction.

Of the course it will not be feasible for the UN to establish such a capacity by procuring and storing all possibly necessary equipment in advance. For the UN to posses and renew such a capacity itself would be unrealistic. It would also be inefficient. However, a UN agency could plan the need for such a capacity, available for use world-wide, in a flexible manner, ensuring direct access, allocation, use and disposal as soon as this becomes necessary. It is essential that this agency, though not owning all the necessary means for relief in case of disasters, should have these under its own control, for instance on the basis of legal agreements with countries and enterprises, which can be invoked directly should the need arise.

Sixth: Behind this there is a general problem: the UN has mandates and procedures of consultation and decision-making, but hardly any capacity to implement decisions. This applies both to humanitarian assistance and to peacekeeping. So, for instance, after the Security Council has decided to send a UN Peace Force to a country in conflict, the UN Secretary-General has to go around the world requesting countries to put troops at his disposal as Blue Helmets. Sometimes this takes months or even more than a year, which renders the whole operation ineffective. The UN should have a police and peacekeeping military force of its own, not a large one, but a core force, which can begin operations as soon as necessary. There should be not only be staff officers in the field but also 'boots on the ground'. The force could then be complemented with additional troops from UN member countries, in order to bring it up to the strength required, as determined by the UN Security Council in the resolution concerned. In order to establish such a standing UN force it should be possible for citizens of individual countries to apply for a military or police job in the UN, in the same way as they can at present apply for a position as an international civil servant.

Seventh: A common feature of the three previous proposals is that the United Nations should have adequate capacity to implement decisions made by countries that meet in the governing bodies of the system. A logical consequence of this requirement is that the United Nations should also be able to raise its own resources, in addition to mandatory and voluntary contributions from member states. It is an old proposal, which has not been welcomed by member states, because members prefer to keep the system under some form of control and they can do so easily by limiting the budget. However, a global system able to respond effectively to global challenges needs to have its own global resources, rather than depend entirely on the goodwill or the whims of individual governments. The present international financial crisis offers a unique opportunity to reconsider the proposal by James Tobin to tax short-term

international financial transactions. An alternative would be to enable the global UN system to levy a tax on the use of global public goods. The financial means raised in this way could be considered general resources, to be spent without restriction, in order to strengthen the capacity of the system as a whole. Alternatively, these resources could be dedicated to programmes that will demand even greater attention in the future than in the earlier decades of the system: reconstruction, humanitarian assistance, peacekeeping and the preservation of global public goods.

The Secretary-General position has weakened since the untimely death of Dag Hammarskjöld. The Secretary-General is as strong as the system permits him to be.

Seen above on the presidential rostrum of the UN General Assembly are U Thant and Dag Hammarskjöld, the second and third Secretary-General. Photo: UN Photo/MB

Eighth: All this would imply a stronger position for the Secretary-General of the United Nations. That position has weakened since the untimely death of Dag Hammarskjöld. It is partly due to the wish of the major powers to limit the executive powers of the Secretary-General. Partly, too, it is the result of the erosion of the capacity of the UN system itself: the Secretary-General is as strong as the system permits him to be. A strong personality can try to rise to the occasion, but the selection of candidates for this position does tend to result in personalities less strong than Dag Hammarskjöld. Those who make an effort, and who try to be independent from the major powers, risk not getting a second term. So, the system could be strengthened by giving the Secretary-General one term only, but longer than at present, say seven years.

In addition to these proposals with regard to the UN system proper, I would like to make two reform proposals related to present global economic issues: unemployment and international finance. To avoid any misunderstanding: the main world economic problem of today is the persistent poverty in which about a third of the world's population lives. This is to a large extent due to bad and unjust policies on the part of individual countries. It is also due to the workings of the global capitalist system. For many years questions of poverty have been very high on the agenda of the United Nations. This has resulted in dedicated programmes of the UN's specialised agencies, in new concepts such as human development, in the Millennium Declaration and the Millennium Development Goals, meant to reduce world poverty by half over a period of 15 years. The challenge is a matter of implementation and it is difficult to see how further reform of the UN system itself could bring this implementation any nearer.

However, there are two new issues that would require institutional reform. In many parts of the world during the last two decades economic growth has been higher than expected. Poverty persists, which means that inequality is growing. One of the consequences of the present pattern of economic growth and inequality is that in many countries a huge and ever-growing army of young boys and girls is unemployed, without

any prospects of finding a job. This applies to equally to unskilled, lower skilled and educated youth. The phenomenon will have dramatic economic, social and political consequences: people falling back into poverty, social decline instead of emancipation, a strong propulsion to migrate, political frustration and radicalisation, increased instabilities among nations, including emerging economies. The establishment of a Global Employment Facility – reform proposal number *nine* – could help steer things in a better direction: job creation through programmes combining labour-intensive public works with investment in small-scale private enterprise, vocational (re-)training, the provision of credit without collateral, protection of small-scale local ownership of land, forests, fishing grounds and other natural resources, support for local enterprise at risks of being driven out of the market by transnational capital, and South-South cooperation. In many emerging countries, particularly in Asia, the introduction of new technologies is offering promising opportunities for younger people to get jobs. Other developing countries, for instance in North and West Africa, Latin America and the Middle East lag behind in this respect. A new international facility, with large funds for a multitude and a variety of small national programmes, decentralised and attuned to local circumstances, could help these countries modify the increasingly dualistic nature of their economy. Such a facility could be allocated a time horizon of a few decades only, assisting countries in a transition from skewed economic growth towards robust employment opportunities for the majority of their people.

Finally, reform proposal number *ten*: broadening the powers of the International Monetary Fund (IMF). The international financial crisis of recent years is twofold. First: irresponsible speculative behaviour on the part of large transnational private banks and financial institutions, aiming to make money with money, rather than financing investment, production and trade in the real sphere of the economy. This has resulted in insurmountable debts and an inextricable network of pure financial relations, footloose, and risking the stability of the global financial system as a whole. In order to cover these deficits, to save the system, and to avoid negative consequences in the real sphere, public resources had to be withdrawn from the same real sphere. This led to a second financial crisis: the large budgetary deficits of many countries, and public debt, which could only be addressed by cutting expenditures. This was bound to have further negative consequences in the real economy: reduction of investment and growth, high unemployment and a deterioration of social welfare. Moreover, the same financial sector that had been saved by public money turned against countries, governments and citizens, by speculating against the weakest, and further weakening them by

demanding an ever-higher price for the financing of public debt, which had been made to carry the consequences of boundless private greed.

A true world public institution with a mandate to correct both governments and transnational commercial banks when they act in conflict with internationally agreed rules and principles could help avoid crises and reduce irresponsible behaviour. So far, the IMF has carried out this function only vis-à-vis nation states, if and when these were plagued by structural deficits in their balance of payments. IMF credits, and as a sequel, World Bank loans and international development assistance, would only be given on the condition that the country concerned changed its detrimental policy. The IMF has been criticised – rightly so – because of the specific conditions it has imposed on countries – developing countries only, and always more or less the same straightjacket adjustment conditions, forcing these countries to cut both development investments and social expenditure. However, this criticism would not justify dismantling the institution. On the contrary, an independent supranational institution with powers to correct behaviour that may destabilise the world economy is an asset. Such an institution should, however, have these powers vis-à-vis all countries: countries with sustained and large structural balance-of-payments surpluses as well as countries in deficit, including those with a key currency, such as the United States. All these categories of countries risk destabilising the world financial markets. The IMF should, moreover, have similar powers vis-à-vis transnational banks. Private commercial banks have grown too large to be controllable by national governments and national central banks alone. The global economy needs a global bank of banks.

An expanded IMF in the present chaotic circumstances would be a great step forward in the effect it could have on world financial markets, provided that the institution was really independent and impartial. However, by itself it would not be able to avoid world economic crises. World financial markets have increasingly been intertwined with markets where investment and production decisions are made regarding scarce commodities: energy, food and raw materials. International financial instability has direct consequences for trade and employment, and thus also for poverty, inequality, political unrest and security. Sustained stability in all domains of the global economy would require strengthening global institutions and international law, and a combination of reforms, such as those proposed above.

Mediation, Prevention and Resolution of Conflicts

Dumisani S. Kumalo

I believe that the best way for Africa to promote the legacy of Dag Hammarskjöld is to intensify our efforts in the mediation, prevention and resolution of conflicts. It remains a sad indictment that the Democratic Republic of the Congo, a country on which Dag Hammarskjöld focused his best efforts, and even lost his life while doing so, is still bedevilled by conflict and underdevelopment more than 60 years later.

However, the encouraging fact is that over the years Africa has developed a framework for addressing conflicts through several instruments, in particular the African Union's Constitutive Act of 2000. In its preambular paragraphs, the Constitutive Act states it is 'conscious of 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'. The Act further expresses a determination 'to promote and protect human and people's rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.

Until recent events in Côte Ivoire and Libya, Africa has tried against great odds to resolve some of the intractable conflicts on the continent. For example, despite any claims that can and will be made about the independence of South Sudan, the role of the AU in guiding and assuring the people of Sudan about the historic and peaceful division of their country, which led to the birth of Africa's new independent state, cannot be forgotten.

The challenge for Africa in mediating, preventing or even resolving conflicts has been the lack of strategic understanding between the AU and the UN, particularly the UN Security Council, regarding a common responsibility in dealing with matters of peace and security. The UN Charter bestows upon the Council the 'primary responsibility for the maintenance of international peace and security'. However, it is a well-known fact that the Council has been selective in carrying out its Charter-given mandate. For example, it has done very little to maintain peace in Somalia, where its powerful members have little interest, yet it has not hesitated to intervene in conflicts where its powerful members

have a vested interest. The people of Burundi were left to suffer extra years of conflict because the Security Council was unconvinced that there was any peace to keep in that country.

On the other hand, Article 16 of the AU Peace and Security Protocol states that the AU has the 'primary responsibility for promoting peace, security and stability in Africa'. In an attempt to absolve the Security Council from its primary mandate of maintaining international peace everywhere, a false debate is raised about why the AU should claim primary responsibility for promoting peace and security and stability on our continent. The problem is that if, for example, the AU did not try to promote, rather than maintain, peace in Burundi, Kenya and Somalia, we would probably still be waiting for the powerful members to decide on where their interest was strongest, while Africa suffered needlessly.

When South Africa was a member of the Security Council in 2007–08, we convinced it to define the relationship between the UN and regional organisations, according to Chapter 8 of the UN Charter. The resistance we faced was that some of the powerful members did not want regional organisations active in their own backyards. The arguments we heard were fascinating. In the end, the Council passed a resolution that supported a close working relationship between the UN and regional organisations, 'in particular the African Union'. By concentrating on the AU, the Council was attempting to protect the big powers from being subjected to the curbs and checks of regional organisations in their part of the world.

As Africans, we must use all the means at our disposal to mediate, prevent and even resolve the conflicts on our continent. Photo: UN Photo/Isaac Billy

For Africa, however, it is clear that our continent cannot enjoy a renaissance as long as we have conflicts that perpetuate underdevelopment and poverty and allow pandemic disease to thrive. As Africans, we must use all the means at our disposal to mediate, prevent and even resolve the conflicts on our continent.

To be successful in our endeavours, we need to increase the capacity in the required skills of peacemaking, particularly mediation skills. I am proud that South Africa made a major contribution in building mediation capacity in the UN. Working with UN Under-Secretary-General Lynn Pascoe we were able to convince other members of the UN to endorse and fund a mediation unit.

Dag Hammarskjöld said: 'I have no doubt that forty years from now we shall also be engaged in the same pursuit. How can we expect otherwise? World organization is still a new adventure in human history. It needs much perfecting in the crucible of experiences and there is no substitute for time in this respect.' Photo: UN Photo/Yutaka Nagata

In one of the papers of this conference contained in the commemorative volume on Dag Hammarskjöld and published by ACCORD, Henning Melber writes that when Dag Hammarskjöld spoke at New York University on 20 May 1956 on the challenge the UN faced, even then, in implementing shared responsibility over matters of general human concern, Dag Hammarskjöld said: 'I have no doubt that forty years from now we shall also be engaged in the same pursuit. How can we expect otherwise? World organization is still a new adventure in human history. It needs much perfecting in the crucible of experiences and there is no substitute for time in this respect.'

Forty-four years later, the AU was launched in Durban. Since then, the AU has developed a framework of policies for addressing all kinds of challenges facing Africa, including the prevention, mediation and resolution of conflicts. Looking back at the progress the AU has made thus far, it is clear that one of the challenges it has faced is the lack of a common understanding and a common vision with its international partners that has manifested itself in the marginalisation of the AU itself. The interference, particularly by former colonial masters, in the mediation, prevention and resolution of African conflicts has complicated and delayed the achievement of genuine and long-lasting peace and security on the continent. For example, the former colonial masters and their powerful supporters have deployed the sophisticated weapons of NATO in an internal, tribal conflict in Libya. The question remains, however, what will become of Libya after the NATO planes have flown back to their bases at the end of the war?

Responsibility to Protect

Jan F. Mutton

It is only recently that individual human beings as well as peoples in general have gained a place in international law and in international politics, traditionally the domain of states and international organisations. Civil society and non-governmental organisations play a crucial role in international issues and through the media and other communication channels people are better informed about the world around them. With this has come more respect for man and for protection of the individual, with attendant rights and obligations.

Going back in history, legal texts such as the French and US constitutions of the late 18th century have pushed the interests of the individual forward. It is, however, primarily since the Second World War that human rights have been firmly established around the world, in particular through the UN Charter of 1945, the 1948 Universal Declaration of Human Rights and the 1948 Genocide Convention. In this context special mention should also be made of the European Convention on Human Rights as it pioneered the right of the individual to bring his or her own state under international jurisdiction, through the European Court of Human Rights.

Closer to home, in Africa, our entire culture is interwoven with respect for the individual and for peoples in general. We have only to think of our common philosophy of *Ubuntu*[1] or of institutions such as the *Abashingantahe*[2] in Burundi. But we also think of the protection of the individual through concrete legal texts such as the Charter of the African Union or the African Charter of Human and Peoples' Rights.

1 *Ubuntu* is an Nguni word, related to *umuntu* (person) or *abantu* (people), which stands for the African philosophy and approach to life based on human interaction. As such, *ubuntu* emphasises the necessity to respect and honour every human being as one can only develop and completely succeed in life through interaction with other people: ' I am because of you are'.

2 *Abashingantahe* refers, within Burundi's historical context, to wise people, community leaders, who naturally rise up in a specific village or community through the respect and esteem of the people around them who consequently confer upon them the responsibility to ensure harmony and justice within that community. A revival of this institution has been witnessed in recent times within the context of Burundi's post-conflict reconciliation efforts. It remains important that such leaders or arbitrators rise up from a community without being officially appointed on political or other grounds.

At the United Nations it was in particular the second Secretary-General, Dag Hammarskjöld, who, very early in the history of the world body, had the insight and the political courage to give special attention to smaller nations as opposed to the main international actors and to place human beings at the centre of UN politics. Humankind was crucial to him, the protection of human rights and human development was more important than the mere juggling of interests between the superpowers or the preservation of state sovereignty. This is Hammarskjöld's main legacy to international politics, including the establishment of UN peacekeeping missions and his tireless commitment to reconciliation and conflict resolution, ending in his last mission to the Congo in 1961.

Looking after the wellbeing of fellow human beings is first of all a duty and a moral obligation. It is, however, also an economic and social necessity. We live in a highly interdependent and profoundly challenged world, which no longer accepts political failure or economic mismanagement and which counts on every single one of us to contribute to a stable political and economic environment.

The rise of the individual on the international scene, however, also forces us to re-evaluate and rethink the concept of the sovereignty of states, especially in Africa, where sovereignty has a special and cherished, almost sacred, meaning in the wake of new-found statehood after decolonisation. Giving attention to the individual need not mean any erosion of the concept of sovereignty. On the contrary, sovereignty has only to be redefined as new responsibilities fall upon states and governments with respect to their citizens and inhabitants. States have the responsibility to protect.

What has brought us this far? Undoubtedly the gradual awareness of atrocities committed during colonial times, the crimes against humanity of the Second World War, the massacres in Cambodia and Yugoslavia, as well as the repression exercised by several former Latin-American regimes, brought the world to a realisation that such things could no longer be tolerated. And indignation continues, even today, with respect to the situation in the southern parts of Sudan, in Somalia, and so on.

However, what moved the international community onto a new level of awareness and action was the genocide in Rwanda and the ongoing feeling of guilt at having done the wrong thing – or not having done anything at all, or having withdrawn troops and support that could have prevented massacres and killings.

An international conference in 2000 in Canada (the International Commission on Intervention and State Sovereignty – ICISS) introduced for the first time the doctrine of Responsibility to Protect (R2P). This was an innovative approach which needed some time to mature. It gave new meaning to state authority, upheld for centuries. For the first time, it was clearly spelled out that states had a primary and sovereign obligation to protect their own people. Sovereignty is a responsibility rather than a right. The international community should assist states to put the necessary environment in place to fulfil this obligation. Failing to protect – or worse, turning against your own people – places special responsibility on the entire international community to intervene and protect the populations concerned through a series of well-defined measures under the umbrella of the UN Security Council.

Such measures range from diplomatic engagement, pressure, sanctions and, as a last resort, military intervention, to oblige states to protect their people. The conference also made it perfectly clear that an R2P intervention could only be driven by the UN Security Council. It is important to note that R2P thus introduced a generally acceptable form of intervention and, in doing so, offered a valid and long-awaited alternative to the concept of humanitarian intervention, which had come under criticism as it was being used without a clear political framework and legal backing.

It needs to be emphasised that the African Union (AU) associated itself at a very early stage with the need to protect human beings and peoples. Even before the ICISS took place, the AU Charter had already stipulated the protection of human rights and peoples as a principle objective of the Union, with the right to intervene pursuant to a decision by the Assembly. Later on, the Ezulmini consensus welcomed the R2P

It was only in 2005 through the report of the World Summit that the UN first recognised the principle of Responsibility to Protect.

doctrine as a tool to prevent atrocities. In doing so, the AU dramatically shifted from non-intervention in internal affairs, as advocated earlier by the OAU, towards non-indifference and, even, collective responsibility. Furthermore, it needs to be pointed out that it was largely due to the support and commitment of the African states that the doctrine of R2P was ultimately adopted in the UN.

It was only in 2005 through the report of the World Summit that the UN first recognised the principle of R2P, each state accepting to protect its own people and the international community being prepared to take collective action in case of violation. The subsequent reference to R2P in Security Council resolutions gave force of international law to the doctrine. The General Assembly, finally, reaffirmed R2P in 2009 (A/RES/63/2009) and a general debate on the subject took place in 2010. The Secretary-General invited regional groups to assist in further defining the doctrine and in elaborating acceptable rules of procedure.

Meanwhile, the doctrine has been invoked on several occasions by different international actors to protect people in imminent danger. The Security Council referred to the doctrine when deciding to intervene in the crisis in Darfur (Resolution 1674) and to extend its mission in the former southern Sudan (now independent South Sudan) (Resolution 1755). In both cases reference was made to R2P only as a background to decisions on humanitarian aid or peacekeeping. Furthermore, both cases involved consent on the part of the government concerned.

It is, therefore, in the case of Libya, that the Council for the first time not only refers to R2P but uses the doctrine as the basis to intervene in a country, without the consent of the government. It is also the first R2P case of armed intervention, through NATO, bringing the doctrine fully to everyone's attention, resulting in widespread criticism and comment, which emphasises more than ever the urgent need to refine its implementation.

To a certain extent, it is unfortunate that R2P has been brought to the test in such a high profile conflict, involving a charismatic African leader and evoking a mixture of reactions and emotions which have, meanwhile, far removed the issue from the very essence of R2P. Irrespective of criticism, R2P is here to stay as it is our ultimate tool to, finally, give full attention to the protection of human and peoples' rights.

For Africa and the AU it is the ultimate test to determine whether the continent really believes in the need to protect, even if a long-term leader, to which many owe loyalty, has to be disposed. Is one really ready to sacrifice the holy principle of sovereignty for the benefit of African

peoples? Is one really ready to react without delay, even diplomatically, and condemn gross violations of human rights by fellow leaders?

As long as this is not clear, there will be a void, a vacuum, on the international scene, which will be filled by other actors, as was the case when NATO responded to the call when the Libyan leader turned against his own people in their search for dignity and freedom.

After Tunisia and Egypt, the crisis in Libya should not have come as a surprise to the AU. It did, however, come as a surprise that other international actors stepped in. Africa must adapt to the speed with which situations unfold and decisions are being taken in the world of today. Instead of focusing on a missed opportunity in Libya, Africa should seize the opportunity to meet the need for a better regulated R2P doctrine.

Africa should now come forward as it is directly concerned. Responding to the Secretary-General's standing request to further elaborate the doctrine, Africa should present a valid project around R2P, defining actions, for example placing emphasis on diplomatic consultations and reconciliation. It should make proposals around the decision-making process and the implementation of R2P, giving the doctrine an African stamp. Most importantly, it should without delay lay down the groundwork for an African early-warning system.

Especially South Africa should play a prominent role in this initiative, as our country enjoys the full support of the African continent as a non-permanent member of the UN Security Council. It could make history and give lasting meaning to Pretoria's second mandate on the Council.

The AU and South Africa, however, should not limit their action to diplomatic proposals but should give proof of their willingness to remind leaders of their responsibility to protect and react when people are at risk. Several situations come immediately to mind where Africa can give proof of its genuine commitment to the doctrine of R2P and place human dignity above state sovereignty and blind respect for established leaders. There is the political crisis in Malawi, there is the plight of the people in the southern parts of Sudan and there is the famine in Somalia.

Indeed, what is needed is not so much talking and planning or supporting R2P in the UN General Assembly, it is above all the political will to take it seriously and act with determination.

Value-Oriented Commonality

Ove Bring

During the first day of our conference critical remarks were made about the UN-authorised operations in Libya and the Ivory Coast. With regard to the latter, it was even said that the international support for the democratically elected presidential candidate amounted to an act of aggression against a sovereign state.

Such remarks fail to take into account the common values of the international community. I am referring to the values of humanitarianism, human rights and democracy. The sovereignty of the people – that is, the political will of the majority – should take precedence over the will of any government wishing to remain in power, when this implies a clash with its own population and a violation of human rights. In Libya, Colonel Gaddafi has bombed civilian areas and referred to the population of Benghazi as 'rats that should be exterminated' (or something to that effect).

The purpose of the relevant UN Security Council resolution on Libya is to protect the civilian population, to pave the road for democratic development and, as far as possible, to ensure the realisation of human rights.

Human rights are not exclusively rooted in Western culture. In a historical perspective, it is possible to show that many human rights elements, such as the freedom to settle and earn one's living, the right to own property (the fruits of one's labour), and freedom of religion, have their origin in Oriental cultures.

During antiquity, when Alexandria manifested itself as a hub of cultural influence, stoic philosophers from Asia Minor, Greece, Cyprus and Egypt spread the idea of universalism, human dignity and the inherent equal rights of all human beings. When Eleanor Roosevelt prepared what was to become the 1948 UN Universal Declaration of Human Rights, she took care to involve experts from all continents and cultures, so as to ensure that the principles being drafted could be said to reflect universal values. As a result, the Universal Declaration of Human Rights really is universal.

Dag Hammarskjöld linked the creation of the UN to what is now called human security. In 1958 he made the point that the Organisation

'. . . is the logical and natural development from lines of thought and aspiration going far back into all corners of the earth since a few men first began to think about the decency and dignity of other men'.

4 February 1960

Mr. Hammarskjöld answering questions put to him by members of the press. Photo: UN Photo/MB/gf

Against this background of value-oriented commonality, it is a pity that this conference has heard so many remarks on Western countries and NATO contra Africa, on the West contra the rest. For the sake of collective security and human security, it is important that the UN, the European Union and the African Union can work together. The frequent reference to 'African solutions to African problems' is worthy of respect, but with regard to Libya, or Côte d'Ivoire, surely one would not like to have seen an African solution going down in history as a case of regime preservation bulldozing over peoples' rights and human rights.

Civil society organisations have at times managed to influence politicians in Europe towards value-oriented decision-making. Hopefully, the same phenomenon is under way in Africa.

Africa and Global Governance – International Perspectives for Peace, Security and the Rule of Law

Sandy Africa

My comments are deliberately brief because I have played no role in the conference proceedings till this stage, other than to be an eager and attentive student. Attending the conference has been a privilege. The depth of knowledge on the subject of Dag Hammarskjöld's legacy has been impressive and challenging. To those whose business it is to teach about the ever-changing reality of global governance, as mine is, the conference has been a rich repository of information.

I agree fully with my fellow panellists whose remarks have centred on how this conference reminds us all of the power of ideas, and of ideals. Ideas have inspired the values enshrined in the United Nations Charter and the Universal Declaration of Human Rights. And it was his ideas and idealism that inspired Dag Hammarskjöld's daily efforts, leaving us with the legacy that we have celebrated over the past few days.

One of the ideas that inspired the founding fathers – sadly, there were no mothers at the time of origin – of the African Union (AU) and its predecessor the Organisation of African Unity (OAU), was that of Pan-Africanism. Emerging from a long century (in some cases more) of colonial rule, the OAU espoused a vision of African solidarity, independence and nationhood. Idealistic thinkers and leaders such as Amilcar Cabral, Kwame Nkrumah and Frantz Fanon inspired many with their views on identity and Africa's bright prospects in the global order. The many disappointments that the people of Africa have suffered need not be repeated here – they are abundantly plain for all to see.

In the current discourse on Africa's prospects, we have observed the tendency to assert the right to nationhood, in the form of an insular Pan-Africanism, as a reaction to external criticisms of authoritarianism. This is where the power of ideas must once again levitate us to a point where we can look beyond the immediate realities of *realpolitik* to a renewed vision for the continent. Uncomfortable ideas may have to be put on the table, and leadership requires that the issues be dealt with squarely.

It is heartening to hear that at the AU there is increasingly robust debate on the way forward on important issues affecting the continent. This can only augur well: surely we must move beyond our conflicts for political power if we are ever to become a continent where development and prosperity are the focus of our attention. In this context, the responsibility to protect as an evolving norm in international relations requires us to do so much more when we see the abuses being visited upon so many of Africa's people. And it requires our leaders to do more.

What many conferences of this nature tend to do, I have observed, is to underestimate the extent to which the masses of ordinary people have agency and are prepared to carve their own destiny. Our analyses tend to be state-centric, or focused on the role of institutions – the UN, the AU, when in fact people are rewriting their own history. This is the context in which the uprisings in North Africa and the Middle East can be seen. All over the continent, people are making enormous sacrifices, demanding their rights and working together for change. This is a resurgence of idealism, one which we dare not ignore. Future conferences on the theme of global governance and Hammarskjöld's legacy should most certainly provide space for new voices to share their perspectives on how to define sovereignty in a changing world. For it is not only regional organisations and global organisations that deserve to shape the debate, so too must the parliaments, the trade unions and civic organisations.

Our analyses tend to be state-centric, or focused on the role of institutions – the UN, the AU, when in fact people are rewriting their own history. This is the context in which the uprisings in North Africa and the Middle East can be seen.

Their voices must be given organisational impetus through movements of South-South solidarity, in fact people-to-people solidarity.

This conference has reminded us all of the global challenges that confront us and the universality of the responses required. Without solidarity in a world fraught with tension and conflict, common values that consolidate peace, tolerance and development will expose us to greater uncertainty and insecurity.

In summary then, I hope we all take away with us three resolutions:

» a continued personal commitment to the ideals that have fostered world cooperation, and a recognition that ideas matter. This is easy enough to convey to students and I certainly will try;

» a commitment to pressure leaders of our regional institutions to raise the bar and shift their definition of state sovereignty to one that puts the aforesaid ideals first. The AU needs to move urgently, beyond a perceived lip service to very noble ideas, to a situation where the institutional architecture is made more robust and more capable of calling our leaders to order; and lastly,

» a commitment to express solidarity with all peoples who are emerging from situations of conflict and to recognise their voices in the debates on the form governance should take.

Thank you to the organisers, the speakers, the panellists and everyone who attended this very inspiring conference.

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This volume contains a selection of the contributions to an international conference held on 13-15 July 2011 at the University of Pretoria, South Africa. The conference was devoted to the legacy of Dag Hammarskjöld and the continued relevance of the principles he advocated. His term as the Secretary-General of the United Nations occurred when "the wind of change" was blowing across the African continent, and his approach to global justice, peace and security is widely viewed as exemplary.

The scholars, officials and political office-bearers that have contributed to this volume in historical perspective the values and norms Dag Hammarskjöld lived – and died – for. They go on to relate them to the current regional, continental and global policy challenges faced by both the United Nations and regional African organisations in terms of conflict mediation, the rule of law and international collective responsibility.

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